

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT,**

**vs.**

**EASTERN LOS ANGELES REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2021050768 (Primary)**

**OAH No. 2021060219 (Secondary)**

**DECISION**

Carmen D. Snuggs-Spraggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 22, 2021.

Jacob Romero, Fair Hearings Representative, appeared on behalf of the Eastern Los Angeles Regional Center (Service Agency or ELARC). Claimant was represented by his mother (Mother).<sup>1</sup>

Oral and documentary evidence was received. The record was held open to allow Claimant to file and serve by September 23, 2021, evidence that California's Emergency Preparedness and Response (Appendix K) related to the Home and Community-Based Services (HCBS) waiver for Californians with Developmental Disabilities was extended past June 30, 2020. Claimant timely submitted a letter from the Centers for Medicare & Medicaid Services (CMS) dated March 10, 2021, which was marked as Exhibit U and admitted into evidence.

The record was closed and the matter submitted for decision on September 23, 2021.

## **ISSUES**

1. May Claimant use funds from the approved Self-Determination Plan certified budget to purchase an iPad and a Nintendo Switch?
2. May Claimant use funds from the approved Self-Determination Plan certified budget to fund field trips for Claimant?

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<sup>1</sup> Titles are used to protect confidentiality.

## **EVIDENCE RELIED UPON**

In making this Decision, the ALJ relied upon exhibits 1 through 14 submitted by the Service Agency, exhibits A through U submitted by Claimant, and the testimony of Cristina Ontiveros, Consumer Services Supervisor, and Kelly Kulzer-Reyes.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Claimant is a nine-year-old boy who receives regional center services under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act)<sup>2</sup> based upon his diagnosis of mild intellectual disability. Claimant also suffers from microcephalic osteodysplastic primordial dwarfism type II spectrum disorder hypospadias, moyamoya and upper respiratory distress. He lives in the family home with his parents, older brother, and twin sister. Claimant is fully ambulatory but needs assistance and accommodations at home and school because of his stature.

2. On April 28, 2021, the Service Agency issued a Notice of Proposed Action (NOPA), denying Claimant's request to allocate funds in his Self-Determination Program (SDP) budget for the purchase of electronic devices, a Nintendo Switch and

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code (Code) unless otherwise indicated.

an iPad. On May 9, 2021, Claimant timely appealed, submitting a Fair Hearing Request, Exhibit 2, regarding his proposed use of the funds.

3. On May 19, 2021, the Service Agency issued a NOPA to Claimant, Exhibit 3, denying a request to use SDP funds for field trips, such as to amusement parks and museums. On May 21, 2021, Claimant timely submitted a Fair Hearing Request, Exhibit 4, which was assigned OAH case number 2021060219.

4. These matters, OAH case number 2021050768, and OAH case number 2021060219, are consolidated.

### **Self-Determination Program**

5. The Self-Determination Program (SDP) allows program participants to control a budgeted amount of money to purchase needed services and supports. The participant's budget amount is based upon the regional center's expenditures during the prior 12 months for supports and services listed in the participant's Individual Program Plan (IPP). The regional center certifies the expenditures used to calculate the participant's budget amount.

6. After the budget is determined, the participant must develop a spending plan to use the available funds to meet the goals and objectives outlined in the IPP. IPPs must be developed using a person-centered planning process. SDP funds can only be used for services approved by the federal Centers for Medicare and Medicaid Services (CMS) and the services must not be available through other funding sources such as schools or Medi-Cal.

7. Claimant's certified budget is \$77,503.88.

## **Claimant's IPP**

8. Claimant's March 19, 2021 IPP, which was approved on May 12, 2021, states in the area of "Community/Social Life" that Claimant's primary source of social recreational activities is his family. (Exh. 14, p. 145.) He likes basketball and baseball, participates in activities offered by his local park, and enjoyed attending camps offered in the summer, winter and spring, where he had a lot of social interaction. Claimant is well liked and respected by his peers. Outcome number six of the IPP indicates that Claimant will participate in social activities within the community, such as Folklorico and hip hop dancing, karate classes, riding his bike and engaging with the Little People of America Community.

9. Kelly Kulzer-Reyes prepared the Person-Centered Plan (PCP) for Claimant that was used to prepare the IPP. The first goal of the PCP is for Claimant to be "included and active in his community while increasing independence through activities he chooses. He will develop adaptive skills, expected of him to effectively and comfortably participate in community activities . . ." (Exh. 7, p. 57.) Pursuant to the PCP, obtaining a modified Segway, participating in basketball clinics, and adding a basketball hoop at home were included as ways to meet this goal. The second goal of the PCP is for Claimant to safely access his community with the assistance of Community Integrators who will teach Claimant safety skills. The purchase of a global positioning system (GPS) device to monitor Claimant's location is listed as a way to meet Claimant's goal. Goal three is for Claimant to develop his interests and independence using appropriate supports. Ways to meet this goal included using a community integrator to access karate, basketball and swimming activities, and taking surf lessons with a one-on-one surf teacher.

