

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency.

OAH No. 2021070636

DECISION

Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on March 28, 2022, by videoconference. An American Sign Language interpreter was duly sworn to assist Claimant and Claimant's advocate and witnesses. The record was closed, and the matter was submitted for decision at the conclusion of the hearing.

Claimant was represented by advocate Jennifer St. Jude.¹ Claimant's family members and conservators (conservator family), and Claimant were present throughout the hearing.

Stella Dorian, Fair Hearing Representative, represented the North Los Angeles County Regional Center (service agency).

ISSUE

Shall the service agency fund an above-ground pool for Claimant at Claimant's home as part of the Self-Determination Program (SDP)?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on service agency exhibits 1 through 26 (exhibit 5 was withdrawn); claimant exhibits B through I, K, S, V (admitted as administrative hearsay (AH)), Z, AA (admitted as AH), DD, FF, II, KK, LL (exhibits A, C, J, BB, CC, EE, GG, HH, JJ were withdrawn), as well as the testimony of Clinical Director Carlo De Antonio, M.D., F.A.A.P, Gerald Calderone, Consumer Services Supervisor, Sylvia Renteria-Haro, Consumer Services Manager, Claimant's conservator family, one family friend, and expert witness Lori Shepherd, M.A.

¹ The names of Claimant, Claimant's conservator family, and family friend are omitted to protect their privacy.

FACTUAL FINDINGS

Parties, Jurisdiction and Background

1. The service agency determines eligibility and provides funding for services and supports to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code (Code), § 4500 et seq.)

2. Claimant is a 32-year-old man who is eligible for services under the Lanterman Act based on his qualifying diagnosis of Intellectual Disability and Autism. Claimant also has diagnoses of mixed receptive-expressive language disorder, Down Syndrome and a medical diagnosis of arthritis. Claimant lives with his conservator family and is employed outside the home, 35-hours per week, with assistance, at Six Flags Magic Mountain (Magic Mountain). Claimant is mostly nonverbal and primarily communicates with a variety of tools, including facial expressions, head nods, pointing, finger tapping as well as basic American Sign Language and augmented and alternative communication (AAC) programs (incorporated in his iPhone). (Exs. 1 and 2.)

3. Claimant transitioned to the Self-Determination Program (SDP) on January 1, 2021. The SDP process includes creating an annual budget for services and supports funded by the service agency. In the process of creating Claimant's SDP budget for the 2021/2022 fiscal year, Claimant's conservators requested a waiver of financial management service (FMS) fees charged, which are deducted from the SDP budget to support the fiscal oversight of the program. (Ex. 1.)

4. In March 2021, Claimant's conservator family requested a waiver of the FMS fees to be repurposed to fund an above-ground heated pool as part of the SDP

category Participated Goods and Services. Claimant's conservator family stated Claimant suffers from arthritis, has joint pain, and aquatic exercise has been the most effective way to manage Claimant's arthritis and improve his balance. Claimant's conservator family reasoned the above-ground heated pool would substitute for the aquatic exercise Claimant obtained through use of the public pool and private gym membership, which was limited or unsafe due to the Covid-19 pandemic. (Ex. 1.)

5. The service agency and Claimant's conservator family exchanged communications about their respective positions. (Exs. 8, 9, 10.) On June 14, 2021, the service agency issued a Notice of Proposed Action (NOPA) advising Claimant's conservator family their request to use SDP funds for an above-ground pool was denied. (Ex. 1.) The reason stated in the NOPA for the denial of funding was such funding was not allowable via the SDP waiver. The serviced agency also included a letter of that date which detailed the history of communications between the service agency and Claimant's conservator family. The service agency explained funds were already included in Claimant's SDP budget for a gym membership, and public pools were currently accessible by reservation. In addition, the service agency considered the outdoor maintenance of an at-home above-ground pool, and its more limited accessibility than an indoor gym pool which would allow him to swim throughout the year. The service agency cited to Code section 4646.4, which requires the utilization of generic resources and supports where appropriate. With the reopening of gyms and fitness establishments, the service agency maintained that any Covid-19 related exceptions to the use of generic resources no longer applied. (Ex. 1.)

As you know, NLACRC has agreed to use SDP funds towards [Claimant's] gym membership for health and fitness purposes. Although we understand that [Claimant] may not

feel safe accessing the public gym, these facilities are taking necessary precautions to ensure the public's health and safety. We also encourage [Claimant] to participate in the social and recreational activities available to him outside of his home and be an integrated and active member of his community. In looking at the SDP Service Definitions for Participated-Directed Goods and Services (Service Code 333) these purchases must consist of "services, equipment or supplies not otherwise provided through the SDP waiver or through the Medicaid State plan that address an identified need in the IPP...(And) promote interdependence and inclusion in the community." An above ground pool installed in a private residence does not meet these criteria because it does not promote interdependence and inclusion in the community.

