

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

In the Matter of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER, Service Agency.

OAH No. 2022070434

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on September 27, 2022.

Bridgette Webster, Attorney at Law, represented San Diego Regional Center (SDRC).

Tara Lindhardt, Advocate, represented claimant who did not appear.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 27, 2022.

ISSUES

1. Should SDRC fund sign language instruction for claimant?
2. Should SDRC fund oral speech therapy services for claimant?
3. Should SDRC fund an assessment for a communication device for claimant?
4. Should SDRC fund behavioral supports for claimant?
5. Should SDRC fund nursing services for claimant?
6. Should SDRC fund mileage during the provision of respite services?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant, a 13-year-old female, resides in her home with her mother and maternal grandparents. According to her Individual Program Plan (IPP), she is eligible for regional center services based on her diagnoses of intellectual disability, autism spectrum disorder, and epilepsy.

2. On June 14, 2022, SDRC issued a Notice of Proposed Action to claimant advising that it was denying her "request to fund (1) sign language instruction, (2) oral speech therapy, (3) communication device assessment, (4) behavior support therapy, (5) nursing, and (6) respite mileage during provision of respite." The reasons for the action were: "Generic resources, school district, and insurance should be assessed for

items 1, 2, 3, and 4. Item 5: Sitter level respite can administer oral medications. Item 6: SDRC does not fund mileage during provision of respite."

3. On July 8, 2022, SDRC received claimant's Fair Hearing Request stating that SDRC "will not provide appropriate services & supports even for an interim period where school district refuses to perform & [claimant] is remaining unserved in critical areas." To resolve her complaint, Claimant needed "SDRC to provide appropriate [services] & supports."

4. The matter was set for hearing, and this hearing ensued.

Documentary Evidence Introduced at Hearing

CLAIMANT'S IPP

5. Claimant's April 1, 2022, IPP set forth her goals, challenges, and strengths. She has a high potential to learn as she retains what she learns and needs positive reinforcement. She has challenges with communication which lead to behaviors. She attends a public school. She has Medi-Cal insurance coverage and "receives CCS (California Children's Services), IHSS (In Home Supportive Services - a county-funded program), and SSI benefits (Supplemental Security Income - a federally funded program). Parent declined to provide the amount of the services she is currently receiving and submitting Confidential Benefit Review Form." Claimant's household is bilingual. Claimant indicates her wants and needs by using different vocalizations, leading by the hand, pointing or taking things to her mother or grandparents. She uses words but is not easily understood by strangers. Claimant's mother reported that claimant's language skills have regressed and her preferred language is sign language. She can sign about 200 basic words. She does not engage in reciprocal conversations. She can sometimes follow two directions depending on

her mood but requires redirection, prompting, and support to complete tasks. She receives speech services from the school district. Claimant was receiving school services in a home hospital mode as the school was unable to provide appropriate services during COVID. Teachers came to the family home three times a week for one hour and 45 minutes. Claimant receives occupational therapy and speech services 30 minutes per week. The school district would like claimant to return to in-person instruction but her mother is concerned the school district cannot provide appropriate services. There were Individualized Education Program (IEP) meetings in December 2021 and February 2022 but no agreement was reached and the IEP has not been signed. As stated at this hearing, claimant is appealing the school district's refusal to fund services.

6. Claimant's June 24, 2022, IPP Addendum documented that since the IPP, claimant had changed respite vendors and that effective July 1, 2022, SDRC will temporarily fund an additional 16 hours per week of respite that will end in August 2022, and be reevaluated at that time. At this hearing SDRC advised that it is continuing to fund this additional 16 hours.

INFORMAL MEETING AND SDRC LETTER

7. On July 27, 2022, an informal meeting was held with Neil Kramer, SDRC Fair Hearing Manager; claimant's mother; Tara Lindhardt, claimant's advocate; and Rebecca Hamada, SDRC Program Manager; and claimant's service coordinator (CSC). The six funding requests were discussed and following the meeting, on August 1, 2022, Mr. Kramer sent a letter to claimant's mother setting forth SDRC's position, citing to various code sections.

In that letter SDRC denied (1) the request to fund sign language as it is an educational service and the responsibility of the school district; and (2) the request to fund speech therapy services on an interim basis but approved a speech therapy assessment through an SDRC vendor. SDRC noted that many of its speech therapy providers work with Medi-Cal and once the assessment was completed, the speech therapist should be able to assist claimant with assessing services through Medi-Cal. SDRC denied (3) the request to fund a communication device assessment as that service should be accessed through the school district appeal process or through claimant's private insurance. SDRC advised that if claimant did not prevail with the school district appeal or if she received a denial from Medi-Cal, SDRC could revisit the request at that time.

