

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020110408

DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings State of California, heard this matter on. December 29, 2020. The hearing was conducted telephonically.

Keri Neal, Fair Hearings Representative, Inland Regional Center, represented Inland Regional Center.

Claimant's mother, who is claimant's conservator, represented claimant.

The record was closed and the matter was submitted for decision on December 29, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 26-year-old female, who has a diagnosis of Trisomy 21, Down syndrome. She is eligible for Lanterman Act services pursuant to the eligibility category of intellectual disability. (The Lanterman Developmental Disabilities Services Act is found at Welfare and Institutions Code section 4500 et seq.)

2. Inland Regional Center (IRC) funds a day program and private transportation for claimant. Claimant also receives services from other sources. She receives Social Security services (SSI), Medi-Cal, and 80 hours per month of In-Home Support Services (IHSS). Claimant's mother is the care provider for the IHSS.

3. Claimant asked IRC to fund her participation in an athletic program provided by a gymnasium, Adaptive Athlete. She asked that IRC fund at least two sessions per week.

4. IRC reviewed the services request and denied it. Tamara Hathaway, Program Manager, IRC, sent claimant's mother a notice of proposed action (NOPA) dated October 26, 2020. The following is a summary of the NOPA: Gym membership or expenses are not a specialized service or support. Everyone has the option of going to the gym for exercise, so the cost is a personal responsibility. Other opportunities for exercise are available to claimant. She can walk or engage in other outdoor activities. There are free online exercise programs that one can follow at home. Also, claimant's day program, Tierra Del Sol, offers various online exercise activities.

5. Claimant's mother filed a Fair Hearing Request dated November 5, 2020, which IRC received November 10, 2020.

Roxanna Soto's Testimony

6. The following is a summary of Roxanna Soto's testimony: Ms. Soto is a consumer services coordinator with IRC. She has been with IRC for 15 years. As a consumer services coordinator, she helps consumers secure resources and helps with case management. She assists with the development of individual program plans (IPP). Ms. Soto holds a bachelor's degree in sociology and a master's degree in counseling and rehabilitation. In September 2020, Ms. Soto became claimant's consumer services coordinator.

7. Claimant's IPP is reviewed at least once per year. Claimant's current IPP is dated January 9, 2020. She has been diagnosed with Trisomy 21, nonmosaicism, and hypothyroidism. Claimant receives medical services through Kaiser, and the services are funded by Inland Empire Health Plan (IEHP). Before the COVID-19 restrictions, claimant attended the Tierra Del Sol day program three days per week. She participated in their creative arts classes. IRC provided private transportation to and from the day program. When the COVID-19 restrictions went into place, Tierra Del Sol developed online programs that are available to claimant.

8. Claimant has a number of opportunities for exercise. One is online exercise programs Tierra Del Sol provides. For example, the calendar for November 9, 2020, offered: "FIT – Exercise and Socialize" from 9:00 a.m. to 10:00 a.m.; "FIT – Straight Up Abilities - Dance" from noon to 12:30 p.m.; and "Fitness with Laurel" from 1:00 p.m. to 1:45 p.m. As a further example, the calendar for December 8, 2020, offered: "FIT – Exercise and Socialize" from 9:00 a.m. to 10:00 a.m.; "FIT – Straight Up Abilities - Dance" from noon to 12:30 p.m.; and "FIT – The Real Workout!!" from 1:00 p.m. to 1:45 p.m. Claimant has an individual service plan with Tierra Del Sol, which was updated on

October 22, 2020. It does not indicate that claimant notified Tierra Del Sol that exercise and weight loss were goals she wanted to pursue.

9. Claimant has not provided documentation to IRC that she requested Kaiser or IEHP to fund an exercise program for her and that they denied her request.

10. IRC provided a nutritional assessment for claimant.

Valerie Mosher's Testimony and Report

11. The following is a summary of Valerie Mosher's testimony: Ms. Mosher is the owner of and chief dietitian for Hope 4 Health Now. She is a regional center vendor. She holds a bachelor's degree in human services, a bachelor's degree in nutrition services, and a master's degree in dietetic administration. She is certified by the Academy of Nutrition and Dietitians as a Registered Dietitian. She also is certified as a Group Exercise Leader and in Food Handlers Management.