6. On July 13, 2021, Claimant's conservator family timely submitted a Fair Hearing Request, which contained a demand for a hearing to challenge the service agency's denial of the above-ground pool (Ex. 1.)

7. All jurisdictional requirements have been met for this matter to proceed to a fair hearing.

Claimant's Individual Program Plan and SDP

INDIVIDUAL PROGRAM PLAN

8. Claimant's most recently completed Individual Program Plan (IPP) is dated December 21, 2020. Claimant's status and needs were summarized as follows:

For personal reasons, Claimant does not feel safe in the home for long periods of time. Claimant uses Access transportation with support and can independently use public transportation after he learns specific routes. At the time of the IPP, due to [the] Covid-19 State of Emergency, Claimant did not use public transportation and primarily took walks in the neighborhood. Claimant requires support with money and does not understand the value of money and was provided a credit card to make purchases. At that time, one conservator family member was the principal designee for Claimant's monthly Social Security Income (SSI) benefits of \$980 a month and was the designated worker for 136 hours of In-Home Support Services (IHSS). Claimant requires support and guidance with self-help tasks; e.g., verbal support for selecting hygiene products to use, put shirts on with the finished side facing out, and physical support to cut food, clean his face after meals, and periodic support to use the shower, manipulate zippers and buttons while dressing. He is reliant on sign language, vocalizations and AAC technology to communicate. The designated IHSS conservator family member is an integral part of the AAC therapy sessions and assists with training Claimant to properly use the AAC system. (Ex. 2.)

9. Claimant's conservator family reported swimming was part of Claimant's health care regime. As part of the IPP's discussion of Claimant's health status, Claimant's recent diagnosis of arthritis and resulting pain were noted. Claimant's arthritis was "being addressed with swimming (prior to Covid) and with over the counter Tylenol. (Ex. 2.)

10. In the area of health care, the focus of the SDP funds, based upon Claimant's primary care physician recommendations, include orthotics, massage therapy, and eye glasses not covered by his insurance, to address Claimant's gait, bone structure, chronic pain and poor eyesight. (Ex. 2.)

11. Claimant's speech deficits are significant and pervasive. He continues to receive AAC therapy sessions as part of his SDP. He is able to respond to yes/no questions, understand others' speech, follow directions and maintain attention to an assigned task, maintain eye contact, and express preferences when given two choices. Claimant can self-advocate if given clear questions. Nevertheless, it is unknown the number of words Claimant understands in written form. (Ex. 2.)

12. The IPP developed social goals for the SDP as well as transportation and learning goals. Claimant's social goals included attending "zoom social events with friends, engag[ing] in the community when safe for things like going out to eat, exercise, socialization, mobility training, etc. and attend summer camp if it is available." (Ex. 2.)

13. Home safety was noted as a priority of the SDP spending plan and included emergency phone lines, grab bars, a lowered peep hole for the front door, and a ring doorbell, among other items. (Ex. 2.)

SELF-DETERMINATION PROGRAM – PARTICIPANT DIRECTED GOODS AND SERVICES

14. Silvia Renteria-Haro, Consumer Services Manager, oversaw the rollout of the SDP for the service agency's Santa Clarita office and is knowledgeable about its purpose and structure. Ms. Renteria-Haro provided credible testimony supported by the exhibits. Gerald Calderone, Consumer Services Supervisor of the service agency's Santa Clarita office, also provided credible testimony supported by the exhibits that explained the application of service agency standards and the Lanterman Act to the service agency's decision not to fund Claimant's request for an above-ground pool.

15. Service Standards, approved by the Department of Developmental Services (DDS), provide internal guidelines for the service agency's funding of services and supports. (Ex. 14) The Service Standards reinforce the funding priorities of the Lanterman Act, i.e., the primary pursuit and exhaustion of generic public and other private sources of funding before the utilization of service agency resources. (Exs. 16 and 17; Code sections 4646.4 and 4659.)

16. The SDP is a new program that provides the participants flexibility to use non-vendors to meet a consumer's IPP goals. The SDP is codified in Code 4685.8 (Ex. 18.)