SDRC granted (4) the request to provide funding on an interim basis for behavioral support services. SDRC offered to submit a referral for a behavioral assessment and, if recommended, to fund behavioral consultation services for six months. SDRC advised that during that time claimant would need to work with her pediatrician to submit a referral for behavioral services through Medi-Cal and if that service was denied, SDRC would review the case to determine if services would be continued. SDRC denied (5) the request to fund nursing services because SDRC does not fund medical services and that service should be accessed through Medi-Cal. However, if claimant agreed, SDRC could provide a nursing level of care assessment to determine if claimant has a nursing need for respite care. Once that assessment was completed, claimant "should be able to provide a copy of the assessment" to claimant's physician for that individual to determine if an insurance referral was warranted. SDRC cautioned that if the assessment recommended a nursing level of care, claimant's current in-home "sitter level" respite would need to be changed to a nursing level of respite and because "of a systemic shortage of nursing level of respite

workers, the change could impact the number of respite hours” claimant would be able to access. SDRC denied (6) claimant’s request to fund mileage during the provision of respite services as those services are to be provided in claimant’s family home. Respite workers should not be transporting SDRC clients.

EMAIL EXCHANGES AND LETTERS

8. Emails exchanged between the parties documented the scheduling of the IPP and information regarding respite, issues claimant had with her communications with SDRC, the numerous changes of claimant’s CSC and her Program Manager per claimant’s requests, issues claimant has had with the school district including postponing her appeal, and the district’s refusal to fund services.

LETTERS FROM ADVOCATE AND SDRC

9. A May 19, 2022, letter from claimant’s advocate to “Mr. Klaus” referenced the meeting conducted the day before with representatives from SDRC, claimant’s advocate, and claimant’s mother. The letter set forth issues between SDRC’s psychologist and claimant’s mother in which claimant’s mother alleged that the psychologist advised her that claimant “had no potential for progress.” (In the June 8, 2022, letter referenced above, claimant’s advocate alleged the psychologist told claimant’s mother claimant was “too severe and not capable.”) Claimant’s mother requested a new psychologist be assigned to her daughter’s case. SDRC denied those allegations regarding the psychologist’s purported statements.

The advocate’s letter further stated: “We discussed the absolute fact that the school district is not and has not been going by the IEP and that [claimant] needs oral speech therapy and Sign language instruction and an appropriate communication device all of which is not being provided by the school.” The letter stated further:

To re-assert and to be clear: This parent has acted in good faith, is overburdened beyond what other parents have to do which we discussed, she has also acted in good faith in that she has taken school [*sic*] to Due Process Hearing scheduled June 1 and 2. Parent has exhausted all generic and private resources and is overloaded with responsibility. Her daughter has no de facto good faith compliance from district which we discussed with [SDRC] in the key areas of communication and behavior. The parent cannot leave the Respite Worker by herself with [claimant] as behaviors are escalating.

We have been asking and asking for interim, and I stress interim, not permanent support in communication, behavior and for respite and help from SDRC Service Coordinator and SDRC Team to actually help this Consumer who is a minor and to help her parent navigate this serious exceptional situation.

Mr. Klaus, can you please help this parent and therefore your Consumer in his interim period to get the situation under better control?

I've never seen SDRC not make exceptions in a case like this.

Please advise as to SDRC decision re replacing the Psychologist and also on our other requests, again, only for interim period. This is urgent.

10. In a June 8, 2022, letter claimant's advocate wrote:

We have repeatedly communicated that the situation is in crisis and that SDRC should understand that the school district is absolutely not offering free appropriate public education per their legal duty. We have asserted the SDRC mandate that Consumers are supposed to be supported by SDRC in a situation of last resort and this Parent has exhausted all resources while SDRC has not agreed to support and much time has passed which has been incredibly detrimental to [claimant], and SDRC consumer who is supposed to be supported.

Further, we have merely asked for INTERIM services and supports and for basic assistance from the SDRC Case Managers and this has not been appropriately offered.

Claimant's advocate advised that the school district had continued the June hearing until July, further delaying services. Claimant's advocate addressed each of the six requests for funding, stating that the request for nursing was because the respite agency will not give claimant medications and in the past SDRC offered nurses "to appropriately deal with [claimant's] Epilepsy and other issues." Claimant's advocate requested funding for mileage so that the respite worker could take claimant into the community. However, at this hearing, claimant's advocate advised that although she

requested mileage reimbursement to take claimant into the community, that was her original request, claimant now is merely seeking to have SDRC fund the respite worker's mileage to come to claimant's home because claimant lives in such a remote area of San Diego County, making it difficult to secure respite workers.

11. A June 14, 2022, letter from SDRC to claimant's mother stated: "You are appealing the denial from the district - which is the due process hearing. We need to know the outcome of the hearing before we can make a decision regarding your request. This is our stance. If you disagree you can pursue a hearing with SDRC." (Underline in original.)

