

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2020120530

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 21, 2021, via Microsoft Teams due to the ongoing public health emergency related to the COVID-19 pandemic.

Stephanie Zermeño, Fair Hearings Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on January 21, 2021.

ISSUE

Must regional center purchase and install an arch swing set for claimant, who has autism spectrum disorder (autism)?

FACTUAL FINDINGS

Background

1. Claimant is a 22-year-old man who lives with his mother. Claimant qualifies for regional center services based on a diagnosis of autism. Claimant receives respite services, in home supportive services, and 130 hours per month of community activity support services (CASS), provided by In-Roads Creative Solutions.

2. In an e-mail dated September 11, 2020, claimant's mother requested IRC fund and install an arch swing, which is essentially the type of heavy-duty swing set that is typically found in public parks. According to an invoice submitted by claimant's mother, the swing alone – without installation – would cost approximately \$1,707.49. In multiple e-mails claimant's mother sent to IRC, she indicated that claimant goes to the park four to six times per week to swing. She said he uses the swing to "self-regulate." Due to the COVID-19 pandemic, the parks have been closed, so claimant's mother felt claimant needed a swing at home.

3. Daniel Timmons, claimants Consumer Services Coordinator who testified at the hearing, helped coordinate claimant's mother's request. E-mail exchanges between the two show that Mr. Timmons thoroughly explained the funding process to claimant's mother. On September 16, 2020, Mr. Timmons told claimant's mother to make a request also to claimant's medical provider.

4. On September 16, 2020, claimant's mother represented to IRC that she called both of claimant's medical providers (IEHP and Medicare) and they gave a "verbal" denial of the arch swing. Claimant's mother was told by both that in order to obtain a written denial she needed to fill out a form and that it could take up to 60 days to receive a written denial.

5. On October 27, 2020, IRC sent a notice of proposed action denying the request that it purchase and install an arch swing set. IRC stated in the denial:

This letter is about your mother's request on your behalf for funding a swing set made on September 11, 2020 via email. It is your opinion that a swing set would help with keeping [claimant's] accessibility to the community since parks are closed due to the COVID-19 pandemic. [IRC] has reviewed your request and has decided the following:

Your request for funding of a 35" arch swing set in the amount of \$1,707.49 has been denied because the swing is not a specialized service or supports as defined below. The COVID-19 pandemic has affected every California resident's typical routines and social recreational activities. However, there are still other age-appropriate ways [claimant] can access the community safely.

Additionally, regional centers are prohibited from funding even specialized social recreational activities for individuals with developmental disabilities. Instead, regional centers

must rely on local school districts, natural supports and other community resources to meet this need.

6. On December 2, 2020, claimant's mother filed a fair hearing request requesting that IRC fund the purchase and installation of an arch swing set. This hearing ensued.

7. According to claimant's most recent Individualized Program Plan dated March 25, 2020, claimant:

Is a friendly young man who has a passion [for] learning about Exotic Animals, his favorite being the Primate Species. He is an Animal Rights Advocate who believes in the fair treatment of all animals and insects, including spiders. Claimant has been learning Japanese online since age 10 Claimant enjoys playing video games

Claimant would like to attend . . . college, graduate, and become a zoologist . . . who can work in a large zoo and/or have his own research team

Claimant is supported in the family home via \$1,745 monthly in Survivor's Benefits from his father and 283 monthly hours of IHSS benefits through DAAS, provided by someone other than consumer's mother. Additionally he is authorized for 80 monthly hours of Respite through Accredited Respite in order to provide supervision and care while his mother takes a break from his daily care needs. . . .

Claimant is an ambulatory young man who is regressing in regards to his daily living skill, by mother's report. Mother reports that he is requiring more promoting to initiate and assistance to complete daily living tasks such as brushing his teeth, applying skin cream, bathing, and washing his hair. He requires assistance while shaving his face and is reported to be doing better. . . .

Claimant is a verbal young man who is capable of advocating for his wants and needs. He will focus on a preferred task for about 15 minutes and is reported to have difficulty in conversational exchanges about non-preferred subjects. His mother reports that he has been having more difficulty filtering out spontaneous conversation or recall Mother is concerned that claimant is becoming more stuck in his head . . . [and although he can be briefly redirected, he will usually go back to his scripting behavior. . . .

Claimant is currently enrolled at Victor Valley College and maintains his class schedule utilizing Community Activity Support Services (CASS) He is currently enrolled in math and Biology classes, goes to the library, and is working on finding a meaningful volunteer position working with Exotic Animals.

8. The IPP is devoid of any information showing that claimant has sensory problems or requires any kind of specialized equipment to "self-regulate."

9. A June 19, 2020, progress report from In-Roads showed claimant spends most of his hours with his provider out in the community. Claimant attends college, volunteers at the college, plays soccer with peers, and likes to take walks, among other things. Claimant was noted to be very social and friendly with other people. However, claimant's mother decided it was better during the COVID-19 pandemic to quarantine, so the provider switched to playing board games and other in-home activities. After a short period of time, claimant and his provider started volunteering and re-engaging in community activities. Nothing in the In-Roads report indicates claimant has sensory problems or behavioral problems that require a swing (or anything else for that matter) to self-regulate.