17. Participants must retain an FMS to oversee expenses. The FMS is paid by the service agency to implement the overall budget for the IPP services and supports for the consumer. Funds to pay the FMS are deducted from the budget and reduce the amount used for goods and services.

18. DDS issued directives during the Covid-19 State of Emergency. (Exs. 19 and 20.) The last directive is still in effect (Directive). Based on the Directive, during the Covid-19 State of Emergency, consumers could request a fee waiver and "repurpose funds" for different and/or additional services and the service agency was required to readjust the budget to reflect where the "repurposed FMS fees will be used." (Ex. 20.)

19. There is no dispute the service agency has followed the mandated procedures for creating the SDP.

20. Claimant's initial SDP budget for the period January 1, 2021 through December 31, 2021 was \$53,602.64.

21. Claimant's conservator family requested an FMS fee waiver. The FMS fee is \$165 a month. On July 18, 2021, the service agency approved the request and added a total of \$990 to the budget for six months, effective January 1, 2021. The total budget was increased to \$54,592.64. (Ex. 21.) An additional FMS fee waiver was granted for another six months in the amount of \$990. In addition, due to a "change in circumstances and needs, funding for the community integration services (personal assistant services, service code 55), provided 30 hours a week, at a rate of \$25.11 an hour, \$753.30 a week, for an additional 13 weeks, was revised by \$9,792.90, for a total revised budget increase of \$10,782.90, or \$65,375.54. (Ex. 22).

22. Claimant initially requested funds in the amount of \$7,823.93 for an above-ground pool package, which included the saltwater oval pool, framing, heater, solar panel, ladders, generator, heat pump and maintenance kit. (Ex. 6.) Due to the passage of time, the cost of the above-ground pool with the same equipment increased to \$11,182.90. (Ex. HH.) Claimant's conservator family committed to investing their own funds to prepare the ground for the installation. Claimant's conservator family prepared a cost assessment to show that the service agency would realize significant cost savings in monthly costs expended in staffing, lessons, exercise club/pool membership over 20 years. Claimant's conservator family estimated the monthly costs of the above-ground pool to be \$167.43 and the monthly costs of his current method of swimming with staff to be \$2,434.33 per month. (Ex. II.)

23. Nothing in the Directive overrides the IPP or other portions of the Lanterman Act. The IPP remains operative and governs the needs and budget for the SPD. DDS Directives for the SDP program reinforce the priority given to the exhaustion of natural supports (such as a family member) or generic services (such as IHSS-personal care attendant). (See e.g., Ex. 11.)

24. Where supports are authorized by the SDP and defined as community living supports, they are provided either in the home or community for the purpose of facilitating greater access to the community under conditions where the participant's "essential personal rights of privacy, dignity and respect and freedom of coercion are protected." (Ex. 12.) Community living supports include self-care, household chores, eating, and socialization.

25. Reference is made to the federal Medicaid waiver in the SDP program because the SDP is included in that program, and goods and services cannot be approved as part of the SDP if they are not allowed under the Medicaid waiver. (Ex. 26.) The Medicaid waiver under the SDP program is also referred to as the SDP waiver. Adaptations or improvements to the home such as housing repairs and renovations that are of general utility and are not related to the disability-related needs of the participant are not allowed, including a swimming pool. (Ex. 13.) Included in the SDP are community integration supports necessary to implement the IPP (under service code 331) and are inclusive of supports that further independence, improve self-help, socialization, communication and self-advocacy, e.g., art and recreation programs, "exercise class in the park, swim class at a public pool...". (Ex. 13.) Community integration services as defined are not provided in the participant's residence. (Ex. 12.)

26. "Participant-Directed Goods and Services" (PDGS) is a term used to describe goods, equipment or supplies not otherwise provided, but not prohibited, through the SDP Waiver or the Medicaid State plan, consistent with the IPP.

27. On January 13, 2022, the DDS issued a directive about the scope of PDGS. (Ex. 11.) As explained in the service agency's letter to Claimant's conservator family dated February 28, 2022, the requested above-ground pool for Claimant is not allowed under the PDGS because the above-ground pool is an adaptation or

improvement of “general utility and not related to the disability-related needs of the participant.” (Ex. 10.) The service agency also noted the item is expressly listed as a household item “not allowed” in a SDP. The service agency quoted from the DDS directive:

Participant-Directed Goods and Services consist of services, equipment or supplies not otherwise provided through the SDP Waiver or through the Medicaid State [P]lan that address an identified need in the IPP (including accommodating, improving and maintaining the participant’s opportunities for full membership in the community); and increase the person’s safety in the home environment; and the participant does not have the personal funds to purchase the item or service and the item or service is not available through another funding source. The participant directed goods and services must be documented in the participant’s Individual Program Plan and purchased from the participant’s Individual Budget. Experimental or prohibited treatments are excluded.