12. There were also emails and a letter from claimant's mother regarding the reasons for the request for additional respite. However, additional respite hours was not one of the six issues in this hearing, so the letter was not considered other than to the extent that it set forth various facts that pertained to the six matters, including the behavior issues caused by claimant's inability to communicate, the school district's denial of services, and the attempts made to procure respite providers, including those who could provide "assistive respite," (provide limited assistance with medical care).

LETTER FROM CLAIMANT'S PHYSICIAN

13. Michael Zimbric, M.D., claimant's neurologist with Rady Children's Hospital, wrote a letter April 19, 2022, addressed "To Whom it May Concern." In it he set out claimant's diagnoses, including her three qualifying developmental disability diagnoses. Dr. Zimbric wrote that claimant "should continue to have ABA services to help behavior. Also, ASL [American sign language] is her preferred method of communication, and should be available and in use in her education."

14. Dr. Zimbric did not testify in this hearing. His records were not introduced, and his letter did not establish that SDRC should fund these services.

LETTER FROM THE SCHOOL DISTRICT

15. In an undated letter¹ to claimant's mother written "in response to requests made in [claimant's] IEP meeting," a Program Specialist at claimant's school district wrote:

The purpose of the meeting was to review the triennial assessments, however, per your request, the team agreed to review the assessments at the next meeting. Instead, the team discussed your concerns and requests. At that time, you stated disagreement with the current academic assessment and the current speech language assessment. As a result of the stated disagreement, you requested independent educational evaluations (IEE) in the areas of academic and speech-language.

Pursuant to California Education Code 56329, a parent has the right to obtain an independent educational evaluation (IEE) at public expense if the parent disagrees with an

¹ Although claimant's mother disagreed with SDRC's statement that the letter was undated, and claimed it was dated, there was no date on the letter.

assessment obtained by the public agency. However, the public agency may initiate a due process hearing to show that its own assessment is appropriate or to conduct its own assessment of the student.

The request for the IEE's is premature considering the two requested assessments haven't been reviewed and discussed in an IEP meeting. Therefore, the District does not agree to fund the IEEs at this time. Following the review of the triennial assessments, please feel free to utilize the Procedural Safeguards by requesting an IEE with any assessment you are in disagreement with from the District.

In addition, you requested the District provide ASL instruction and support to [claimant]. Although your request was carefully considered, the District respectfully denies your request to teach [claimant] American Sign Language. A review of the records, including the review of IEP's and Meeting Notes, occurred to assist with the District's decision. The district believes [claimant's] needs can be met through the use of verbal, AAC as well as basic sign language. [Claimant] is demonstrating growth in academics and her communication skills through the current supports and accommodations. The district has agreed to increase her home academic instruction for seven hours weekly.

In addition the district wishes to complete an alternative communication evaluation (AAC). Included are a copy of procedural safeguards, the district policy regarding Independent Educational Evaluations, and the assessment plan for the alternative communication evaluation (AAC).

SDRC TITLE 19 NOTES

16. SDRC introduced internal communication case notes, known as Title 19 Notes. A March 22, 2022, note documented that claimant's mother advised that "she spoke with her insurance today and is waiting to hear back from insurance supervisor to discuss ABA. Insurance provider let her know that for speech services family will need referral from doctor. Parent will be requesting referral from doctor." The note further stated: "Insurance denied ASL services for [claimant]. [CSC] informed parent that school documentation and insurance denial letters will be needed. [CSC] recommended documentation be presented to SDRC before Notice of Action be conducted."

17. A March 29, 2022, note documented that after receiving an email from claimant and her advocate, SDRC advised them that the denial letters from the insurance, school district or other generic resources must be provided in order for SDRC to make a decision.

18. An April 13, 2022, note documented a conference call in which claimant's mother and claimant's advocate advised that insurance had approved claimant to receive 20 hours per week of ABA services. Claimant's mother further advised that insurance recommended a parent consult and that a referral from the physician with speech services through insurance had been established with Rady Children's Hospital.

There was no IEP meeting held as of that date and claimant was awaiting a resolution session meeting with the district. Claimant's mother would be providing documentation regarding services to SDRC.

19. An April 21, 2022, note documented email exchanges advising claimant's mother that "in order to process family requests for services[,] denial letters are needed from school, medical insurance, etc."

20. An April 22, 2022, note documented a phone call with claimant's mother in which the CSC informed her that "ASL letters have been submitted." Claimant's mother informed the CSC that "ABA is currently canceled and she will be holding off on ABA request. Parent will also be working on getting referral for speech through [claimant's] insurance."

21. A May 16, 2022, note documented email exchanges. The family had been referred to Rady Children's Hospital for speech services but were told claimant was too old and needed to be referred to a different agency. Claimant's mother was going to work on getting the referral for speech to the appropriate place. Claimant's mother advised that her "biggest concern/request for SDRC" was "ASL and respite."