12. In her work with regional center consumers, she primarily does assessments and consultations concerning diet and physical activity. As part of her business, she offers classes in life style management, cooking, and nutrition.

13. On December 15, 2020, Ms. Mosher met with claimant and claimant's mother by Zoom. She conducted a nutritional assessment and made exercise recommendations. She wrote a report dated December 16, 2020. Ms. Mosher opined that people with Down syndrome tend to have a low metabolic rate and need exercise. Because of claimant's combination of Down syndrome and hypothyroidism, it is imperative that she participate in physical activity.

14. One medical concern Ms. Mosher identified was obesity. Ms. Mosher concluded that claimant's nutritional intake was good; she likes the food her parents prepare, and she does not overeat.

15. Before the COVID-19 restrictions were imposed, claimant participated in line dancing and took tap dancing classes. Her parents paid for those. With the COVID-19 restrictions in place, neither line dancing nor tap dancing is available to claimant. However, Adaptive Athlete continues to offer live classes, with face covering and social distancing requirements, and that is the program claimant asks IRC to fund.

16. Ms. Mosher recommended the following: Claimant should engage in 30 minutes of physical activity four to five times per week. Claimant's parents can check with claimant's medical insurance; during the COVID-19 pandemic, a number of insurance providers are offering exercise classes on Zoom and Facebook Live. YouTube has videos on walking, Zumba, line dancing, and chair exercises. Claimant's parents might offer claimant incentives at the end of each week if she has met the goal of 30 minutes of physical activity four to five times during the week. Claimant's parents can compete with claimant with weekly rewards going to the person or persons who meet their exercise goals.

17. People with Down syndrome find it easier to exercise in a group because they tend to be very social. During the COVID-19 pandemic it is important to adapt. For example, claimant's parents might set up Zoom exercise sessions for claimant and people she knows.

18. Ms. Mosher does not know whether the instructors on the various internet exercise programs have been trained in teaching people with special needs.

Tamara Hathaway's Testimony

19. The following is a summary of Ms. Hathaway's testimony: She has been with IRC for 21 years. She started working as a service coordinator; currently, she is a program manager. She holds a master's degree.

20. Ms. Hathaway has reviewed claimant's file and request for funding for Adaptive Athlete classes. As noted above, Ms. Hathaway sent the NOPA to claimant's mother.

21. Claimant attends Adaptive Athlete group fitness classes twice per week at a cost of \$160 per month.

22. Ms. Hathaway referred to a brochure Adaptive Athlete distributed. The brochure described Adaptive Athlete group fitness classes:

Adaptive Group Fitness classes teach the fundamentals and building blocks [for] functional fitness, cardiovascular endurance, balance, coordination, mobility, strength and conditioning. These classes are designed to provide any and all individualized progressions and modifications based on physical, cognitive and adaptive functioning of each athlete. Group classes also promote social skills, peer interactions, and following multistep directives. Groupings are made after assessing each athlete to ensure that athletes are grouped appropriately.

23. Ms. Hathaway testified, "These descriptions are consistent with *social/recreational services*. And IRC is prohibited from funding social recreational services." (Italics added.)

24. IRC must pursue all funding sources. Claimant has not provided IRC with proof that she sought services from her medical insurance provider and was denied.

25. Claimant has exercise equipment at home – a stationary bike and a three-wheel bike. She and her mother go for walks, and she can do line dancing in her garage.

26. Ms. Hathaway referred to a December 2020 newsletter for the Inland Valley Down Syndrome Association. It listed virtual events, including: Mondays, Kickboxing with Aida 11:00 a.m.; Tuesdays, Yoga with Aida 5:30 p.m.; Thursdays, Hip Hop with Kaylee 5:00 p.m.; and Saturdays, Lyrical Jazz Dance with Julia, 4:00 p.m.

27. Ms. Hathaway referred to a fitness guide sponsored by Special Olympics and others. It described how to perform endurance, chair, wall, floor, and other exercises at home.