(Ex. 10; see also Exs. 11, 12 and 16.)

Claimant’s Disability and the Above-Ground Pool

28. Claimant’s conservator family provided genuine and sincere testimony of the benefits of an above-ground pool to ameliorate Claimant’s disabling condition. Their testimony was consistent with their written communications with the service

agency and they were completely candid about Claimant's needs, interests and physical status.

29. Claimant undeniably benefits from swimming and aquatic exercise and has a passion for it. Claimant suffers from arthritis and swimming does provide some relief. It reduces his pain from arthritis and increases his mobility. He also suffers from insomnia, anxiety and depression, and his past experience with swimming and aquatic therapy has greatly improved his mobility and mental health. Prior to the Covid-19 State of Emergency and pool closures, Claimant went swimming regularly and swam every day, except Sundays, at the public swimming pool or at 24-Hour Fitness (membership was funded as part of his IPP/SDP). Claimant has had access to assistants to transport and accompany him to the swimming pool, assist him with aquatic exercise in the deep parts of the public pool by the wall, and accompany him as he swims back and forth doing laps. Claimant can do 100 laps with the staff providing cues to use large strokes for his arms and kick his legs. (Conservator family testimony; see e.g., Ex. E.) The above-ground pool selected is 24 feet in length and allows for lap swimming.

30. Claimant has had access to the pool of a friend of Claimant's conservator family who testified at the fair hearing. The friend provided sincere and honest testimony of her observations of Claimant at her community swimming pool. She has known Claimant for a long time as mostly nonverbal but while in the pool Claimant surprisingly spoke clearly to her. Claimant's conservator family also witnessed Claimant's improved ability to speak when he is in the pool.

31. Claimant's conservator family described the current circumstances that make having an above-ground pool at home still necessary, even though the public pools and the fitness centers have reopened. There are logistical issues: Claimant

currently works up to 35 hours a week at Magic Mountain and to access the public swimming pool an appointment must be scheduled on-line. Claimant's conservator family has had difficulty securing an appointment on-line for a time that can be coordinated around Claimant's work schedule. Claimant has a robust and busy weekly calendar. In addition to his work schedule, his activities include physical therapy (when available), yoga and cardio exercise classes (3-4 times weekly), cooking classes, hiking, ice hockey, theater group, drum lessons, and jazz band. Many activities were curtailed or conducted on Zoom due to Covid-19, including movies, bowling, the indoor gym, and the public swimming pool, some of which have returned.

32. There are also the physical and perceptual issues that impede Claimant's access to public swimming locations. Claimant has a reaction to chlorine and the proposed above-ground pool will be salt water, which would eliminate or reduce the use of chemicals. Claimant is resistant to removing his mask at a public location even where a lane is reserved.

33. Claimant's conservator family did not perceive a disconnect between Claimant's resistance to the public pool based upon his concerns with masking and working 35 hours a week at Magic Mountain where he must be present with random customers. They explained during work Claimant is behind a counter and more distant from the public. This explanation did not make sense because as described Claimant swim's laps in the water on a reserved lane.

34. Claimant's conservator family claims that an at-home pool would not impede but would foster socialization. Claimant has discussed plans to invite people over. He excitedly communicates to his conservator family and caregivers his plans to swim in the proposed above-ground pool.

35. Claimant's conservator family disagreed with the service agency's position that funding the above-ground pool was contrary to the DDS directives. They offered the expert testimony of Lori Shepherd, who holds a Master of Art in Technology and Human Services and works with Claimant as an Independent Facilitator through Beyond Assessments and provides him assistance with his communication technology. In a SDP, the Independent Facilitator is defined as a person selected and directed by the participant, who is not otherwise providing services to the participant, to assist in planning, accessing, and implementing services, and to advocate for the participant. (Ex. 12.)

36. On May 24, 2021, on behalf of Claimant, Ms. Shepherd requested an IPP addendum to redirect the FMS fees to the above-ground pool due to his increased arthritis pain and other physical ailments. She reported the above-ground pool offered a consistent and stable place for him to exercise, stretch and increase his mobility through pool exercise. To that end, she suggested a "health and safety" goal aimed at Claimant living a full, pain-free life, with daily pool workouts and movement therapy with physical and occupational therapists. (Ex. 4.)

