

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH Nos. 2017120922
2018011111
2018020689

DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on February 28 and March 1, 2018.¹

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, Inland Regional Center, represented Inland Regional Center (IRC).

Claimant's mother represented claimant.

¹ Claimant's three cases (OAH Case Nos. 2017120922, 2018011111, and 2018020689) and her two brothers' four cases (OAH Case Nos. 2018011110, 2018020690, 2018011109, and 2018020688) were consolidated for a single hearing. There is one decision for each claimant. Therefore, this decision addresses OAH Case Nos. 2017120922, 2018011111, and 2018020689; a second decision addresses OAH Case Nos. 2018011110 and 2018020690; and a third decision addresses OAH Case Nos. 2018011109 and 2018020688.

The matter was submitted on March 9, 2018.²

ISSUES³

1. Should IRC fund diabetes camp for claimant and her family?
2. Should IRC fund claimant's attendance at Marquee Performing Arts Academy?
3. Should IRC fund homemaker services?⁴
4. Does claimant require nursing level respite services or may IRC fund non-licensed persons to provide nursing level respite services?

² The record was held open until March 9, 2018, to allow the parties to simultaneously submit closing argument briefs. On March 9, 2018, claimant's closing argument brief was marked as Exhibit C-31 for identification, IRC's closing argument brief was marked as Exhibit I-45 for identification, the record was closed, and the case was submitted. Claimant submitted additional evidence after the case was closed, which was not considered.

³ During the hearing, claimant withdrew her request for in-home occupational therapy services, which eliminated one of the requests for services raised in OAH Case No. 2018011111.

⁴ As is discussed further below, at the time of the hearing, IRC had offered to fund personal attendant services; claimant's mother was still learning about those services and had not yet decided whether to accept them. Although the parties raised the personal attendant services as a possible issue, because IRC did not deny those services, whether IRC should fund personal attendant services was not an issue that was ripe for a fair hearing determination.

5. Should IRC reimburse claimant for payments claimant's parents made to non-licensed respite workers who provided nursing level respite services, which payments IRC did not approve in advance?⁵

FACTUAL FINDINGS

CLAIMANT'S FAIR HEARING REQUESTS⁶

1. Claimant submitted fair hearing requests appealing:
 - IRC's December 4, 2017, denial of claimant's request that IRC fund diabetes camp for claimant and her family.
 - IRC's December 11, 2017, denial of claimant's request that IRC fund in-home occupational therapy services.⁷
 - IRC's January 9, 2018, denial of claimant's request for homemaker services.

⁵ Issues 4 and 5 overlap because claimant sought reimbursement for payments made to non-licensed persons to provide nursing level care when IRC's vendors were not able to supply nursing level respite workers.

⁶ During the instant hearing, claimant's mother argued that IRC refused to meet with her to update claimant's May 5, 2017, Individual Program Plan (IPP). The evidence showed IRC issued IPP addenda on October 2, 2017; November 27, 2017; January 11, 2018; and January 24, 2018. Claimant's requests to update her IPP were not the subject of a notice of proposed action or a request for fair hearing, and no findings are made in this decision regarding claimant's requests to update her IPP.

⁷ Claimant withdrew her request for in-home occupational therapy. Her mother noted during the hearing that, although claimant no longer desired this service, she only requested a fair hearing regarding her in-home occupational therapy request in order to show that IRC had recently denied so many requests for services.

- IRC's January 25, 2018, denial of claimant's request that IRC fund claimant's attendance at the Marquee Academy of Performing Arts.
- IRC's February 14, 2018, denial of claimant's request that IRC reimburse her or provide a voucher for respite.⁸

2. Claimant's Fair Hearing Request, dated December 12, 2017, stated that the reason for the request was "[a]ppealing denial to fund diabetes camp," and that the following was needed to resolve the complaint: "IRC agreeing to fund diabetes camp."

3. Claimant's Fair Hearing Request, dated January 18, 2018, stated the following reason for requesting a hearing:

Including siblings, also IRC consumers, mother estimates that she has 11 denials of services requests over the last 2 months. Requesting a hearing to resolve as many of these issues as possible. See attached list of denials and why family requested each one.

In the attachment, claimant argued that IRC should fund: (1) "Occupational Therapy Request";⁹ (2) "Diabetes Camp"; (3) "Performing Arts Classes at Marquee Performing Arts"; (4) "Request for Household Services"; and (5) "Request for regular respite for all three children."

⁸ Although claimant had requested a "voucher for respite," which was denied in the same notice of proposed action that denied the request for reimbursement for respite, neither party knew what a voucher for respite might be, and claimant withdrew the request for a "voucher for respite" during the hearing.

⁹ See footnote 7, above.

The January 18, 2018, Fair Hearing Request stated that the following was needed to resolve the complaint:

1. Securing appropriate respite.
2. Household help for mother who was recently diagnosed with Lupus.
3. Help mother with after school routine: homework, behavior management, self-care.
4. Creative ideas for out of home respite that meet IPP outcomes.

4. In another Fair Hearing Request, dated February 9, 2018, regarding problems claimant experienced with respite services, the reason for seeking a hearing was stated as follows:

Inaction to request to be reimbursed, or use vouchers, to assure no gaps in respite services. First request made 11/15/16.¹⁰ No NOA or decision made, 5 months gap of

¹⁰ This decision does not address the November 2016 request. On March 10, 2017, claimant submitted a fair hearing request concerning her respite care. On April 27, 2017, IRC and claimant entered into a Final Mediation Agreement related to that request, in which, IRC agreed to provide claimant 120 hours per month of licensed vocational nurse (LVN) level respite and 60 hours per month of Specialized Individual Training (SIT). The 120 hours of LVN respite were approved, in part, to make the assignment more attractive to an LVN who may want full time hours, as there had been some difficulty finding LVNs willing to work part time hours. Since then, at claimant's

service ensued. Recent LVN quit 12/15/17, asked repeatedly in writing and verbally for decision, none given, 57 day gap of service so far.

The February 9, 2018, Fair Hearing Request stated that the following was needed to resolve claimant's complaint:

1. The ability to secure my own respite to avoid gaps in service and to ensure timely access to care.
2. The ability to be reimbursed for emergencies that required me to find my own respite during the 5 month and 57 [sic] gap in coverage respectively.