10. A December 9, 2020, progress report from In-Roads shows that claimant continues to volunteer at his school, church, and at a ranch helping take care of animals. At the library, claimant helps with various book sales and kids' events where he greets children and passes out goodie bags. At his church, he helps with cleaning up after social events/gatherings and has served food at a BBQ/picnic hosted by the youth group. At the Ranch, claimant helps get the animals ready for the petting zoo/pony rides. He also cleans the equipment and helps groom horses. He also spends time with friends. Claimant does practice "social distancing" and has expressed that he would like things to get back to normal.

11. Both progress reports from In-Roads are devoid of any information showing that claimant has sensory problems or requires any kind of specialized equipment to "self-regulate."

12. Prior to issuing the notice of proposed action denying claimant's request for an arch swing set, Mr. Timmons requested documentation from claimant's medical providers showing claimant has sensory needs or that an arch swing is necessary to

address a sensory need or to self-regulate. To date, he has received no documentation.

13. Angelica Serrano, an IRC Program Manager, also testified at the hearing. Ms. Serrano also noted that in addition to not receiving any documentation showing an arch swing set to be medically necessary, claimant has not been evaluated by an occupational therapist. IRC attempted to complete an assessment with an occupational therapist by offering it to claimant's mother, however, claimant's mother refused. The assessment would have allowed the occupational therapist to complete a sensory profile and assess not only whether claimant needed any specialized equipment but also would have allowed IRC to explore (assuming he has sensory needs) other generic or cost-effective options that might be available to meet his needs. When any type of equipment is requested, she explained, there must be documentation showing it is medically necessary according to applicable law. It must also be shown that there are no generic resources available.

Since claimant's mother's request, the parks in the area are again open.¹ Thus, claimant may utilize the parks again. Ms. Serrano also reviewed an occupational therapy report submitted by claimant's mother and stated it does not change her opinion that an arch swing set is medically necessary. Regarding any difficulties claimant may have wearing a mask in public or sanitizing equipment, claimant can be

¹ Official notice is taken of California's regional stay at home order issued by the California Department of Public Health on December 3, 2020, and modified on December 9, 2020, specifically deeming playgrounds "essential" and permitting them to open to facilitate personal health and wellness through outdoor exercise.

taught to tolerate those things and if his behaviors are increasing because he does not want to go to a park during the pandemic, the more appropriate therapy would be applied behavioral analysis, and not the purchase of an arch swing set that has not been found to be medically necessary. Finally, she noted that since claimant volunteers in public at several different places, it did not make sense that he would be fine in those locations but somehow afraid of catching COVID-19 at the park. In closing, Ms. Serrano explained that there is simply a lack of documentation showing a need to fund an arch swing set.

14. Claimant's mother submitted several letters from various individuals who are not licensed psychologists or occupational therapists. They were various In-Roads providers and claimant's brother.

One provider, Nicholas Marquez, indicated claimant did enjoy playing on the swings. Mr. Marquez wrote that claimant's mother "told him" that claimant uses the swings as a "sensory break." He then notes that claimant's attitude has changed since the pandemic began and how claimant talks about it "being the end of the world." He said claimant does not want to play on the swings because he is "afraid of catching COVID" so he should get his own swing at home.

Another In-Roads provider, Andrew Avilez, wrote that claimant's mother contacted him and requested he provide input regarding claimant's needs regarding sensory input and swinging." Mr. Avilez, like Mr. Marquez, wrote that claimant likes the swings and that he is no longer the same person because he is 'bothered by COVID."

Claimant's brother, like the two other individuals, wrote that claimant has exhibited more introverted behavior and attributed that behavior to not being able to

use the swings at the park. He also said claimant has said he did not want to go to the park because he does not want to get COVID.

15. Claimant's mother submitted an occupational therapy assessment dated January 13, 2021. The individual who completed the report, Mike Brooksby, "MOT OTR/L" did not testify. His curriculum vitae was not submitted. Mr. Brooksby wrote that he has had "informal observations" and interacted "sporadically" with claimant in 2016, 2017, 2018, 2019, and 2020 "at his home and in the community." He did not indicate in what capacity he interacted with or observed claimant. The report indicates that prior to rendering his assessment, he interviewed claimant's mother who told him claimant has a diagnosis of Sensory Processing Disorder, and autism, among other things. Claimant's mother told him prior to the COVID-19 pandemic that claimant "never had problems" waking up, going to class, completing chores, or any other issues. Now, he is angry, talks to himself, and is choosing to self-isolate. Mr. Brooksby then wrote that claimant's mother told him swinging was one of claimant's preferred activities to "self-regulate" when overstimulated by his environment. Claimant would use park swings to accomplish this before the pandemic. Since closures, claimant has "been deprived" of going to the park, among other things, which has resulted in anger, fear, and defiance. Mr. Brooksby wrote that he observed claimant in claimant's home on December 17, 2020. Generally, he observed claimant to be anxious. He then concluded that claimant needs "access to self-regulation tools which he has found a pleasure and success" and also concluded that such self-regulation tools would include the type of swing claimant's mother is requesting and a trampoline.