22. A May 18, 2022, note documented a meeting with claimant's mother and advocate to discuss claimant's requests. Claimant's mother and advocate agreed to meet with the SDRC psychologist to discuss what behavioral programs SDRC could offer besides ABA. There were also references to the respite request. The note further stated that SDRC would be meeting to see if it would be providing services or sending a Notice of Proposed Action. Claimant's mother was "in due process" with the school district, and a hearing was scheduled regarding claimant's communication as claimant's mother wants ASL but the school is not providing this service.

SCHEDULING ORDER IN SCHOOL DISTRICT CASE

23. An August 19, 2022, Scheduling Order in claimant's school district matter indicated that the due process hearing has been set for October 4, 5, and 6, 2022.

Witness Testimony

NEIL KRAMER, SDRC FAIR HEARING MANAGER

24. Neil Kramer, SDRC Fair Hearing Manager, testified that he recognized that claimant had challenges and was doing what he could to offer her services as he was trying to be helpful. He is constrained by the laws that require claimant to seek services from generic resources, which include her school district and her private insurance. Further, SDRC cannot use its funds to supplant the budget of an agency that has a legal responsibility to provide those services and is receiving public funds for providing those services. The school district is such an agency and it is required to provide many of the services claimant seeks such as sign language instruction, speech therapy, and a communication device.

Mr. Kramer explained the basis for his decision regarding the six issues. He testified that SDRC must comply with the Lanterman Developmental Disabilities Services Act (Lanterman Act) and also act in conformance with its Department of Developmental Services (DDS)-approved purchase of services policy. Welfare and Institutions Code section 4659 contains the word "shall" not "may," requiring SDRC to pursue all sources of funding for requested services. Here, many of the services claimant sought are ones that should be funded by generic resources.

Regarding the request for sign language instruction, that is an education service which is the responsibility of the school district. Mr. Kramer cited to Welfare and

Institutions Code section 4648, subdivision (a)(8), in support of SDRC's position. That section prohibits SDRC from using its funds to supplant school district funds. In addition, SDRC does not have vendors who provide sign language services, as that request is outside of SDRC's DDS-approved purchase of services agreement, meaning it is not a service SDRC can offer.

Claimant's request for speech therapy services is also a service the school district should provide so SDRC cannot fund it. However, SDRC did offer an assessment for speech therapy to determine claimant's needs. Mr. Kramer explained that because many of SDRC's vendors also accept Medi-Cal, claimant could work with such a vendor to access speech therapy through Medi-Cal. Mr. Kramer was "trying to be helpful" so claimant could get the service, even though SDRC cannot fund it. Claimant did not agree to that assessment, but Mr. Kramer testified that it is still available to claimant.

Moreover, Mr. Kramer testified that Title 19 notes in March 2022 documented that claimant's insurance provider informed claimant's mother that she will need a physician referral for speech services and claimant's mother would be requesting that referral from claimant's physician. An April 2022 note documented that a referral with the physician for speech services through insurance had been established with Rady Children's Hospital, but a later note in April indicated claimant's mother was working on getting a referral for speech through claimant's insurance. Mr. Kramer explained that it appeared that claimant was struggling to get speech services so this is why he approved the speech therapy assessment and why he did it with an SDRC vendor who was Medi-Cal approved.

Claimant's request for a communication device was denied because it is also a service the school district should provide. Further, according to the undated letter

from the school district, it does want to perform an alternative communication evaluation to assess claimant's communication needs.

Regarding claimant's request for behavioral services, Mr. Kramer recognized that claimant has behavioral challenges and he "really wanted to help the family." As such, he approved the request and offered an assessment and behavioral consultation for six months as ABA contracts are done on a six-month basis. Claimant never underwent the assessment because she disagreed with SDRC's position which is why the matter proceeded to this hearing. Mr. Kramer also pointed out the Title 19 notes which documented discussions with claimant's mother about ABA. In March 2022 she was waiting to hear back from her insurance regarding ABA. An April 2022 note documented that insurance had approved claimant to receive 20 hours per week of ABA services. However a note later in April 2022 indicated she advised SDRC that ABA was currently canceled and she was "holding off" on the ABA request. Mr. Kramer does not know why the ABA was canceled but SDRC is still offering that assessment and six-month consultation to claimant. Mr. Kramer testified that no matter the outcome of this hearing, SDRC is still offering the speech and ABA assessments to claimant. Mr. Kramer explained that those assessments could help claimant get physician referrals.

SDRC denied the request for nursing services because it does not fund those services. Mr. Kramer testified that SDRC is prohibited by law from providing direct medical services to its consumers. He explained that SDRC can do a nursing needs assessment to determine the level of respite care required. If a nursing level of respite is needed, SDRC can provide that care. However, one caveat is that if there is a determination that claimant requires nursing level respite, SDRC would have to shift her from sitter level respite to nursing level respite which could impact the number of

hours of respite she receives because there is a shortage in the community of providers for nurse level respite. Mr. Kramer also testified that since issuing the Notice of Proposed Action, SDRC has increased claimant's respite by 16 hours per week.