28. Ms. Hathaway referred to an announcement of the beginning of live workout videos to be offered on Facebook by Any Time Fitness in partnership with Special Olympics. The announcement said the videos would be offered every Wednesday at 1:00 p.m. eastern standard time, beginning on April 1, 2020. The announcement said each video would be 10 to 30 minutes long.

29. IRC has not vendorized Adaptive Athlete.

30. Ms. Hathaway does not know whether the instructors for Tierra Del Sol's internet classes are certified to provide services to developmentally disabled individuals.

E-Mail from Claimant's Mother to Ms. Neal

31. Claimant's mother sent Ms. Neal an e-mail dated November 25, 2020. The following is an excerpt from the e-mail.

I had mentioned how physical activity for [claimant] has to be enjoyable and motivating to her and how she loves to Linedance, which we don't have as many opportunities to do currently due to Covid. I have attached a dance she is doing and her dance list. I have also attached some pictures of her at the Adaptive Athlete, one on the trampoline and the other an obstacle course where she is being geared up to try and work really hard at it. The staff is trained and does a great job at keeping her engaged. I also attached a short clip of one of our walks, I was trying to motivate her as we go. She used to take Tap and Line dance classes before Covid, two classes a week, and we would go out dancing 2 to 3 times a week prior to Covid. She has a 3-wheel bike but enjoys riding it even less than walking, it is actually hard to pedal when you weigh so much. And we have a stationary bike I try to get her to ride. Since she was able to walk, I have had her in Gymnastics or dance classes to keep her active because she would prefer to stay in the house and color instead of being outside.

Claimant's Mother's Testimony

32. The following is a summary of claimant's mother's testimony: Claimant has a thyroid condition that makes it difficult for her to maintain her weight. And she prefers to be sedentary. She will engage in physical activity only if she is motivated by finding it to be fun. The staff at Adaptive Athlete are trained to motivate special needs individuals, and they keep them motivated. Since claimant was very young, claimant's mother has had her enrolled in gymnastics or dance classes because of the problem of controlling her weight. Being in a group helps to motivate her. In a Zumba class at a regular gym, claimant was unable to keep up. Claimant would benefit from the Adaptive Athlete program because she is severely obese.

33. Claimant's parents always paid for the dance classes.

34. Claimant's mother testified that she inquired of Kaiser concerning funding for the Adaptive Athlete program. She received a response, which is in evidence as Exhibit L. Kaiser said that the services are not covered under claimant's health plan and are not subject to the terms set forth in claimant's evidence of coverage. (Note regarding Exhibit L: It appears there may be a mistake in that claimant's mother may not have uploaded all of the document. Exhibit L is quoted immediately below.)

Communication That Claimant's Mother Said She Received from Kaiser

35. This is Exhibit L, to which claimant's mother referred.

Footnotes

*Medi-Cal member eligibility for ClassPass is pending regulatory approval.

ClassPass is not available to Kaiser Permanente Dental-only members.

The services described above are not covered under your health plan benefits and are not subject to the terms set forth in your Evidence of Coverage or other plan documents. These services may be discontinued at any time without notice.

These value-added products are neither offered nor guaranteed under contract with the FEHB Program, but are made available to all enrollees and family members who become members of Kaiser Permanente.

ClassPass

Plan 1: On-demand video workouts - Get access to a vast on-demand audio and video library, which includes a wide variety of workouts and meditations ranging from 5 to 75 minutes. \$0/month. No credit card required for sign-up.

Plan 2: Livestream & in-person workouts - Get 20% off a monthly package to reserve in-person and livestream fitness classes, plus get access to plan 1's vast on-demand library of workouts. Not sure if you want a monthly package? Plan2 includes a 45-day trial period (30-day trial

period for residents of Washington, D.C.) where you can try livestream and in-person workouts for \$0. A credit card is required for sign-up, but you won't be charged anything. After the 45-day trial period (30-day trial period for residents of Washington, D.C.), you'll automatically roll over to plan 1, the \$0 on demand video workouts. At the end of the trial period, you'll also have the option to purchase a monthly package for 20% off the retail price

Letter from Deborah Yeh Gililland Do, M.D.