10. Claimant's PCP does not mention a Nintendo Switch or an iPad. Nor does it include field trips as a means to meet the PCP goals.

## **ELARC Evidence**

11. Cristina Ontiveros is an ELARC Consumer Services Supervisor. In that capacity she provides guidance to ELARC's service coordinators and case managers with respect to purchases of service and other supports. Ms. Ontiveros has overseen the provision of Claimant's services for three years. She demonstrated knowledge of the SDP. Ms. Ontiveros' testimony established the following facts.

12. Claimant currently receives personal assistant services, out-of-home respite, funding for a GPS device, and parent conferences. A Segway is being purchased, which will assist Claimant in the area of mobility. Generic resources available to Claimant include school district services and private insurance.

13. It is Ms. Ontiveros' understanding that Claimant will use the Nintendo Switch to play games with peers and concurrently use the iPad to see the people he is interacting with on the Nintendo Switch. ELARC considered the article entitled "Digital media: Promoting healthy screen use in school-aged children and adolescents," which Claimant submitted with his Fair Hearing Request in support of funding for the electronics. However, the Service Agency did not find the article persuasive because it does not discuss children with developmental disabilities or recommend using electronics to socialize.

14. The article briefly mentions that "many children—especially boys—regularly socialize through games. Some video gaming has been positively associated with . . . pro-social behavior . . ." (Exh. 2, p. 10.) However, the article also suggests that solitary screen use greatly increases the risk of exposure to negative or harmful content,

higher rates of recreational screen use are reported in children with higher depressive symptoms, and leisure-time screen-based sedentary activities are strongly associated with depressive symptoms, particularly in younger children who are vulnerable to negative socio-cognitive outcomes from heavy screen use.

15. SDP funds can be used to purchase the resources listed in Claimant's PCP to support his goal of exploring and developing his interests and independence (surf lessons, summer camp, etc.), but not field trips. Ms. Ontiveros explained that summer camps are structured and provide activities that are therapeutic and develop skills, while field trip activities are solely recreational. Moreover, "services that are diversional/recreational in nature fall outside the scope of the HCBS waiver." (Exh. 10, p. 110.) Here, Claimant requested funds to pay for trips to the Los Angeles Zoo, Knott's Berry Farm, museums, Discovery Cube, bowling, movie theaters and fairs.

16. The Department of Developmental Services (Department) has provided SDP service definitions.

17. SDP Community Integration Supports is defined as:

[A] service [that] is provided to participants tailored to their specific personal outcomes related to the acquisition, improvement, and/or retention of skills and abilities to prepare and support the participant for community participation, interdependence, and independence.

The participant receives this service in settings that are integrated in and supports full access to the greater community, and allows for participant comfort,

interdependence, independence, preferences and the use of technology.

These services and supports may take place in a wide variety of community-based settings that promote community integration. . . . Services may be provided on a regularly scheduled basis for one or more days per week. These services are not provided in the participant's residence.

(Exh. 9, p. 103.)

18. Technology is defined as:

[A]n item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to promote community integration, independence, and increase, maintain, or improve functional capabilities of participants. Allowable technology services, as specified in the participants IPP include:

1. Evaluation of technology needs of a participant, including functional evaluation of the impact of the provision of appropriate technology and appropriate services to the participant in the customary environment of the participant;
2. Purchasing, leasing, or otherwise providing for the acquisition of any technology device; cell phones (monthly bill, cell phone apps), iPads, tablets, and laptops. Service



includes insurance and training on the use of any technology device.

[¶] . . . [¶]

(Exh. 9, p. 103.)

19. Ms. Ontiveros explained that Technology supports must be connected to the PCP and used for communication and speech support as determined by an assessment. Because Claimant intends to use the Nintendo Switch and iPad for socialization, those items do not meet the definition of Technology supports.

20. In order to prevent regional center clients who receive services under the HBCS waiver from being exposed to COVID-19, the State of California allowed changes the delivery of services pursuant to an Emergency Amendment to the waiver. Specifically, Day Services, provided to adults, could be provided in the participant's home; provider qualifications were temporarily modified; plan development and monitoring meetings could take place virtually or telephonically in lieu of in-person meetings; and regional centers could make retainer payments for Habilitation, Behavioral Intervention Services and Day Services. The Emergency Amendment does not provide for the provision of Community Integration Services at the participant's home. In addition, while the Emergency Amendment has been extended past its sunset date of June 30, 2020, it has not been expanded to include Community Integration Services in the participant's residence.