Claimant's request for mileage was denied because respite should be provided in the home. Respite workers should not be transporting consumers into the community; doing so creates liability issues. Mr. Kramer cited to Welfare and Institutions Code section 4690.2 which states respite is a service provided in the home.

Mr. Kramer presented as an empathetic and credible witness. He thoughtfully explained his decision making process, citing to the applicable laws. His testimony conveyed his sincere desire to help claimant and assist her with procuring services, but that he must do so within the confines of the law.

REBECCA HAMADA, SDRC PROGRAM MANAGER

25. Rebecca Hamada, SDRC Program Manager, testified SDRC agreed to fund an additional 16 hours per week of respite on a temporary basis while claimant's appeal is pending with the school district. Respite services are currently offered at the sitter level because claimant refused the offer to have a nursing assessment performed. Ms. Hamada echoed Mr. Kramer's testimony that SDRC is prohibited from funding services that should be funded by generic resources such as the school district and insurance. She explained that claimant advised that her requests were denied by those generic resources, but never provided any documentation of the insurance denial. SDRC was never provided with any documentation that claimant had exhausted all of her resources from her insurance or the school district.

SDRC has been accommodating to claimant and honored her requests to switch her caseworker and has tried to work with claimant. Claimant has not accepted any of

SDRC's offers for assessments and SDRC does not know if claimant followed up with the offer in the school district's undated letter regarding an alternative communication evaluation. SDRC does not know if claimant ever received ABA services, the Title 19 notes indicates that those were approved, but then canceled.

Ms. Hamada answered questions in a straightforward and direct manner. She explained SDRC's decisions and made a credible witness.

TARA LINDHARDT, CLAIMANT'S ADVOCATE

26. Tara Lindhardt, claimant's advocate, testified in this hearing. She thanked SDRC and OAH for taking the time to work with claimant and address these issues. She questioned whether SDRC met its duty under existing law. At points during her testimony, Ms. Lindhardt read from a summary of the Lanterman Act she found online. That summary was not introduced at hearing. Although the document generally summarized Lanterman Act requirements, it was not controlling nor did it supersede the specific language of the applicable code sections and regulations.

Ms. Lindhardt explained how neither she nor claimant came lightly to this hearing. Claimant has been repeatedly reaching out to SDRC to articulate what is happening with the school district. Claimant requested a change in her CSC because she did not feel as though she was being heard. Both before and after COVID, claimant has not been supported by her school district even though services are set forth in her IEP. It is taking a really long time for the school district hearing to be held, it has been continued several times and claimant has had to retain different attorneys.

Ms. Lindhardt explained that claimant lives in a rural area and the request for mileage is to pay the respite worker's mileage to come to the home. Claimant is not seeking funding for the respite worker to take claimant into the community.

Ms. Lindhardt acknowledged that this was the request in her email, but it was her initial starting point in the negotiation; claimant is now only seeking funding for the respite worker's mileage to come to the family home. She stated that mileage may be the incentive needed for respite workers to drive to claimant's rural community.

Claimant is grateful for the additional 16 hours of respite. Given claimant's medical condition, and her medications, she is requesting a nursing level of respite and Ms. Lindhardt is aware of exceptions where SDRC has provided nurses to consumers. Ms. Lindhardt stated that claimant is willing to accept the offer of a nursing assessment, explaining that claimant is not looking for ongoing nursing care, and if the assessment indicates that nursing level respite is not required, she will accept that finding. Claimant just felt she was not being heard on this issue.

The request for ASL is a "very big issue." Ms. Lindhardt explained that this is "really an exceptional case." Claimant is a hearing child whose preferred language is ASL. Her request for ASL "speaks to the respect and integrity of people with developmental disabilities." It is discrimination to a developmentally disabled individual to deny her preferred method of communication. Citing to the online Lanterman Act summary, Ms. Lindhardt stated that the law requires SDRC to contract with a provider or to arrange for the service through publicly funded agencies and claimant's CSC had not looked into that option. The intent of the law is that SDRC is the payor of last resort and if the parent has exhausted the generic resources, SDRC can step in. Ms. Lindhardt described the deaf community resources she discovered which offer various services, and questioned why SDRC has not worked with that agency to provide ASL services to consumers and/or why the CSC had not advised claimant about that agency. Of note, this agency appeared to be a generic resource

and its existence did not establish that SDRC should fund the requested service; quite the contrary, it is a generic resource that claimant should pursue.

Given that SDRC waived requirements for other services and offered assessments, claimant would like ASL to also be offered. Claimant's mother is a single parent and claimant has escalating behaviors. The school is not providing any of the services which is why claimant has had to sue the school district. It is an ongoing issue that the school district is not helping claimant or providing the necessary and IEP services to her. "This is a very special case, [SDRC] is going by the general rules, but this is a special case."