36. The following is a letter dated December 21, 2020, from Deborah Yeh Gililland Do, M.D., to Whom it May Concern

[Claimant] is my patient in the Family Medicine Clinic. This patient has asked me to write a letter on her behalf.

With her history of severe obesity, she would benefit from a program that would continue to assist with her physical activity goals as well as nutritional needs to overall improve her health.

E-Mail Regarding Adaptive Athlete's Vendor Status and Staff Training

37. Brittany Kato, Operations Manager, Adaptive Athlete, sent an e-mail dated December 8, 2020, to claimant's mother.

Yes, we have tried sending emails and have made phone calls to begin the process to become an IRC vendor and haven't had much luck. I did invite a representative from

PSGVRC as we have athletes from that regional center as well, and did not receive a response.

Our staff have undergone fitness training to facilitate fitness instruction with proper biomechanics, form and technique. All staff are prepared to modify or progress an exercise to enhance performance, prevent injury, and promote muscular endurance and strength, endurance and coordination, stability, aerobic capacity, and functional independence.

In addition to physical fitness training, our staff are also trained in applied behavior analysis. The Adaptive Athlete presents exercises that cater to each athlete's physical abilities and needs, but also their adaptive and cognitive needs. Staff are trained to set contingencies and expectations, maintain motivating operations, positively reinforce all efforts, and provide opportunities to earn preferred activities as reinforcers. Staff are also trained to detect the function of presented behaviors and deescalate maladaptive behaviors as needed.

Research Regarding Levels of Physical Activity and Persons with Down Syndrome

38. In an abstract entitled *Facilitators and Barriers to Physical Activity for Adults with Down Syndrome*, the authors, J. Mahy, N. Shields, N.F. Taylor, and K.J. Dodd, reported on a study aimed at identifying the facilitators and barriers to physical

activity for adults with Down syndrome. The study was originally published August 3, 2010, in the *Journal of Intellectual Disability Research*. It is available online at Wiley Online Library. The authors wrote:

Adults with Down syndrome are typically sedentary, and many do not participate in the recommended levels of physical activity per week.

[11] . . . [11]

Three themes around facilitators to physical activity were identified: (1) support from others; (2) that the physical activity was fun or had an interesting purpose; and (3) routine and familiarity.

Specific Findings

39. Because of claimant's combination of Down syndrome and hypothyroidism, it is imperative that she participate in physical activity. Claimant will not engage in a physical activity unless it is enjoyable and motivating for her. There is no evidence that this is a result of defiance or contrariness. It is characteristic of people who have Down syndrome. Before the Governor ordered COVID-19 restrictions, claimant's parents provided claimant with dance classes and opportunities for line dancing. With COVID-19 restrictions in place, those activities no longer are available. Claimant's parents have provided exercise vehicles for claimant. She has a stationary bicycle and a three-wheel bicycle. She has online video exercise classes. Her mother tries to get her to go on walks. In spite of claimant's parents providing these opportunities for physical activity, they cannot get claimant to engage in an

acceptable level of physical activity. Claimant's parents have enrolled her in a group, physical activity program, Adaptive Athlete, that claimant does participate in.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) Claimant has the burden of proving that she is entitled to the service she is requesting.

2. The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Provisions Regarding the Extent of Entitlement to Services

3. Welfare and Institutions Code section 4512, subdivision (b), provides:

"Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of an independent, productive, and normal

life. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, 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 of the individual with a developmental disability and of the individual's family, protective and other social and sociolegal services, information and referral services, follow-along services, adaptive equipment and supplies, advocacy assistance, including self-advocacy training, facilitation and peer advocates, assessment, assistance in locating a home, childcare, behavior training and behavior modification programs, camping, community integration services, community support, daily living skills training, emergency and crisis intervention, facilitating circles of support, habilitation, homemaker services, infant

stimulation programs, paid roommates, paid neighbors, respite, short-term out-of-home care, social skills training, specialized medical and dental care, telehealth services and supports, as described in Section 2290.5 of the Business and Professions Code, supported living arrangements, technical and financial assistance, travel training, training for parents of children with developmental disabilities, training for parents with developmental disabilities, vouchers, and transportation services necessary to ensure delivery of services to persons with developmental disabilities. This subdivision does not expand or authorize a new or different service or support for any consumer unless that service or support is contained in the consumer's individual program plan.