21. ELARC's Purchase of Service Guidelines allow for the purchase of assistive technology, but only when it is provided with documentation that all possible sources of funding have been exhausted. All requests for assistive technology for school-aged children must be presented to the school district through the Individual Education Plan

(IEP) process. ELARC can make an exception and purchase assistive technology only where the service is a primary or critical means for ameliorating the psychosocial effects of a developmental disability, or the service is necessary for the consumer to remain in the home. None of these exceptions apply to Claimant. Moreover, Claimant's IEP does not indicate that Claimant has deficits in the area of socialization or that he needs the assistance of technology.

22. ELARC recognizes Claimant's heightened vulnerability to contracting the COVID-19 virus but contends that Claimant is able to navigate the community with the assistance of community integration services, which will ensure that Claimant wears a mask, is socially distant, and utilizes hand sanitizer.

### **Claimant's Evidence**

23. Kelly Kulzer-Reyes has a daughter with Down Syndrome and has known Claimant's family since 2012. She is knowledgeable about the SDP as she has served on an SDP advisory committee for Kern County for five years as well as a Department SDP task force for two years, assisting families with SDP issues and bring those issues to the Department's attention.

24. Ms. Kulzer-Reyes contended that Community Integration Services are authorized by the Emergency Amendment to be provided in the home during the COVID-19. However, her contention is contradicted by the express language of the Emergency Amendment. Ms. Kulzer-Reyes also contended that because of the COVID-19 Delta variant, there are no options for community integration activities to be provided in the community. Claimant attends school in-person but does not want to risk exposure to COVID-19 by accessing the community for other purposes.

25. Claimant requested the iPad to access dance class and the Nintendo Switch to participate in activities with friends and Little People of America. Claimant has access to a school-issued iPad, but he is prohibited from using it for purposes other than school work. Ms. Kulzer-Reyes believes the advantages of the Nintendo Switch is that it helps with community building. Claimant can engage in physical activities such as dance and American Ninja Warrior, and with the iPad Claimant can see the other participants' actions, he can learn to read social cues, improve at taking turns, and develop his communication skills. Ms. Kulzer-Reyes disagrees that technology is isolating because parents can ensure that the devices are used as social tools such as videoconferencing. She suggested that her children and Claimant can play together.

26. According to Ms. Kulzer-Reyes, Claimant asked for suggestions from the IPP team on how to access the community if the request for the Nintendo and iPad were denied, but ELARC issued the NOPA instead of providing guidance. Claimant believes the request for the electronics is reasonable because it allows for community integration while keeping Claimant safe.

27. The preparation of Claimant's PCP began in 2020, with the hope that Claimant would be able to participate in summer camps and the other activities listed in the PCP in the summer of 2020. Now, Claimant hopes to participate in those activities in the spring of 2021.

## LEGAL CONCLUSIONS

### The Lanterman Act

1. Under the Lanterman Act, an administrative “fair hearing” is available to determine the rights and obligations of the parties. (Code, § 4710.5.) Claimant requested a fair hearing to appeal the Service Agency’s denial of funding for extra respite hours and for purchase of equipment. Jurisdiction in this case was thus established. (Factual Findings 1-7.)

2. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) A consumer seeking to obtain funding for a new service has the burden to demonstrate that the funding should be provided, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Claimant bears the burden of proof regarding his funding requests.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. 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, 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . .

and to support their integration into the mainstream life of the community.” (Code, § 4501.)

4. DDS is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as regional centers, to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” (Code, § 4620.)

5. A consumer’s needs and goals, and the services and supports to address them determined through the IPP process, are described generally in Code section 4512, subdivision (b), which states in part:

“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 an independent, productive, and normal life. 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.

6. Use of the IPP process to determine the services to meet the needs of a consumer is referenced in Code section 4646, subdivision (a):

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Several portions of the Lanterman Act address the need for regional centers to identify sources for funding and services, such as the language in Code section 4659, subdivision (a), that the regional center "shall identify and pursue all possible sources of funding," including governmental programs such as Medi-Cal and school districts, and private entities such as insurance. (*Id.*, subdivision (a)(1) and (2).)

8. Code section 4659, subdivision (c), states a regional center shall not purchase any service available from Medi-Cal, private insurance, or other identified sources. And under Code section 4648, subdivision (a)(8):

Regional center funds shall not be used to supplant the budget of any agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

9. Further, ELARC is mandated to ensure the effective and efficient use of public resources and detect and prevent waste and abuse in the utilization of public funds. (Code, § 4620.3, subdivision (b).)

10. When purchasing services and supports, regional centers shall (1) ensure they have conformed with their purchase of service policies; (2) utilize generic services when appropriate; and (3) utilize other sources of funding as listed in section 4659. (Code, § 4646.4, subd. (a).) ELARC is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (*Ibid.*)

11. Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. Services and supports shall be flexible and individually tailored to the consumer. This section also requires regional centers to be fiscally responsible.