Claimant has done her due diligence to contact Medi-Cal and have services funded by insurance, to no avail. She has unsuccessfully tried obtaining services from 10 different respite agencies, but it is difficult to locate workers because she lives in a rural area. Claimant is requesting a determination as to whether or not she has exhausted all her generic resources; if she has, SDRC should fund the requested services. Here, the school district is acting egregiously and SDRC is not used to such a school district, but here where the parent is really trying to exhaust her generic resources, she should not have to wait for the conclusion of the school district case before receiving necessary services. Ms. Lindhardt stressed that claimant is not asking SDRC to supplant the budget of the school district; she is merely asking for interim funding since the school district is not providing the services it is supposed to provide. One of the reasons claimant has requested her CSC to attend the IEP meetings is because the school district is not complying with the IEP. Claimant does not feel she is getting support from her CSC and she would like SDRC to make an exception here because of the egregious facts.

Ms. Lindhardt asserted that the school district is not in compliance with the laws. The school district has not performed any assessments of claimant and the law permits the parent to have a say regarding assessments and she has asked the school district to do them but the district has refused. An individual from the North County Consortium came to claimant's home to do the communication device assessment without claimant's mother's knowledge or notice, and merely provided an iPad to claimant. Claimant prefers ASL, has learned it, and had an IEP with the school district where it agreed it would offer it, but then denied that service. (Of note, no IEP demonstrating that fact was introduced at hearing.) Claimant is being disrespected by not being provided her preferred language, ASL. The school district is actively discriminating against claimant because by not providing ASL she cannot learn and cannot communicate.

Ms. Lindhardt asserted there were many deaf individuals who are also regional center clients and SDRC should access ASL services through this publicly funded deaf agency. She has been in contact with that agency and they are very helpful and willing to offer ASL and assistance to those in need. Of note, this testimony established that this agency is a generic resources, as SDRC asserted; it did not establish that SDRC should fund ASL. Ms. Lindhardt also testified that community colleges might be a resource to provide ASL services. Again, like the deaf agency, community colleges are also generic resources.

Ms. Lindhardt described complainant's escalating behaviors which make it impossible for claimant's mother to utilize the respite as she must be present to assist the respite worker. Ms. Lindhardt described the "vicious cycle" that occurs because claimant cannot communicate and her behaviors escalate. She asserted claimant's

welfare needs to be given priority, and in the interim period, while the school district is denying services, SDRC should fund the requested services.

Ms. Lindhardt concluded her testimony by stating that she had the “utmost respect” for SDRC and knew they were acting in good faith. However, claimant needs ASL services, the school district is doing nothing, and claimant could really benefit by getting this service now. The Lanterman Act permits SDRC to purchase needed services and supports through vendors or by having them provided through publicly funded generic resources. Claimant is seeking interim funding for the services while she pursues her school district appeal. Claimant has exhausted all generic resources, she has done all she can, and wonders if there is a duty by SDRC to meet her needs in the interim, especially given SDRC’s knowledge of the continuance of the school district hearing.

Ms. Lindhardt was extremely respectful of the proceedings and testified in a direct and kind manner. She made a credible witness and it is clear she is trying to procure services she believes claimant needs.

CLAIMANT’S MOTHER

27. Claimant’s mother testified she has tried obtaining the services from several agencies. She sent the school district’s denial letter to SDRC. Claimant’s mother has spent a lot of time seeking services, contacting her insurance provider a number of times, but they keep denying the services. She testified that although insurance provider denied her requests, it would not provide her with a letter of denial. Given that insurers routinely issue letters of denial, that testimony did not seem plausible and was contradicted by the Title 19 notes. Claimant’s mother has also called CCS for ASL services and they also denied them but would not provide a denial letter.

Claimant's mother described her many attempts to obtain services through the school district. She has hired a number of advocates and attorneys but the school district keeps denying the services. The school district has been denying services for several years. It took her years to get 1:1 speech therapy, occupational therapy, and a communication device for her daughter. Approximately four or five years ago another attorney was able to procure funding for claimant to receive ASL training. She learned approximately 200 words in two months so she was able to communicate. Claimant's preferred method of communication is ASL.

The communication device the district provided is not the proper one for claimant and they had never updated the programs on it. Claimant's mother explained that an individual came to their home, asked one or two questions, gave claimant a new iPad, and said that will be her device but it had a different program on it than the one claimant used and the district has never programmed her device to be "in line with claimant's level of communication or education." It has a program with nothing on it, the district has not programmed the device, changed it, or added things to it, so it is not working for claimant. She has never been properly assessed by the district.

Complainant did not receive any summer services from the school district. Although the district advised that it would provide summer school for claimant, it never did. Claimant's mother sent numerous emails to the district asking for those services, but they were never provided.

Claimant's mother presented as a sincere and credible witness. It was clear that she is trying to do the best she can to obtain services for her daughter. She stated that she appreciated any help the regional center could offer, especially with addressing her daughter's communication needs.