4. Welfare and Institutions Code section 4646, subdivision (a), provides:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, when appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to

consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

5. Welfare and Institutions Code section 4648, subdivisions (a)(1)-(a)(3) & (a)(8), provide, in part:

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 to achieve the greatest self-sufficiency possible and to exercise 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 that 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, if appropriate, the consumer's family.

(3) *A regional center may, pursuant to* vendorization or *a contract*, purchase services or supports for a consumer from an individual or agency that the regional center and consumer or, if appropriate, the consumer's parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or part of that consumer's program plan.

[¶] . . . [¶]

(8) Regional center funds shall not be used to supplant the budget of an agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services. (Italics added.)

6. Welfare and Institutions Code section 4648.5 suspends a regional center's authority to purchase certain services. That section provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' 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.
- (b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.
- (c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means 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.

Regional Center's Obligation to Identify and Acquire Funding

7. Welfare and Institutions Code section 4659 provides, in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

(b) Any revenues collected by a regional center pursuant to this section shall be applied against the cost of services prior to use of regional center funds for those services. This revenue shall not result in a reduction in the regional

center's purchase of services budget, except as it relates to federal supplemental security income and the state supplementary program.

(c) Effective July 1, 2009, notwithstanding any other law or regulation, 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 a family meets the criteria of this coverage but chooses not to pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.

(d)(1) Effective July 1, 2009, notwithstanding any other law or regulation, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit. If, on July 1, 2009, a regional center is purchasing the service as part of a consumer's IPP, this provision shall take effect on August 1, 2009. Regional

centers may pay for medical or dental services during the following periods:

(A) While coverage is being pursued, but before a denial is made.

(B) Pending a final administrative decision on the administrative appeal if the family has provided to the regional center a verification that an administrative appeal is being pursued.

(C) Until the commencement of services by Medi-Cal, private insurance, or a health care service plan.

(2) When necessary, the consumer or family may receive assistance from the regional center, the Clients' Rights Advocate funded by the department, or the state council in pursuing these appeals.

(e) This section shall not impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay.

(f) In order to best utilize generic resources, federally funded programs, and private insurance programs for individuals with developmental disabilities, the department and regional centers shall engage in the following activities:

(1) Within existing resources, the department shall provide training to regional centers, no less than once every two years, in the availability and requirements of generic, federally funded and private programs available to persons with developmental disabilities, including, but not limited to, eligibility requirements, the application process and covered services, and the appeal process.

Evaluation

THE PURPOSE OF THE LANTERMAN ACT

8. Welfare and Institutions Code section 4501 sets out the purpose of the Lanterman Act. That section provides, in part:

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.

REGIONAL CENTERS HAVE AN OBLIGATION TO BE COST CONSCIOUS

9. As noted above, Welfare and Institutions Code section 4512, subdivision (b), provides, in part:

The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in

the individual program plan, *and the cost-effectiveness of each option.* (Italics added.)

10. Welfare and Institutions Code section 4646, subdivision (a), provides, in part:

It is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and *reflect the cost-effective use of public resources.* (Italics added.)

11. Welfare and Institutions Code section 4648, subdivision (a)(8), provides:

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

CLAIMANT IS ENTITLED TO A PHYSICAL ACTIVITY VEHICLE THAT SHE WILL USE

12. Ms. Mosher, IRC's witness, testified as follows: People with Down syndrome tend to have a low metabolic rate and need exercise. Because of claimant's combination of Down syndrome and hypothyroidism, it is *imperative* that she participate in *physical activity*. For claimant, obesity is a medical concern. Claimant's obesity is not a result of over-eating; she does not over-eat. Her nutritional intake is good. Claimant should engage in 30 minutes of physical activity four to five times per

week. Down syndrome people find it easier to exercise in a group because they tend to be very social. (*Italics added.*)