## The Self-Determination Program

12. Code section 4685.8, subdivision (a), provides:

The department shall implement a statewide Self-Determination Program. The Self-Determination Program shall be available in every regional center catchment area to provide participants and their families, within an individual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP. . . .

13. Self-determination gives the participant greater control over which services and supports best meet their IPP needs, goals, and objectives. (Code, § 4685.8, subd. (b)(2)(B).) One goal of the SDP is to allow participants to innovate to achieve their goals more effectively. (Code, § 4685.8, subd. (b)(2)(F).)

14. The SDP specifically obligates the participant to “utilize the services and supports available within the Self-Determination Program only when generic services and supports are not available.” (Code, § 4685.8, subd. (d)(3)(B).)

15. The SDP requires participants to “only purchase services and supports necessary to implement his or her IPP . . . .” (Code, § 4685.8, subd. (d)(3)(C).)

16. When a consumer is in the SDP, the IPP team is to develop the plan, utilizing the person-centered planning process. (Code, § 4685.8, subd. (k).)

17. Code section 4685.8, subdivision (l) provides:



The participant shall implement their IPP, including choosing and purchasing the services and supports allowable under this section necessary to implement the plan. A participant is exempt from the cost control restrictions regarding the purchases of services and supports pursuant to Section 4648.5.<sup>3</sup> A regional center shall not prohibit the purchase of any service or support that is otherwise allowable under this section.

18. Code section 4685.8, subdivision (n), provides:

(1) The IPP team shall determine the initial and any revised individual budget for the participant using the following methodology:

(A) (i) Except as specified in clause (ii), for a participant who is a current consumer of the regional center, their individual budget shall be the total amount of the most recently available 12 months of purchase of service expenditures for the participant.

(ii) An adjustment may be made to the amount specified in clause (i) if both of the following occur:

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<sup>3</sup> Under Code section 4648.5, regional centers' ability to purchase certain services, such as camping, social recreation activities, and educational services, was suspended.

(I) The IPP team determines that an adjustment to this amount is necessary due to a change in the participant's circumstances, needs, or resources that would result in an increase or decrease in purchase of service expenditures, or the IPP team identifies prior needs or resources that were unaddressed in the IPP, which would have resulted in an increase or decrease in purchase of service expenditures.

(II) The regional center certifies on the individual budget document that regional center expenditures for the individual budget, including any adjustment, would have occurred regardless of the individual's participation in the Self-Determination Program.

[¶] . . . [¶]

(2) The amount of the individual budget shall be available to the participant each year for the purchase of program services and supports. An individual budget shall be calculated no more than once in a 12-month period, unless revised to reflect a change in circumstances, needs, or resources of the participant using the process specified in clause (ii) of subparagraph (A) of paragraph (1).

19. SDP participants and their families have the authority to make decisions about the services and support they need in their lives (Code, § 4685.8, subd. (z)(B)) and the SDP allows the participant to decide how they want to spend their time. (Code, § 4685.8, subd. (z)(3)(A).)

## **Claimant's Request for SDP Funding for an iPad and Nintendo Switch**

20. Claimant did not submit sufficient evidence to support funding for purchase of an iPad and a Nintendo Switch as Community Integration Services in furtherance of meeting the goals identified in the IPP. The devices do not meet the definition of Community Integration Services. While it is arguable that they provide some socialization, they are not a "service" that can be provided in an integrated community setting. Moreover, community integration services may not be provided at a consumer's residence. While the Emergency Amendment allows for exceptions for the provision of services, community integration services were not included. Accordingly, the devices are outside the scope of the SDP. As a result, funding the proposed purchases under Claimant's SDP individual budget would be contrary to Welfare and Institutions Code sections 4685.8, subdivision (c)(6) and 4685.7, as inconsistent with federal law. Moreover, the evidence did not establish that claimant meets criteria for allowable Technology under the SDP Service Definitions.

## **Claimant's Request for SDP Funding for Field Trips**

21. Similarly, Claimant did not submit sufficient evidence to support funding for field trips. Notwithstanding the fact that Claimant does not intend on taking field trips due to the COVID-19 pandemic, the field trips are diversionary and recreational in nature and therefore, not a service that has been approved by CMS.

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## **ORDER**

The appeal by Claimant of the Service Agency's decision to deny Claimant the use of funds from the approved SDP certified budget to purchase an iPad and a Nintendo Switch is denied.

The appeal by Claimant of the Service Agency's decision to deny Claimant the use of funds from the approved SDP certified budget for field trips is denied. Funding for 40 hours of respite is denied.

DATE:

CARMEN D. SNUGGS-SPRAGGINS

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.