Closing Arguments

28. SDRC argued that it had offered assessments to claimant and those offers still stood. Claimant has the burden of proof in this hearing and the overarching issue is that claimant is asking SDRC to fund services that should be funded by her school district or her insurance, and not by SDRC. Claimant has not provided any denials demonstrating she exhausted her generic resources and SDRC needs denials in writing as evidence that she has done so. As to the request for ASL, claimant did not follow through with the school district process regarding that service and SDRC may not use its funds to supplant the school district funding. The services claimant seeks are things the school district should fund and she needs to complete her school district appeal process. At this stage that has not happened, so SDRC cannot fund the requested services.

29. Claimant rejected the argument that the school district appeal has to be exhausted before SDRC can fund services. Claimant is requesting the services be funded in the interim, when the school district is not funding them, so SDRC would not be supplanting the district funds. Claimant has exhausted her pursuit of generic resources. The letter from the school district denying ASL is a written denial of that service, so she does not understand SDRC's argument in that regard. The Lanterman Act does allow funding for communication services, so there is authority to fund claimant's requests. As to insurance denials, the insurer will not provide written denials which claimant's mother communicated to SDRC. Further, SDRC did not require a written denial before offering the behavior service, so she does not understand why they require written denials for the other services. Claimant's concern with accepting the assessments SDRC offered is that she would have an assessment but no funding for the service, and it takes time if the services were approved to get staffing, and

claimant was trying to get all services put in place at one time. She reiterated that this is an emergency situation, the school district is not serving claimant, making this an exceptional case. Claimant's needs should be respected and supported.

LEGAL CONCLUSIONS

Purpose of the Lanterman Act

1. The purpose of the Lanterman Act is 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." (Welf. & Inst. Code § 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

Burden and Standard of Proof

2. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.) In this case, claimant bears the burden to demonstrate that SDRC should fund the services she seeks.

3. The standard by which each party must prove those matters is the "preponderance of the evidence" standard. (Evid. Code, § 115.)

4. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act and Regional Centers

5. The Lanterman Act is found at Welfare and Institutions Code section 4500 *et seq.*

6. 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.)

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

8. SDRC is one of 21 California regional centers. SDRC provides advocacy for and assistance to a large developmentally disabled population living in San Diego County and Imperial County. To qualify for SDRC services, a person must live within one of these counties and be diagnosed with a substantial disability as defined by Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, section 54000.

Applicable Statutes

9. 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 . . .

[¶] . . . [¶]

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.

10. Welfare and Institutions Code section 4646 requires that the IPP and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. The IPP is developed through a process of individualized needs determination. The individual with developmental disabilities and, if appropriate, the individual's parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan. The provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

11. Welfare and Institutions Code section 4646.4 states:

(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 if 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 if appropriate. The individualized family service planning team for infants and toddlers eligible under Section 95014 of the Government Code may determine that a medical service identified in the individualized family service plan is not available through the family's private health insurance policy or health care service plan and therefore, in compliance with the timely provision of service requirements contained in Part 303 (commencing with Section 303.1) of Title 34 of the Code of Federal Regulations, will be funded by the regional center.

(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.

(5) Commencing October 1, 2022, consideration of information obtained from the consumer and, if appropriate, the parents, legal guardian, conservator, or authorized representative about the consumer's need for the services, barriers to service access, and other information.

(b) 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 consumer, or, if appropriate, the parents, legal guardian, or conservator, shall provide copies of their health benefit cards under which the consumer is eligible to receive health benefits, including, but not limited to, private health insurance, a health care

service plan, Medi-Cal, Medicare, and TRICARE. If the individual, or, if appropriate, the parents, legal guardians, or conservators, do not have health benefits, the regional center shall not use that fact to negatively impact the services that the individual may or may not receive from the regional center.

(c) Final decisions regarding the consumer's individual program plan shall be made pursuant to Section 4646.

(d) Final decisions regarding the individualized family service plan shall be made pursuant to Section 95020 of the Government Code.

12. Welfare and Institutions Code section 4646.5 sets forth the IPP development process which must include a statement of goals and the sources of the funded services. Subdivisions (a)(7)(A) and (B), authorize development of a transportation access plan to provide transportation funding when a consumer is enrolled in a day or work service program or to access public transportation. None of which applied here.

13. Welfare and Institutions Code section 4647 states in part:

(a) Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective;

securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; collection and dissemination of information; and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.

14. 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. Regional centers must secure services and supports that meet the needs of the consumer, as determined by the IPP. Regional centers must be fiscally responsible and may purchase services or supports through vendorization or contracting. Subdivision (a)(8) prohibits the regional center from using its funds "to supplant the budget of an agency that has responsibility to serve all members of the general public and is receiving public funds for providing those services."

15. Welfare and Institutions Code section 4659 states:

(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.

(2) Regional centers shall disseminate information and training to all service coordinators regarding the availability and requirements of generic, federally funded, and private insurance programs on the local level.