13. Claimant needs a service or support directed toward providing her with physical activity because it is imperative that she have physical activity. One benefit of engaging in physical activity is weight control, but that is not the only reason claimant needs physical activity. She needs it because of her combination of Down syndrome and hypothyroidism. IRC's evidence was replete with examples of vehicles for physical activity, but according to claimant's mother, whose testimony was credible, they are vehicles claimant will not use. There was no evidence that claimant simply is defiant or contrary. She has Down syndrome. She needs a vehicle for physical activity that she will use. And such a vehicle exists. It is expensive – \$160 per month, but that is not exorbitantly or unreasonably expensive.

14. Before the COVID-19 restrictions, claimant's parents paid for opportunities for physical activity that claimant would engage in, primarily line dancing and other forms of social dancing. With COVID-19 restrictions, those activities are not available. Claimant needs IRC to fund a vehicle for physical activity that she will use. Her parents have found an example, Adaptive Athlete. Perhaps other providers of similar vehicles are available.

15. It may be that IRC presently does not vendor a provider of physical activity that claimant will use. If that is the case, regional center needs to find a vendor; finding vendors to serve consumers' needs is one of IRC's most important tasks. Alternatively, IRC can enter into a contract.

16. It is expected that COVID-19 will be under control by the end of 2021 or perhaps sooner. When it is under control, claimant's parents probably will be able to

resume providing her with the physical activity she needs. So, it is appropriate to review this matter on some date near the end of 2021.

GYM EXPENSES MAY BE A SPECIALIZED SERVICE OR SUPPORT

17. In IRC's NOPA, the regional center said, "Gym membership/expenses are not a specialized service or support, as defined below." The reference is to Welfare and Institutions code section 4512, subdivision, (b), which, as noted above, provides, in part:

"Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of an independent, productive, and normal life.

18. As noted above, Welfare and Institutions code section 4512, subdivision, (b), then lists numerous examples of services and supports and provides that the list is not exhaustive.

19. Nothing in Welfare and Institutions code section 4512, subdivision, (b), supports IRC's contention that, within the terms of that subdivision, gym expenses cannot be a service or support. If a gym expense is "directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward

the achievement and maintenance of an independent, productive, and normal life," it can be, within the terms of the code, a specialized service or support. And the enormous variety in the examples only reinforces that conclusion.

20. In IRC's NOPA, the regional center said, further, "Everyone has the option of going to the gym for exercise, and the cost is a *personal responsibility* . . ." (Italics added.) There are very few provisions in the Lanterman Act that condition a right to a service by reference to people who are not developmentally disabled. There are a few. For example, regarding day care services, unless a family demonstrates a financial need, a regional center may pay only the cost that exceeds the cost of providing day care for a child without disabilities. (Welf. & Inst., § 4685, subd. (c)(6).) And a regional center may purchase diapers for a child under three years of age only if a family can demonstrate a financial need and doing so will enable the child to remain in the family home. (Welf. & Inst., § 4685, subd. (c)(7).) But with very few exceptions, the right to regional center services does not depend on what people without disabilities do. And there is nothing in Welfare and Institutions Code section 4512, subdivision (b), that suggests that everyone's having the option to do something causes it to be a service or support that a regional center cannot provide. Indeed, most of the services and supports regional centers provide for their consumers are things other people might provide for themselves. Just because people without disabilities do something, does not mean that such a service is a consumer's "personal responsibility."

VEHICLES FOR PHYSICAL ACTIVITY ARE NOT NECESSARILY RECREATION

21. As noted above, Welfare and Institutions Code section 4648.5 suspends a regional center's authority to purchase certain services. Services included in the suspension include "social recreation activities" and "nonmedical therapies, including . . . specialized recreation, art, dance, and music."

22. Claimant is not seeking recreation. Her need for physical activity is different from a need to restore or refresh her strength or spirits. She is not looking for a diversion or hobby. She is not asking for horseback riding, art classes, or dancing. She has Down syndrome, and in the words of IRC's witness, because of claimant's combination of Down syndrome and hypothyroidism, it is imperative that she participate in physical activity. Because of claimant's Down syndrome, she will not engage in physical activities that do not involve other people.