16. The report by Mr. Brooksby is given little weight. First, he did not testify and did not submit a curriculum vitae concerning his background. The report is very short and conclusory; it seems most of his conclusions were driven by claimant's

mother's report to him – he conducted no testing or assessment to determine claimant's needs. Also, while he may have observed claimant on occasion in past years, his cursory observation of claimant in December 2020 showed nothing more than generalized anxiety. Nothing in the report credibly indicates that claimant has sensory needs that can only be alleviated by the type of swing claimant's mother requests. Moreover, nothing in the report indicates that a swing is medically necessary. Finally, nothing in the report indicates claimant is unable to go to a public park and use the swings there. While Mr. Brooksby noted claimant's "fear" of catching COVID-19, that subjective fear does not change how a regional center determination is made concerning what services and supports are needed. Mr. Brooksby's report also does not take into consideration that, assuming claimant's fears exist, he can be taught to take precautions or obtain behavioral therapy/counseling to help with those fears.

17. Claimant's mother's testimony is summarized as follows: Since the COVID-19 pandemic started, claimant's bad behaviors have increased. Parks were closed initially, but even now that they are open it does not help because there is no social distancing. They may find something five years from now that works better, but for now, claimant likes to swing. Claimant's mother declined IRC's offer for an occupational therapy assessment because it was going to be telephonic and claimant must be observed since he has sensory issues. Claimant takes walks, rides his bike, and does many things outside (like working out and practicing yoga). He still volunteers at his church, among other places. However, it would be very helpful for him to have a swing in his own backyard instead of having to go across town to a park. It is also awkward in the park because claimant is now 22 years old – and not a child. Claimant doesn't mind volunteering because it is "socially distanced." He will wear a mask but does not like to and eventually removes it. Claimant's mother has received verbal

denials from claimant's medical providers for the swing, but they said it could take up to six months for a written denial.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

The Lanterman Act

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized 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, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act.

(Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as “regional centers,” to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” (Welf. & Inst. Code, § 4620.)

5. A regional center’s responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the IPP and provision of services and supports be centered on the individual and take into account the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, *and be a cost-effective use of public resources.* [emphasis added].

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be *fiscally responsible.* [emphasis added].

8. In implementing IPPs, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: a provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4659, subdivision (c), prohibits IRC from purchasing services available from generic resources.

12. In 2009, the enactment of Welfare and Institutions Code section 4648.5 modified section 4512 and suspended a regional center's authority to purchase certain services, including social recreational services. Subdivision (c) of section 4648.5 provides that an exemption may be granted "when the regional center determines that the service is a **primary or critical means** for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs." (Emphasis Added).

Evaluation

13. Claimant had the burden of proving he meets the exception to the general prohibition of regional centers from funding social recreation activities like a swing set. Claimant did not meet that burden.

14. Regional centers are prohibited from purchasing services that constitute recreational activities. An exception to this prohibition exists only 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. On this record, it was not established by a preponderance of the evidence that an arch swing set is a **primary or critical** means for ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability, that a swing is required to maintain him in his home, or that no alternative service is available to meet his needs.

15. Claimant participates in a wide array of activities to meet his needs. Yoga, walking, working out, riding his bike, volunteering, and playing video games, among other things. Claimant receives 130 hours per month of services from CASS designed to get him out into the community or otherwise engage him in activities that meet his social and recreational needs. Nothing credible in the record showed that claimant has any unique sensory need that only swinging will alleviate. Nothing credible in the record showed a swing is medically necessary. Nothing credible in the record showed that claimant's increased anxiety or behaviors are attributable solely to the inability to swing, as opposed to a more generalized anxiety caused by the pandemic. If claimant is experiencing aggression, anxiety, depression, or other behavioral concerns due to anxiety concerning the pandemic, IRC should have been permitted to have their

occupational therapist conduct an assessment to determine what appropriate interventions, if any, are needed.

16. Nonetheless, even assuming swinging is not considered a social recreational activity; even assuming claimant did have a unique sensory issue that only a swing could address; even if it was established that a swing was a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability; or even if it was medically necessary; IRC is still prohibited by law from funding a swing because generic resources are available to meet claimant's need. The public parks are open. There are swings available. Claimant used the parks without issue before the pandemic. Although claimant's concern about possibly contracting COVID-19 is understandable, he can take precautions (such as a mask, social distancing, sanitizing the swings, going to the park when nobody is present, or choosing another activity until the swings are available). Claimant's fear of contracting COVID-19 is not sufficient to ignore the applicable legal standards that prohibit IRC from purchasing services or supports when generic resources are available.

ORDER

Claimant's appeal from Inland Regional Center's determination that it will not pay for the purchase and installation of an adult arch swing is denied.

DATE: January 27, 2021

KIMBERLY J. BELVEDERE
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.