CLAIMANT'S BACKGROUND AND THE SERVICES SHE HAS RECEIVED

5. Claimant is a 12-year-old girl, who has been an IRC consumer since 2007, based on a diagnosis of Cerebral Palsy. She is one of three triplets who are all IRC consumers. The other two triplets, her brothers, are IRC consumers based on diagnoses of Autism Spectrum Disorder. Claimant recently learned that she may also be autistic, and IRC has scheduled an evaluation to determine whether she may be eligible for regional center services based on Autism Spectrum Disorder.¹¹ During fall 2016, claimant learned that she suffers from type 1 diabetes. As a result, she must monitor her

request, the LVN level respite was reduced to 92 hours to match the routine respite hours. In the present matter, claimant was not seeking an increase in the approved LVN hours.

¹¹ Whether claimant may be eligible for regional center services based on autism was not the subject of the present matter.

glucose levels and her carbohydrate intake, she requires insulin injections, and someone must be present who is able to administer an emergency Glucagon injection in case she loses consciousness. Claimant and her brothers have a nine-year-old sister who is not an IRC consumer. Claimant's father works full time out of the home. Her mother does not work outside the home; she stopped working as a teacher to care for claimant and her siblings.

6. Claimant has an Individualized Education Program (IEP) and she receives special education services and supports through her school district, including occupational therapy, based on autism and orthopedic impairment. Claimant has been doing well in school academically, and her teacher nominated her to attend the Junior Young Leaders Conference in Washington, D.C., during summer 2018, due to her "scholastic merit, maturity, and strength of character." During the hearing and in its closing argument brief, IRC focused much of its attention on claimant's and her siblings' school accomplishments and the school's evaluations regarding their abilities and argued that they may not suffer substantial deficits in their adaptive functioning. Despite IRC's arguments regarding the triplets' abilities and adaptive functioning, the professionals who have interacted with and provided services to the triplets indicated that due to their significant deficits, including problems with their adaptive functioning, they are in need of multiple services.

7. Bailey J. Nelson, OTR/L, the children's occupational therapist since August 2017, wrote a letter dated February 22, 2018. In her letter, she stated that she treats the triplets on a weekly basis and has been working with them to address "various behavioral, emotional, and self-care concerns." She also wrote that "their complex, and various diagnoses represent a complicated and challenging situation." She wrote that it is her "professional opinion that the [claimant's] family requires multiple professionals and service providers to aid in the success and development of the children as fully functional, fulfilled, and happy individuals." She also noted that "[a]ll three have many

skills and talents, and are truly incredible children, but they also present with many tricky and demanding needs.”

8. Claimant and her brothers received IRC funded Applied Behavior Analysis (ABA) therapy until July 31, 2017, when the ABA provider, Specialized Psychology Solutions, terminated the services after the provider determined that the needs of one of claimant’s brothers were beyond what its staff could provide, and the triplets would be better treated by a mental health practitioner. Adam Cash, BCBA-D, Psy.D., Specialized Psychology Solutions’s Clinical Director, wrote the following in a February 12, 2018, memorandum:

At some point, the children were receiving services from multiple professionals and providers that made coordination of care extremely difficult. [Claimant’s] medical issues were severe and were straining the family’s (and my staff’s) resources to the breaking point. The children and the family as a whole, were in need of significant support just to get by on a daily basis. The children continued to need intervention for Autism-related issues, [claimant’s brother] was possibly in need of additional mental health treatment, [claimant] was in need of daily care for her diabetes, and the family needed ongoing respite-type support and most likely family therapy in order to cope with these extreme stressors. It was clear to our clinical team that we were simply incapable of providing effective services in such a complex situation and felt that perhaps a more capable program would be more appropriate.

It is my position to this day, that the [claimant's] family's situation represented one of the most complicated clinical cases we have ever come across. I humbly admit that their situation was simply too much for my clinical team to handle. Moreover, I believe their situation is simply too much for any single family to overcome without substantial help and support from outside the family, . . . Although the . . . children all show great potential, their deficits will continue to challenge the knowledge and skill of any intervention program. Yet, I believe that with the proper intervention, support, and resources, they can succeed and thrive.

9. IRC funded claimant's receipt of 60 hours per month of one-on-one Behavioral Respite Specialized Individual Training (SIT) from California Psychcare beginning April 1, 2017, and ending September 18, 2017. SIT was terminated at claimant's mother's request, and the SIT services were replaced with United Cerebral Palsy of the Inland Empire (UCP) routine respite care. California Psychcare's September 2017 termination report noted that claimant was able to independently initiate social interactions, engage in parallel and imaginary play with peers, and had social awareness skills. The report also noted the following "Behavior Excesses":

[Claimant] displays problem behavior such as self injurious behavior which includes hitting face with closed and open hand when presented with non-preferred tasks. [Claimant] engages in tantrum behaviors and verbal protest. Tantrum includes screaming above normal volume accompanied with "No" or "Why [*sic*] I have to do that." Yelling at high pitch

tone with no words and crying for over five minutes during tantrum episodes.

10. From October 2016 through July 2017, claimant also received services from Uplift Family Services (formerly EMQ Families First). IRC agreed to provide those services after claimant suffered a mental health crisis that appeared to have been triggered by her diabetes diagnosis. Corey Thompson, M.A., an Uplift associate professional clinical counselor, wrote an undated letter in which he stated the following about those services:

The Uplift Family Services team worked with [claimant's mother] to create a functional schedule that attended to the individual needs of her children, allowed [claimant's mother] to spend quality one-on-one time with each child, and set aside some much needed time for self-care. Scheduling activities proved difficult due to the many needs of each child, as the children craved [claimant's mother's] attention and would often seek her out when she was attending to another child

From my observation, the family functioned best when the children had structured activities where [claimant's mother] was able to manage schedules for each child to include adequate time for mother's self-care. . . .

Uplift program coordinator Yvonne Sanchez, B.A., echoed the sentiment of Mr. Thompson and added in a letter, dated February 20, 2018, that:

[Claimant's mother] consistently attempted to accommodate the needs of each sibling, but found it difficult to be in many places at once. The team assisted [claimant's mother] in organizing homework help, outdoor play, chores, mindfulness activities, and services in a daily calendar. . . . I observed that [claimant's mother] found it easier to write down the daily schedule on a white board and always included the services to help implement the daily check list. . . .