37. Ms. Shephard's expertise is limited to her stated education as a technology expert and her facilitative role. She is not a medical professional or a physical therapist. Claimant's conservator family provided literature about the benefits of swimming but there is no dispute presented about swimming being beneficial to the overall population to improve strength and control weight. There is also no dispute swimming assists in ameliorating the pain of arthritis and as an individual with Down Syndrome, Claimant's more severe and persistent medical challenges including a fatty liver.

38. Ms. Shepherd's stated expertise as a technologist did not add anything to the dispute. She offered the service agency never provided an AAC assessment, which was not relevant to this dispute.

39. Ms. Shepherd posited the above-ground pool was consistent with the DDS directives and definition of technology.

Technology is an 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 participant's IPP include:

1. Evaluation of technology needs...¶;
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;
3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing technology devices;
4. Training or assistance for the participant, ...¶;
5. Training or technical assistance for professionals,...¶.

Technology may only be purchased under the SDP Waiver if it is not available through the state plan.

40. Ms. Shepherd's attempt to fit the above-ground pool within what she considered a "broad definition" of assistive technology was inconsistent with the language of the paragraph cited, which consistently used the term technology to refer to typical electronic-related items, the overall service model of the Lanterman Act, the SDP directives, which described a swimming pool as part of household items (not technology) under goods and services (Exhibit 13), and the common use of the term technology in the English-language (see, e.g., Merriam Webster, www.merriam-webster.com/dictionary/technology, "the manner of accomplishing a task especially using technical processes, methods, or knowledge.")

Service Agency's Expert Testimony

41. The service agency offered the testimony of Carlo De Antonio, M.D., F.A.A.P., Diplomate, American Board of Pediatrics, and a physician and surgeon licensee with the Medical Board of California. (Ex. 23.) Dr. De Antonio is the Clinical Director for the service agency and is a highly qualified practitioner, familiar with the diagnoses and eligibility requirements of service agency clients, including Claimant. His testimony was given great weight. Dr. De Antonio did not have access to Claimant's recent medical records but accepted Claimant's diagnosis of arthritis and was well-versed in the lifelong medical struggles of individuals diagnosed with Down Syndrome. Dr. De Antonio provided straightforward, articulate and research-based responses to questions.

42. Dr. De Antonio reaffirmed Claimant's eligibility for services was based on his dual diagnoses of Intellectual Disability and Autism. Claimant's medical diagnosis of arthritis was not directly relevant to his IPP.

43. Dr. De Antonio explained that the only research-based intervention for the eligibility category of Autism was applied behavior analysis (ABA), for which he provided the findings and conclusion of the National Standards Project, Phase 2. (Ex. 24.) Swimming is not an evidence-based treatment for Autism, "in and of itself." Aquatic therapy may have other benefits for an individual with a developmental disability, particularly as a social recreation activity. The benefits of exercise are not unique to individuals with developmental disabilities, e.g., individuals suffering from obesity, hypertension, and diabetes benefit from exercise.

44. Dr. De Antonio agreed those with Down Syndrome suffer from or at a higher risk of developing congenital heart problems, hypothyroidism, leukemia, early onset Alzheimer's Disease and ear infections. He opined that "maybe there were higher incidents of juvenile arthritis, but it was "unclear" if adult onset arthritis was related to Claimant's Down Syndrome.

45. Dr. De Antonio was firm in his opinion swimming as an exercise was not a recognized treatment for Autism and swimming or aquatic therapy would be experimental if considered as directly related to the treatment of Autism. He clearly distinguished swimming as an exercise from swimming as a form of social recreation. Likewise, swimming instructions may be a social activity, like walking or running, but are not designed to treat Autism. He acknowledged individuals may improve their strength and fitness in an exercise program, (Exhibit S), but this improvement is not different from what would occur to the general population involved in a similar program.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (Code §§ 4700-4716.)² Claimant's conservator family appealed the service agency's denial of their service request, and therefore jurisdiction exists for this appeal. (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.) This standard is met when the party bearing the burden of proof presents evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

3. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) In this case, Claimant's conservator family is requesting increases in Claimant's current funding and services, and therefore they have the burden of proving by a preponderance of the evidence that Claimant is entitled to them. Claimant's conservator family failed to meet their burden of proof. (Factual Findings 1-45.)

² Undesignated statutory references are to the Welfare and Institutions Code.