16. Welfare and Institutions Code section 4690.2 requires respite to be provided in claimant's home.

17. Welfare and Institutions Code section 4418.6 authorizes DDS to establish the rates of reimbursement for respite care. No evidence was introduced that authorizes SDRC to exceed those rates by funding mileage for respite care workers.

Evaluation of the Issues

SIGN LANGUAGE INSTRUCTION

18. ASL is a service that should be provided by the school district, if it determines that claimant has a need for that service. Here, in an undated letter, the district denied claimant's request for that service, finding that her needs were better met by other services. Claimant's remedy, should she disagree with the district's determination, is to file an appeal with the district, which she has done. "Exhausting her administrative remedies" means pursuing her appeals to the end. Claimant has yet to exhaust her administrative remedies regarding the school district as her hearing has not yet taken place or concluded.

The clear language of Welfare and Institutions Code section 4648 precludes SDRC from using its funds to supplant the school district's budget, even "on an interim basis" pending claimant's school district appeal. Further, although claimant prefers ASL, there was no evidence that ASL met claimant's needs, and the school district determined it did not. At this point, claimant's only remedy is to appeal the school district's determination which she is doing. Moreover, SDRC must comply with its DDS-approved purchase of services agreement. That agreement does not contain any provision for ASL services, so SDRC may not offer those services to claimant.

SDRC's denial of the request that it fund ASL services is affirmed.

ORAL SPEECH THERAPY SERVICES

19. As with ASL services, speech therapy is also a service the school district should provide. SDRC may not use its funds to supplant the school budget, even on an interim basis. Claimant's remedy is to pursue her appeal of the school district's denial

of that service, an appeal that is currently pending. This is also service which can be funded by a generic resource, claimant's insurance, and claimant has not submitted a written denial from her insurer.

SDRC's denial of the request to fund speech therapy services is affirmed. SDRC's offer to have claimant undergo a speech therapy assessment is still available to claimant should she wish to accept it.

ASSESSMENT FOR A COMMUNICATION DEVICE

20. A communication device is also something the school district should provide and SDRC funds cannot be used to supplant the school district's budget. Claimant has been provided with a device, albeit she disagrees with the type of device provided, and asserted it is not compatible with claimant's communication or education needs, and has not been properly programmed. Again, claimant's sole remedy is to pursue her appeal with the school district, which is currently pending. This device may also be funded by claimant's insurance, a generic resource.

SDRC's denial of the request to fund a communication device is affirmed.

BEHAVIORAL SUPPORTS

21. SDRC offered to fund behavioral supports on an interim basis. Claimant did not accept that offer, although it is still available to her. Behavioral supports are services typically funded by insurance. Here it appears the insurance provider agreed to fund those services but the services were later canceled for some unknown reason. To date, claimant has never provided a written denial to SDRC from the insurer refusing to fund behavioral support services.

SDRC's denial of the request to fund behavioral supports is affirmed. SDRC has agreed to fund a behavioral assessment and behavioral supports for six months while claimant pursues that service with her insurer. That offer is still available to claimant should she choose to accept it.

NURSING SERVICES

22. SDRC's purchase of services agreement does not include nursing services so it cannot provide those to claimant. SDRC offered to have claimant undergo a nursing assessment to determine if her respite needs should be at a nursing level. However, SDRC cautioned claimant that if her needs are at a nursing level, her respite hours may decrease because there are not enough nurses available to provide that service. To date, claimant has not undergone this assessment, although she did accept SDRC's offer to increase her respite hours by 16 hours per week.

SDRC's determination not to fund nursing services is affirmed. The offer to have claimant undergo a nursing assessment for respite services is still available should claimant wish to accept it.

MILEAGE FOR RESPITE SERVICES

23. Rates for vendors are established by DDS. SDRC may not pay vendors beyond those rates. Paying mileage to a vendor would constitute payment above the DDS-approved vendor rate. Claimant cited to no law, and indeed there is none, that would allow SDRC to reimburse vendors for mileage to travel to claimant's home. Regional centers are funding agencies, not staffing agencies, and the Title 19 notes and emails between the parties demonstrated SDRC has made great attempts to procure respite vendors, but it has been difficult because of claimant's rural location.

SDRC's denial of claimant's request to fund mileage for respite services is affirmed.

OFFER FOR ASSESSMENTS AND BEHAVIORAL SUPPORT SERVICES

San Diego Regional Center has offered to fund a speech therapy assessment, a behavioral assessment, behavioral supports for six months, and an assessment to determine the appropriate level of respite care. Claimant may still accept those offers should she choose to do so.

ORDER

San Diego Regional Center's denial of claimant's requests to fund sign language instruction, speech therapy services, a communication device, behavioral supports, nursing services, and respite mileage is affirmed.

DATE: October 7, 2022

MARY AGNES MATYSZEWSKI
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.