11. The triplets also receive mental health care, funded through insurance. Maria Elena Moya, M.D., a child and adolescent psychiatrist, treats claimant and her brothers. Rachel Taylor, a licensed marriage and family therapist and registered play therapist supervisor, has been providing therapy to claimant and her siblings on Saturdays since May 2017. Dr. Moya wrote a letter, dated May 13, 2016, in support of claimant's family's need for adequate respite services. Ms. Taylor wrote an undated letter that outlined her opinions regarding the extraordinary nature of the family's situation as follows:

I have formed a professional opinion that there is more than one extraordinary circumstance that makes this family's situation unique. I thought it best to list them:

1. There are pre-adolescent triplets in the home. Each developmental stage is magnified at this time.
2. The triplets each have a developmental disability, and one of them also has cerebral palsy and type I diabetes.

3. The triplets can all become aggressive to themselves and/or each other at any given moment, sometimes without any provocation.

4. There is a typically developing child in the home who has three special needs siblings and is unable to get the parental attention she needs due to her siblings' severe and constant needs.

5. [Claimant's mother] is battling an autoimmune disorder that leaves her exhausted and unable to perform daily tasks on occasion.

[¶] . . . [¶]

When [claimant's parents] request supports and services for their children, I believe that their requests are urgent, critically important, and should be given careful consideration as a means to keep the family intact.

Furthermore, I believe that there are extraordinary circumstances that should always be a frame of reference in which their family's needs should be carefully determined.

12. Claimant's mother has been working to arrange ABA therapy through a different provider through her family's current medical insurance. Claimant's mother has

also been considering the personal attendant services that were recently offered by IRC.¹²

RESPITE SERVICES THAT HAVE BEEN APPROVED AND PROVIDED AND THE PROBLEMS ENCOUNTERED WITH RESPITE SERVICES

13. IRC has approved 92 hours per month of one-on-one routine respite and 92 hours per month of one-on-one LVN level respite for claimant. IRC has also approved 92 hours per month of respite services for her two brothers, which they share such that one respite worker is assigned at a time for the two boys. The children attend school Monday through Friday from 8:30 a.m. until 3:16 p.m., except that school starts later, at 9:20 a.m., on Thursdays. Claimant's mother has scheduled respite hours from approximately 3:30 p.m. through 8:30 p.m. on weekdays, to cover the time from when the children come home from school until they go to bed. As a result of claimant's need for LVN level respite and the manner in which the routine respite care is staffed, when the approved respite hours are fully staffed, there are two routine respite workers and one LVN respite worker in the family's home at the same time. During those after school hours, claimant's mother helps each of her four children with homework, and she has a checklist of activities she has developed that she wants the respite workers to follow in order to maintain the children's routines.

14. Claimant's parents participate in couples' therapy one evening a week from approximately 6:45 p.m. until 8:45 p.m., and it is important that they are able to leave the children with the respite workers, so they can attend those sessions together. Robert Sawicky, Ph.D., claimant's parents' psychotherapist, wrote that the parents' couples' therapy was "essential to the sustained functionality" of their family and that

¹² The proposed personal assistant services are discussed further under the heading "Homemaker Services."

they needed in-home workers to provide respite care to facilitate their participation in treatment.

15. According to UCP's Program Description for its Respite Care Program, its respite workers provide non-medical care and:

[A]ssist with daily living needs and promote independent skills, and other skills as directed by the client/consumer's parent(s)/legal guardian. UCP Respite Care Program's goal is to ensure a safe environment with optimal supervision of client/consumer at all times. Compatibility Process, will include, but not [*sic*] limited to screening for behaviors, likes and dislikes, daily living and safety needs. . . . [¶] As of 06-01-03: Each client will have an Individual Service Plan (ISP) developed with input given by client/consumer and/or their family member(s)/legal guardian(s) to the Respite Worker at the time of orientation, conducted at the home of the client/consumer. Establishment of 2-3 goals and objectives depending on the needs and capabilities of the client/consumer. . . .¹³

UCP's respite worker job description also lists the following duties: provide responsible care, "[f]ollow instructions for care of client/consumers and siblings as outlined by parent(s)/Guardian(s)," and "[a]ssist client/consumer(s) in areas of feeding, dressing, toileting, bathing, grooming, light meal preparation, etc."

¹³ No evidence was presented regarding whether ISP documents were generated for any of the three claimants or whether any goals or objectives had been set.

16. Reliant Home Healthcare provided LVNs for claimant's LVN level respite care until mid-December 2017. Reliant's In-Home Respite Care Program Design described the scope of its services as follows:

Reliant Home HealthCare Services, Inc. provides skilled nursing care and respite services to consumers in their own homes, to encourage and support family members, integrating activities of daily living, range of motion exercises, being able to educate parents, about the consumers' specific individual goal, achieving this goal through objectives in measurable terms, as possible.

17. With three respite workers in the family home at the same time, the workers had conflicts. The LVN worker recently supplied by Reliant would only provide nursing level care, and she therefore did not do anything but wait for there to be a need for nursing level care. That caused the routine respite workers to complain that the LVN worker was not helping. Sometimes, while claimant's mother was helping her children with their homework, the respite workers would be playing with their phones or coloring, and not doing anything to help with the children. Additionally, one of the UCP respite workers consistently arrived late. As a result, claimant's mother became frustrated and asked IRC for help managing the workers in her home.¹⁴ Despite the

¹⁴ IRC scheduled a meeting with claimant's mother for January 11, 2018, but after IRC Consumer Services Coordinator (CSC) Elizabeth Velazquez sent an email to claimant's mother with what appeared to be a mocking emoji, claimant's mother cancelled that meeting and said she wanted to go before the hearing officer. CSC Velazquez explained during the hearing that she accidentally used that emoji and she

problems that arose with the UCP workers, claimant's mother hesitated changing respite workers because she was concerned such changes might negatively impact her children, who need consistent routines due to their disabilities. During the hearing, IRC seemed to focus a lot of attention on what might be a "usual" way for families to use respite hours.¹⁵ But, based on the letters written by the ABA, SIT, Uplift, occupational therapy, and psychological professionals, there is nothing "usual" about the challenges faced by this family.

18. Due to claimant's diabetes, if there is no LVN present, claimant's parents are unable to leave home because the routine respite workers are not licensed to

accidentally sent an internal email with that emoji to claimant's mother. She apologized to claimant's mother.