Applicable Provisions of the Lanterman Act

4. A. Code section 4685.8 governs regional center consumers participating in the SDP. The purpose of the SDP is to provide consumers (also referred to as participants) and their families, within an individual annual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP. (*Id.*, subd. (a).)

B. "Self-determination" is defined in the statute as a voluntary delivery system consisting of a defined and comprehensive mix of services and supports, selected and directed by a participant through person-centered planning, in order to meet the objectives in their IPP. Self-determination services and supports are designed to assist the participant to achieve personally defined outcomes in community settings that promote inclusion. (*Id.*, subd. (c)(6).)

C. When developing the individual budget, the IPP team determines the services, supports, and goods necessary for each consumer, based on the needs and preferences of the consumer, and when appropriate the consumer's family, and the effectiveness of each option in meeting the goals specified in the IPP, and the cost effectiveness of each option, as specified in section 4648, subdivision (a)(6)(D). (*Id.*, subd. (b)(2)(H)(i).)

D. The participant shall utilize the services and supports available within the SDP only when generic services and supports are not available. (*Id.*, subd. (d)(3)(B).) Generic services and supports should be used when appropriate. (Code § 4646.4.) It is the intent of the Legislature in implementing the IPP, the planning team first consider services and supports in the natural community, home, work and recreational settings. (Code § 4648, subd. (a)(2).)

E. Services and supports mean specialized services and supports or adaptations of generic services and supports directed toward the alleviation of the developmental disability or toward the social, personal, physical or economic habilitation or rehabilitation of an individual with a developmental disability...and shall include, but are not limited to, the diagnosis, evaluation, treatment, personal care, daycare, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling...adaptive equipment and supplies, ...behavior modification... ." (Code § 4512.)

F. Other sources of funding including government, such as Medi-Cal, Medicare, school districts, federal supplemental security income, and other entities or programs should be used for regional center services. (Code § 4659.)

G. DDS Directives provide guidance to the regional centers on the application of the SDP to the IPP and services and supports. (See Factual Findings 3, 15-18.)

5. Pursuant to Code section 4685.8, subdivision (n)(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.

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

(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.

6. In requiring a regional center to certify its expenditures would have occurred regardless of the consumer's participation in the SDP, it is clear that other provisions of the Lanterman Act not expressly exempted in Code section 4685.8 still apply to funding determinations within the SDP process. For example, there is nothing in section 4685.8 exempting the Legislature's intention set forth in Code section 4646, subdivision (a), "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."

Disposition

7. Claimant failed to provide sufficient evidence his request for an above-ground pool at his residence is directly related to his eligibility for regional center services or provides a source of relief for his developmental disability that cannot be otherwise provided by generic and less costly resources, such as public pools. Claimant's request was not supported by the evidence or the dictates of the Lanterman Act as applied to the SDP. The service agency was supportive of Claimant's need to access opportunities in the community to swim for community integration and health. It provided him with a gym membership and assistants to accompany him for swimming. However, its support for swimming as an activity does not translate into funding for a private pool. Public pools or a gym membership and assistants to accompany him provide cost-effective access to a public and community resource Claimant might not otherwise pursue.

8. Claimant's verbal skills are limited. He tended to vocalize more when he is swimming. However, there is no evidence his increased vocalization during his swim translated into longer term or sustained improvement in his communication skills.

9. Swimming with others has a positive effect on recreation, socialization and general physical and mental health for everyone and is particularly helpful to Claimant because he enjoys it and suffers from arthritis. Claimant has access to the public swimming pool however difficult it may be for his conservator family to schedule appointments for him. Access is also limited by his current schedule, which includes work and various other elective activities.

10. Claimant's conservator family maintains Claimant will benefit as much if not more socially with a pool at his residence. However, the Lanterman Act is designed

to promote integration into the community and there is no support for the proposition that swimming in one's own backyard is a community activity similar to a public pool.

11. Undoubtedly, Claimant has arthritis and swimming provides some relief from his condition. However, he does have access to a public space to swim and his fear of swimming in a public place and removing his mask due to Covid-19 is not a sufficient reason to fund an above-ground pool at his home. Claimant swims in a dedicated lane with his assistants and with his assistants can maintain the appropriate distance from other swimmers. Claimant manages to function in a public place 35 hours a week working at Magic Mountain.

ORDER

Claimant's appeal of the service agency's denial of the request to fund an above-ground swimming pool at Claimant's residence is denied. The service agency shall not be obligated to fund an above-ground swimming pool at Claimant's residence. Any FMS fee waivers shall not be applied to the funding of an above-ground swimming pool.

DATE:

EILEEN COHN

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.