VEHICLES FOR PHYSICAL ACTIVITY ARE NOT NECESSARILY MEDICAL SERVICES

23. IRC contends that claimant is seeking a medical service and that IRC cannot grant her request because claimant has not provided documentation that her health care service plan has denied a request for the service.

24. Welfare and Institutions Code section 4659 suspends a regional center's authority to purchase certain services and conditions the purchase of a medical or dental service on a health care plan's having refused to provide it. As noted above, subdivision (d)(1) of that section provides, in part:

Effective July 1, 2009, notwithstanding any other law or regulation, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and IRC determines that an appeal by the consumer or family of the denial does not have merit.

25. For two reasons, IRC's contention is not persuasive. First, complainant's mother testified that she did request Kaiser to provide the service, and Kaiser denied

the request. She offered Exhibit L as evidence of the denial. While it appears that Exhibit L is only part of a document, it does tend to corroborate claimant's mother's testimony. It says: "The services described above are not covered under your health plan benefits and are not subject to the terms set forth in your Evidence of Coverage or other plan documents." Second, and more importantly, a vehicle for physical activity is not a medical service. The fact that claimant needs it because of having Down Syndrome does not make it a medical service. Her Down syndrome causes her to need lots of things that are not medical services.

SECURING SERVICES AND SUPPORTS THAT A CONSUMER NEEDS IS AT THE HEART OF WHAT A REGIONAL CENTER DOES

26. As noted above, Welfare and Institutions Code section 4646, subdivision (a), provides:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, when appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments.

27. Welfare and Institutions Code section 4648, subdivision (a)(1), provides, in part:

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:
Securing needed services and supports. It is the intent of the Legislature that services and supports assist individuals with developmental disabilities to achieve the greatest self-sufficiency possible and to exercise personal choices.

LIMITATIONS ON THE AUTHORITY TO PURCHASE CERTAIN SERVICES SHOULD NOT BE READ EXPANSIVELY

28. Because of budgetary constraints, the Legislature suspended the authority of regional centers to purchase certain services. (Welf. & Inst. Code § 4646, subd. (a).) The Legislature prohibited regional centers from funding a service that some other agency has a responsibility to provide. (Welf. & Inst. Code § 4648, subd. (a)(8).) The Legislature prohibited regional centers from purchasing a service that is available from a government source or private insurance unless a claimant provides documentation that he or she pursued that coverage and was denied. (Welf. & Inst. Code § 4659, subds. (c) & (d).)

29. But the Lanterman Act is an entitlement act. These limitations should not be read expansively. Regional centers must adhere to these limitations, but they should not be read expansively to overturn a consumer's receiving services to which he or she is entitled.

IRC MAY RESPECT THE GOVERNOR'S COVID-19 RESTRICTIONS

30. On March 4, 2020, in response to the threat of the COVID-19 pandemic, the Governor proclaimed a State of Emergency. Following that proclamation, he issued

several orders. Local public health entities have also issued orders in response to the COVID-19 pandemic. The obligation of a regional center to fund necessary services and supports for a consumer shall not be construed or applied in such a way as to violate the governor's proclamation and orders or those of local public health entities. From time to time, there are changes in the conduct and activities that are required or allowed in California. As a consequence, from time to time, IRC may adjust the manner in which it provides a consumer's services and supports.

ORDER

1. IRC shall provide claimant with a physical activity vehicle that she will be motivated to use.

2. IRC shall provide private transportation to and from that activity.

3. If, at any time, claimant's availing herself of the service violates the Governor's orders, IRC shall suspend the service until claimant can avail herself of it without being in violation of the Governor's orders.

//

//

//

//

//

//

4. On or after October 1, 2021, IRC may reevaluate this matter and determine whether COVID-19 restrictions no longer prevent claimant's parents from funding a physical activity vehicle that claimant is motivated to use. If IRC concludes that COVID-19 restrictions no longer create an obstacle in that regard, IRC may issue an appropriate NOPA.

DATE: January 12, 2021

ROBERT WALKER

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.