¹⁵ IRC presented its employees' opinion testimony concerning when parents "usually" used respite hours, why most parents "usually" used respite, and what the respite workers "usually" did. IRC program manager Leigh-Ann Pierce referred to respite as "just like babysitting" where a respite worker would "watch a movie with" the consumer and maybe give the consumer a snack or meal that had already been prepared in advance by the consumer's parents. She also stated that consumer's parents "usually" left their home when respite workers were present. IRC employees also testified that claimant's mother should not be "delegating" to the respite workers, although they stated that she could give them "instructions." There was no foundational basis for those opinions and they were not consistent with the other evidence presented or with the definitions of "respite" contained in the Welfare and Institutions Code and the California Code of Regulations. It was troubling that IRC chose to critique claimant's mother's use of respite services when the UCP respite workers were not supplying the services outlined in UCP's program description.

provide medical care. Claimant has not had an LVN respite worker since December 15, 2017, when the last LVN respite worker supplied by Reliant quit. When that LVN quit, she notified Reliant in an email that “these kids need behavioral experts. Parents and pt herself are able to manage diabetes, Lvn [sic] is unnecessary (in my opinion).”¹⁶ Reliant then notified IRC it was unable to supply an LVN to cover the scheduled times. IRC contacted multiple vendors to try to find an LVN respite worker. As of January 2018, IRC made a referral to Heavenly Home Health (Heavenly) for LVN respite services, but as of February 23, 2018, Heavenly did not have an LVN who could cover the schedule requested because the LVNs wanted full time work. However, at this hearing, a mere five days later, CSC Velazquez stated that Heavenly had an LVN who could work the schedule claimant’s mother had requested. (IRC’s closing argument brief stated that Heavenly was “available and willing to provide LVN respite if the schedule can be modified.”)

19. Since December 15, 2017, claimant’s parents have paid UCP routine respite workers to provide the LVN level respite care after those workers clocked out from their shifts working for UCP. According to claimant’s mother, those UCP workers have volunteered to provide emergency medical measures to claimant, if necessary. If claimant’s mother wanted or needed to leave claimant at home with a routine respite worker, the worker clocked out from her work for UCP and claimant’s mother paid her directly for that time. Claimant wants IRC to reimburse her family for those out of pocket payments. IRC declined to fund those payments because the UCP respite workers are not licensed to provide medical care and such services were not approved by IRC in advance.

¹⁶ IRC’s closing argument brief did not mention this email and seemed to blame claimant’s mother for the difficulty finding LVNs to cover the shifts requested.

20. At claimant's mother's request, IRC had a nursing assessment performed to assess whether IRC may fund non-LVN level respite care for claimant when her parents are not home. When the nurse conducting the assessment spoke to claimant, the nurse learned that claimant needed prompting to remember the steps to inject her insulin. Additionally, claimant alternates injections between her arms, and she needs assistance to inject insulin in her right arm due to the limited use of her left upper extremity (as a result of her Cerebral Palsy). According to the assessment, dated February 20, 2018, LVN level respite care is required due to claimant's diabetes, as a license to provide medical care is needed to perform injections. The assessment also stated, "[u]nlicensed personnel are not trained in the scientific knowledge or technical skills of medication administration."

21. IRC has told claimant's mother that, as an alternative, IRC would fund the nursing level care provided through a "preferred provider" program with an appropriate waiver. Under a preferred provider program, claimant could choose a family member or friend to provide the service and, with the waiver, one of IRC's vendors could hire and pay the preferred provider for those services. During the hearing, Tiffany Christofferson, Maxim Healthcare Services (Maxim) Operational Manager, explained how those services could be provided through Maxim's preferred provider program.

22. Claimant offered a Decision issued by the Office of Administrative Hearings in another case (OAH Case No. 2016050867),¹⁷ which concerned Alta California Regional Center's denial of a request to fund the services of a non-licensed respite worker who might need to provide seizure rescue medication in the event of a medical emergency. In that case, the administrative law judge ordered the regional center to

¹⁷ The prior Office of Administrative Hearings decision does not have precedential value and it not binding in this proceeding. It was considered as part of claimant's argument.

fund respite services which would allow an unlicensed respite worker to volunteer to provide emergency medications if that claimant's family notified the regional center that a "volunteer agreement" had been reached. In that decision, the administrative law judge reasoned that a regional center could not "prohibit an employee from volunteering to provide services in a medical emergency." The decision also noted that an agreement could be reached between a claimant and a vendor setting forth the specific requirements for volunteer medical administration to ensure a claimant's health and safety.

23. In the present case, the evidence established that UCP provides only non-medical respite services, and Ms. Christofferson explained that Maxim could not provide routine respite workers if it was anticipated that they might need to provide medical care because those workers are not licensed to provide medical care. She also stated that entering into an arrangement that would allow Maxim's non-licensed respite workers to provide care requiring a health care license would jeopardize Maxim's licensing.

HOMEMAKER SERVICES

24. Claimant's mother asked IRC to fund homemaker services, because she was recently diagnosed with lupus, which causes her to be fatigued, and she has struggled with keeping up with household duties as a result of having three developmentally disabled children in the home. Claimant's mother's doctor, V. Douglas Jodoin, M.D., wrote a letter stating that claimant's mother suffers from systemic lupus, autoimmune thyroiditis, chronic post-traumatic stress, and chronic migraines. Due to her medical condition, and the extra care and attention she needs to give to her triplets, Dr. Jodoin stated that "it is difficult for [claimant's mother] to attend to all the daily tasks of managing a household."

25. Claimant receives 18 hours per month of In Home Supportive Services (IHSS), funded through the county, and claimant's mother is paid for providing those services. Claimant's mother requested additional IHSS hours to pay for housekeeping services. That request was denied. She has not appealed that denial.

26. In IRC's January 9, 2018, letter denying homemaker services, it stated that "housekeeping/household maintenance is not a service that can be funded by the regional center for minor children who live with their parents. This is a responsibility of all parents of minor children"; "maintaining the household benefits the entire family; this is not something exclusively for [claimant]"; "the regional center may fund in-home personal care assistance or homemaker services, including tasks to help maintain the home environment, for adult consumers who live independently"; and "funding homemaker services/household maintenance services to help you maintain an orderly home for you and your family is not a specialized service or support directed toward alleviation of [claimant's] developmental disability; nor is it a service directed toward the social, personal, physical, or economic habilitation or rehabilitation of [claimant]."¹⁸

27. In an addendum to claimant's IPP, dated January 24, 2018, the following language was added at claimant's mother's request:

The parents would like to include that the mother's doctor, and the mental health provider for [claimant] believe that homemaker services would support the family in achieving and maintaining the least restrictive environment of a clean and orderly home. The extraordinary level of care required to

¹⁸ As is discussed in the Legal Conclusions portion of this decision, IRC's reasoning is contrary to the law set forth in Welfare and Institutions Code sections 4512, subdivision (b), and 4685.

raise disabled triplets, as well as the mother's health are major obstacles to providing what would typically be a parent's responsibility for a minor child without disabilities.

28. As an alternative to providing homemaker services, IRC offered to provide claimant personal attendant services that would include goals to assist claimant to learn to perform housekeeping tasks and prepare meals.¹⁹ On February 12, 2018, Maxim performed a personal attendant evaluation and proposed to provide a one-on-one personal attendant to help claimant become more independent in private and public settings, function independently with daily activities, and provide stand by assistance due to her risk of falling. In the proposal, Maxim listed the following as claimant's objectives and goals: initiate homework, prepare meals, clean dishes and pick up after herself, and attend to her own personal care, including showering/bathing, dressing, toileting, and brushing teeth. Because the personal attendant would not be licensed to provide medical care, Maxim proposed that the personal attendant could accompany claimant and her parents to her parents' weekly counseling appointment and supervise claimant in the waiting area while claimant's parents were in therapy. Claimant's parents

¹⁹ IRC has taken the position that if a personal attendant helps claimant learn to prepare a meal, claimant may not prepare a meal for the entire family because the service must exclusively benefit the claimant and preparing a family meal would also benefit the family. That rigid position is at odds with the language of Welfare and Institutions Code section 4685, as is discussed further in the Legal Conclusions portion of this decision.

could then assist claimant in the event she experienced a diabetic medical emergency while in the waiting room.²⁰

Claimant and her family have not decided whether to pursue the personal attendant services IRC offered to fund shortly before the hearing. Claimant's mother raised concerns regarding having so many adults in her home at the same time and was worried about how she would coordinate other services, including ABA therapy and respite, during the limited time when claimant and her siblings were not in school or engaged in other activities.²¹

MARQUEE ACADEMY OF PERFORMING ARTS

29. Marquee Academy of Performing Arts (Marquee) is a non-profit music school. Its mission is "to provide an educational environment that fosters artistic growth of its students, resourcing the support and involvement of local, regional and national artists and patrons of the arts." (As stated in excerpts from Marquee's website received in evidence.)

30. Claimant has been attending Marquee classes after school one day after school during the week and on Saturdays, where she learns piano, dance, and singing. Her participation in Marquee's programs allows her to interact and socialize with typical

²⁰ Claimant's mother did not believe having her child in the therapist's waiting area was a viable option or a good idea, particularly given that claimant's bedtime is earlier than when her parents' counseling sessions end.

²¹ It was clear during the hearing that IRC and claimant's mother need to figure out a better way to communicate with each other in order to work toward flexibly coordinating services to best serve claimant's, her siblings', and the family's needs.

peers. Marquee's executive director wrote a letter, dated February 15, 2018, which stated:

[Claimant and her siblings] spend on-average 7 hours per week at Marquee, (3 hours on Wednesday and 4 hours on Saturday). During that time, the parents take turns being at Marquee in the waiting room while the other is out taking personal time. Sometimes in the waiting room, Dad works on his computer and when Mom is there, she is working or talking with other parents. Often the parent in the waiting room is doing homework with a child that isn't in a class; constantly interacting to [sic] the emotional needs of the children and monitoring [claimant's] intense medical needs.

DIABETES CAMP

31. On November 29, 2017, claimant's mother submitted a request to IRC to fund claimant and her family attending a family session at a diabetes camp. According to excerpts from the Camp Conrad Chinnock website supplied by the parties, the diabetes camp "offers recreation, social, and educational opportunities for youth and families with diabetes. Campers are taught diabetes self-management skills in a fun, interactive, and safe environment." Claimant's mother argued that the diabetes camp should be funded because of the extraordinary nature of the camp, it would provide respite to the parents while the children were engaged in activities at the camp, it would help claimant and her family deal with the emotional toll diabetes has on the entire family, and it would provide claimant an opportunity to socialize with other children who have diabetes. After IRC denied the request, claimant and her family attended the winter weekend family session at the diabetes camp.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The burden of proof is on the claimant to establish IRC is required to fund the requested services. (Evid. Code, § 115.) The standard is a preponderance of the evidence. (Evid. Code, § 500.)

2. "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid*, italics emphasis in original.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

STATUTORY AUTHORITY REGARDING THE STATE'S RESPONSIBILITIES TO PERSONS WITH DEVELOPMENTAL DISABILITIES

3. The Lanterman Development Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., governs the state's responsibilities to persons with developmental disabilities.

4. Welfare and Institutions Code section 4501 states:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors, and whole

communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.

The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports. A consumer of services and supports, and where appropriate, his or her parents, legal guardian, or conservator, shall have a leadership role in service design.

An array of services and supports should be established which is 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. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities. . . .

5. Welfare and Institutions Code section 4502.1 states:

The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities, including,

but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decision-making skills in any aspect of day-to-day living and shall provide consumers with relevant information in an understandable form to aid the consumer in making his or her choice.

6. "Services and supports for persons with developmental disabilities" are defined by Welfare and Institutions Code section 4512, subdivision (b), and include: "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. . . . Services and supports listed in the individual program plan may include, but are not limited to, . . . homemaker services, . . . [and] respite, . . ."

IN-HOME SERVICES FOR CHILDREN WITH DEVELOPMENTAL DISABILITIES, INCLUDING SERVICES TO MEET THE FAMILY'S NEEDS AND HOMEMAKER SERVICES

7. Welfare and Institutions Code section 4685 addresses in-home services for children with developmental disabilities as follows:

(a) Consistent with state and federal law, the Legislature finds and declares that children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families. The

Legislature further finds and declares that the cost of providing necessary services and supports which enable a child with developmental disabilities to live at home is typically equal to or lower than the cost of providing out-of-home placement. The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan.

(b) It is the intent of the Legislature that regional centers provide or secure family support services that do all of the following:

(1) Respect and support the decision-making authority of the family.

(2) Be flexible and creative in meeting the unique and individual needs of families as they evolve over time.

(3) Recognize and build on family strengths, natural supports, and existing community resources.

(4) Be designed to meet the cultural preferences, values, and lifestyles of families.

(5) Focus on the entire family and promote the inclusion of children with disabilities in all aspects of school and community.

(c) In order to provide opportunities for children to live with their families, the following procedures shall be adopted:

(1) The department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home, when that is the preferred objective in the individual program plan. This assistance may include, but is not limited to, . . . respite for parents, homemaker services, camping, day care, short-term out-of-home care, child care, counseling, mental health services, behavior modification programs, . . . and other benefits to which they are entitled.

(2) When children with developmental disabilities live with their families, the individual program plan shall include a family plan component which describes those services and supports necessary to successfully maintain the child at home. Regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child, before considering out-of-home placement alternatives. When the regional center first becomes aware that a family may consider an out-of-home placement, or is in need of additional specialized services to assist in caring for the child in the home, the regional center shall meet with the family to discuss the situation and the family's current needs, solicit from the family what supports would be necessary to

maintain the child in the home, and utilize creative and innovative ways of meeting the family's needs and providing adequate supports to keep the family together, if possible. . .

8. California Code of Regulations, title 17, section 54342, lists the service codes for various regional center services. Subdivision (a)(33) and (34) describe "homemaker" services, but they do not place any limitations on the age of the recipients of such services.

(33) Homemaker - Service Code 858. A regional center shall classify a vendor as a homemaker if the vendor maintains, strengthens, or safeguards the care of individuals in their homes.

(34) Homemaker Service - Service Code 860. A regional center shall classify a vendor as a homemaker service if the vendor employs, trains, and assigns personnel who maintain, strengthen, or safeguard the care of individuals in their homes.

USE OF GENERIC AND OTHER RESOURCES AND CONSIDERATION OF THE FAMILY'S RESPONSIBILITY TO PROVIDE SERVICES

9. According to Welfare and Institutions Code section 4646.4:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of

an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate. . . .

(3) Utilization of other services and sources of funding as contained in Section 4659.

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care. . . .

10. Pursuant to Welfare and Institutions Code section 4648, subdivision (a)(1) and (2):

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

11. Regional centers "shall identify and pursue all possible sources of funding for consumers receiving regional center services." (Welf. & Inst. Code, § 4659, subd. (a).) Regional centers "shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, The Civilian Health and Medical Program for Uniform Services, In-

Home Support Services, California Children’s Services, private insurance, or a health care service plan when a consumer or family meets the criteria of such coverage but chooses not to pursue that coverage.” (Welf. & Inst. Code, § 4659, subd. (c).)

12. Welfare and Institutions Code section 4648, subdivision (a)(8), states that “[r]egional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.”

13. Pursuant to Education Code section 56345.2, subdivision (a), school districts have a legal responsibility to provide “supplementary aids and services determined appropriate and necessary by the individualized education program team of the individual with exceptional needs, to provide nonacademic and extracurricular services and activities in the manner necessary to afford individuals with exceptional needs an equal opportunity for participation in those services and activities.” The nonacademic and extracurricular services and activities “may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with exceptional needs, and employment of pupils, including both employment by the public agency and assistance in making outside employment available.” (Ed. Code, § 56345.2, subd. (b).)

LIMITATIONS REGARDING THE TYPES OF SERVICES THAT IRC MAY FUND

14. Welfare and Institutions Code section 4648.5 provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center’s 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 costs 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.

[¶] . . . [¶]

(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 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.

IN-HOME RESPITE SERVICES AND PROVISION OF INCIDENTAL MEDICAL CARE BY NON-LICENSED RESPITE CARE WORKERS

15. Welfare and Institutions Code section 4690.2, subdivision (a), defines "[i]n-home respite services" as:

[I]ntermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member.

These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members.

16. California Code of Regulations, title 17, section 54302, subdivision (a)(38), also defines "in-home respite services" as follows:

(38) "In-home Respite Services" means intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer's own home and designed to do all of the following:

- (A) Assist family members in maintaining the consumer at home;
- (B) Provide appropriate care and supervision to protect the consumer's safety in the absence of family members;
- (C) Relieve family members from the constantly demanding responsibility of caring for a consumer; and
- (D) Attend to the consumer's basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family member; . . .

17. Welfare and Institutions Code section 4686 outlines when a respite worker who is not a licensed health care provider may provide incidental medical care:

(a) Notwithstanding any other provision of law or regulation to the contrary, an in-home respite worker who is not a licensed health care professional but who is trained by a licensed health care professional may perform incidental medical services for consumers of regional centers with stable conditions, after successful completion of training as provided in this section. Incidental medical services provided by trained in-home respite workers shall be limited to the following:

(1) Colostomy and ileostomy: changing bags and cleaning stoma.

(2) Urinary catheter: emptying and changing bags and care of catheter site.

(3) Gastrostomy: feeding, hydration, cleaning stoma, and adding medication per physician's or nurse practitioner's orders for the routine medication of patients with stable conditions.

(b) In order to be eligible to receive training for purposes of this section, an in-home respite worker shall submit to the trainer proof of successful completion of a first aid course and successful completion of a cardiopulmonary resuscitation course within the preceding year.

(c) The training in incidental medical services required under this section shall be provided by physicians or registered nurses. Training in gastrostomy services shall be provided by a physician or registered nurse, or through a gastroenterology or surgical center in an acute care hospital, as defined in subdivision (a) of Section 1250 of the Health and Safety Code, which meets California Children Services' Program standards for centers for children with congenital gastrointestinal disorders, or comparable standards for adults, or by a physician or registered nurse who has been certified to provide training by the center.

(d) The in-home respite agency providing the training shall develop a training protocol which shall be submitted for approval to the State Department of Developmental Services.

The department shall approve those protocols that specifically address both of the following:

(1) A description of the incidental medical services to be provided by trained in-home respite workers.

(2) A description of the protocols by which the training will be provided. Protocols shall include a demonstration of the following skills by the trainee:

(A) Care of the gastrostomy, colostomy, ileostomy, or urinary catheter site.

(B) Performance of gastrostomy tube feeding, changing bags and cleaning stoma of colostomy or ileostomy sites, and emptying and changing urinary catheter bags.

(C) Identification of, and appropriate response to, problems and complications associated with gastrostomy care and feeding, colostomy and ileostomy care, and care of urinary catheter sites.

(D) Continuing education requirements.

(e) Training by the gastroenterology or surgical center, or the certified physician or registered nurse, shall be done in accordance with the approved training protocol. Training of in-home respite workers shall be specific to the individual needs of the regional center consumer receiving the

incidental medical service and shall be in accordance with orders from the consumer's treating physician or surgeon.

(f) The treating physician or surgeon shall give assurances to the regional center that the patient's condition is stable prior to the regional center's purchasing incidental medical services for the consumer through an appropriately trained respite worker.

(g) Prior to the purchase of incidental medical services through a trained respite worker, the regional center shall do all of the following:

(1) Ensure that a nursing assessment of the consumer, performed by a registered nurse, is conducted to determine whether an in-home respite worker, licensed vocational nurse, or registered nurse may perform the services.

(2) Ensure that a nursing assessment of the home has been conducted to determine whether incidental medical services can appropriately be provided in that setting.

(h) The agency providing in-home respite services shall do all of the following:

(1) Ensure adequate training of the in-home respite worker.

(2) Ensure that telephone backup and emergency consultation by a registered nurse or physician is available.

(3) Develop a plan for care specific to the incidental medical services provided to be carried out by the respite worker.

(4) Ensure that the in-home respite worker and the incidental medical services provided by the respite worker are adequately supervised by a registered nurse.

[¶] . . . [¶]

(k) For purposes of this section, "in-home respite worker" means an individual employed by an agency which is vendored by a regional center to provide in-home respite services. These agencies include, but are not limited to, in-home respite services agencies, home health agencies, or other agencies providing these services.

REGULATION REGARDING PRIOR AUTHORIZATION FOR REGIONAL CENTER SERVICES

18. California Code of Regulations, title 17, section 50612, subdivisions (a) and (b), provide:

(a) A purchase of service authorization shall be obtained from the regional center for all services purchased out of center funds. This requirement may be satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.

(b) The authorization shall be in advance of the provision of service, except as follows:

(1) A retroactive authorization shall be allowed for emergency services if services are rendered by a vendored service provider:

(A) At a time when authorized personnel of the regional center cannot be reached by the service provider either by telephone or in person (e.g., during the night or on weekends or holidays);

(B) Where the service provider, consumer, or the consumer's parent, guardian or conservator, notifies the regional center within five working days following the provision of service; and

(C) Where the regional center determines that the service was necessary and appropriate.

APPLICABLE CASE LAW

19. In *Williams v. Macomber* (1990) 226 Cal.App.3d 225 (as modified on January 4, 1991), the Second District Court of Appeal considered a regional center's denial of home care services based on that regional center's strict compliance with its purchase of services policies and held that services were improperly denied without taking into consideration all the relevant circumstances. (*Id.* at pp. 271-272.) The appellate court explained that "application of an inflexible policy denying such services is contrary to the Act. Whether appellant is entitled to day-care services depends upon a consideration of all relevant circumstances." (*Id.* at p. 272.)

EVALUATION

20. The Lanterman Act requires IRC to “give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home.” (Welf. & Inst. Code, 4685, subd. (c)(1).) When providing services to developmentally disabled children living with their families, such as claimant, regional centers must provide services that do all of the following: “Respect and support the decision-making authority of the family”; are “flexible and creative in meeting the unique and individual needs of families as they evolve over time”; “[r]ecognize and build on family strengths, natural supports, and existing community resources”; are “designed to meet the cultural preferences, values, and lifestyles of families”; and “[f]ocus on the entire family and promote the inclusion of children with disabilities in all aspects of school and community.” (Welf. & Inst. Code, 4685, subd. (b)(1), (2), (3), (4), and (5).) IRC’s argument that it may not provide a service unless it “exclusively” benefits the consumer is not consistent with the law. The Lanterman Act, and section 4685 in particular, does not require IRC to deny services if some incidental benefit may be provided to a consumer’s family. Instead, section 4685 requires IRC to focus on supporting and assisting a developmentally disabled child’s family so the child may remain with her family.

21. Claimant’s parents have worked hard to support claimant’s special needs and the needs of her siblings in a unique situation involving triplet developmentally disabled children. It is important that IRC and claimant’s family work together to explore and coordinate flexible solutions to assist claimant and her family in a manner that does not overwhelm the family with too many additional adults in the home at the same time. While IRC’s offer to fund personal attendant services appears to be a step in the right direction, IRC should keep in mind that the Lanterman Act commands that regional centers provide services to assist the family of a developmentally disabled child, so the child may continue to live with her family.

22. However, the Lanterman Act specifies limitations regarding certain services a regional center may fund. Some of the services claimant requested may not be funded by IRC, even though the requested services could help claimant achieve the objectives outlined in her IPP.

Request that IRC Fund Non-Licensed Respite Workers to Provide LVN Level Care

23. There is no dispute that claimant suffers from diabetes, needs to monitor her insulin levels, and in the case of an emergency, she could require a Glucagon injection as a life saving measure. IRC agreed to provide 92 hours per month of routine respite care and 92 hours per month of LVN level respite care to claimant. At claimant's request, IRC conducted a nursing assessment to determine the required level of care, as mandated by Welfare and Institutions Code section 4686, subdivision (g)(1). Based on that assessment, IRC determined claimant needs at least LVN level care because non-licensed workers do not have sufficient training to provide the life saving measures claimant might need.

IRC has been working to locate LVNs to provide care by contacting multiple vendors. Unfortunately, it has been difficult to find and maintain coverage of nursing hours for a variety of reasons, including a shortage of nurses in claimant's area who are willing to accept part-time work hours. IRC has also suggested that claimant may chose a family member or friend to provide the nursing level respite care through a vendor's "preferred provider" program, which claimant's family is currently evaluating. (Perhaps such an arrangement could result in claimant needing fewer respite workers, if the preferred provider worker is willing to do more than the LVNs were willing to do, so that claimant's family may avoid having so many people crowding their home.)

Claimant failed to meet her burden of proving facts that would support the use of non-nursing care under Welfare and Institutions Code section 4686. Although claimant may desire to use the 92 hours per month of LVN level respite care authorized

by IRC for a non-licensed person to “volunteer” to provide medical care in the event of an emergency, Welfare and Institutions Code section 4686, subdivision (a), states that the incidental medical care provided by non-licensed respite care givers “shall be limited” to specific enumerated care. Claimant requires medication injections, which are not among the types of incidental medical care listed in section 4686, subdivision (a). Furthermore, while claimant may know some non-licensed respite workers who may be willing to assist with claimant’s potential emergency medical care, the only evidence presented regarding how those providers may be trained was claimant’s mother’s testimony that she had shown them how to inject Glucagon. Welfare and Institutions Code section 4686, subdivisions (b), (c), and (d), require training and supervision by physicians or registered nurses and continuing education. Those subdivisions do not allow for training provided by a non-licensed parent. Additionally, the 2016 OAH decision claimant relied upon is not binding in this proceeding. However, the result in that case seems consistent with the preferred provider program IRC suggested.

Accordingly, claimant’s request that IRC either not require LVN care or that IRC fund the provision of medical services by non-licensed respite workers who may “volunteer” to provide claimant a Glucagon injection in the event of a medical emergency is denied.

Request for Reimbursement of Funds Claimant’s Family Paid for Respite Care When There was No LVN Available

24. Since the most recent LVN quit in December 2017, claimant’s parents have paid respite workers to care for claimant in the place of an LVN, and claimant’s parents now want IRC to reimburse them for those out of pocket expenses. The same reasons that preclude an order requiring IRC to fund non-nursing staff to provide nursing level care also apply to this request. Additionally, pursuant to California Code of Regulations, title 17, section 50612, a service authorization was necessary in advance of those expenses being incurred. While there is an exception to the requirement of advance

approval if IRC cannot be reached to request authorization, that exception does not apply under the circumstances of this case. Therefore, IRC shall not be required to reimburse claimant's family for payments made to respite workers when an LVN was not available.

Diabetes Camp

25. Under Welfare and Institutions Code section 4648.5, subdivision (a)(1), IRC may not fund claimant's and her family's attendance at diabetes camp. Claimant failed to prove by a preponderance of the evidence that the exception provided in subdivision (c) of section 4648.5 applies. Diabetes camp is not a "primary or critical means for ameliorating the physical, cognitive, or psychosocial effects" of claimant's disability of cerebral palsy, and diabetes camp is not "necessary to enable the consumer to remain in his or her home." Rather, diabetes camp is something that a family of a minor child without developmental disabilities would be responsible for providing. (See Welf. & Inst. Code, § 4646.4, subd. (a)(4).) Therefore, IRC shall not be ordered to pay for claimant's and her family's attendance at diabetes camp.

Marquee Performing Arts Academy

26. Similarly, IRC may not fund claimant's attendance at the Marquee Performing Arts Academy under Welfare and Institutions Code section 4648.5, subdivisions (a)(2), (a)(3), and (a)(4), because IRC may not fund "[s]ocial recreation activities, except for those activities vendored as community-based day programs" (subdivision (a)(2)); "[e]ducational services for children three to 17" (subdivision (a)(3)); or "[n]onmedical therapies, including, but not limited to, specialized recreation, art, dance, and music" (subdivision (a)(4)). Claimant failed to prove by a preponderance of the evidence that the exception provided in subdivision (c) of section 4648.5 applies. The Marquee classes are not a "primary or critical means for ameliorating the physical, cognitive, or psychosocial effects" of claimant's disability of cerebral palsy, and the

Marquee classes are not "necessary to enable the consumer to remain in his or her home." Rather the music and dance classes claimant attends at Marquee are something that a family of a minor child without disabilities would be responsible for providing. (See Welf. & Inst. Code, § 4646.4, subd. (a)(4).) Therefore, IRC shall not be ordered to pay for claimant's piano, dance, and singing classes at Marquee.

Homemaker Services

27. IRC's positions, that homemaker services may not be provided for a developmentally disabled child living with her family or that such services may not be provided because they do not exclusively benefit the consumer, are belied by the explicit language of Welfare and Institutions Code section 4685. That section states that homemaker services may be provided for a consumer who is a developmentally disabled child living with her family. Homemaker services are listed in section 4685, subdivision (c)(1), as a means to "assist families that are caring for their children at home" with the goal of keeping the developmentally disabled child living at home with her family. Homemaker services to assure a clean and organized home environment clearly benefit a developmentally disabled child living with her family. Further, similar to respite, providing homemaker services helps alleviate the stress of caring for a developmentally disabled child, which is also beneficial to the child.

In the present case, where claimant's parents are caring for four children, three of whom are developmentally disabled, providing homemaker services would likely be more beneficial than having three respite workers playing with their phones and/or coloring while claimant's mother struggles to help her four children do their homework. While the personal attendant services may be helpful in teaching the children how to pick up after themselves and help with household chores, 12-year-old children with homework and deficits to deal with cannot be expected to handle all the household duties. While a parent of a non-disabled child would be responsible for household

duties, this is an extraordinary situation, involving three developmentally disabled children, all the same age, in the same household, with a fourth younger sibling, a stay at home mother who suffers from debilitating medical conditions, and a father who works full time. Under these circumstances, IRC should fund homemaker services to help claimant's parents keep a clean and orderly home.²²

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ORDER

1. Claimant's appeal from IRC's determination that claimant requires LVN level respite care is denied. Claimant requires LVN level respite services. However, this order does not preclude claimant from pursuing a preferred provider arrangement as suggested by IRC.

2. Claimant's appeal from IRC's determination that it will not reimburse claimant for out of pocket payments for respite services when an LVN was not available is denied. IRC shall not be required to reimburse claimant or her family for those expenses.

3. Claimant's appeal from IRC's determination that it will not fund claimant and her family's attendance at diabetes camp is denied. IRC shall not be required to fund diabetes camp.

²² Claimant's mother already sought additional IHSS hours to pay for homemaker services, and her request was denied. Therefore, Welfare and Institutions Code section 4659, subdivision (c), does not preclude IRC from funding homemaker services. The requirement that a consumer appeal a denial of services before IRC may fund as the payer of last resort only refers to insurance denials of medical or dental services. (See Welf. & Inst. Code, § 4659, subd. (d).)

4. Claimant's appeal from IRC's determination that it will not fund claimant's attendance at the Marquee Performing Arts Academy is denied. IRC shall not be required to fund claimant's classes at the Marquee Performing Arts Academy.

5. Claimant's appeal from IRC's determination that it will not fund homemaker services is granted. IRC's decision not to fund that service is reversed. IRC shall fund homemaker services. This order does not preclude claimant from also receiving the personal attendant services offered by IRC, should claimant choose to accept those services.

DATED: March 22, 2018

THERESA M. BREHL
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 ninety days.