

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**FRANK D. LANTERMAN REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2022090423**

**DECISION**

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on November 7 and 10, 2022.

Claimant was represented by his mother (Mother) and father (Father) (collectively, Parents). Claimant and his family members are identified by titles to protect their privacy.

Michele Johnson, Intake Manager, represented Frank D. Lanterman Regional Center (Service Agency).

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on November 10, 2022.

## **ISSUE**

Should Service Agency increase claimant's Self-Determination Program (SDP) budget by \$73,000 to pay for a behavioral aide for claimant at school?

## **EVIDENCE RELIED UPON**

Documentary: Service Agency's exhibits 1-20; claimant's exhibits A-X.

Testimonial (for Service Agency): Felipe Simon, Service Coordinator; Adrian Jimenez, Self-Determination Program Specialist; and Frank Chavez, Regional Manager.

Testimonial (for Claimant): Morgan Thomas, Teacher; Kim Petrarca, Lead Teacher and Supervisor; and Mother.

## **Jurisdictional Matters**

1. Claimant is a 13-year-old boy who is eligible for regional center services based on his diagnosis of autism spectrum disorder.

2. As of April 1, 2022, claimant is a participant in the SDP, which is an alternative model of service delivery under the Lanterman Developmental Disabilities Services Act (Lanterman Act). Under the SDP, the participant is given an individual budget. Within that budget, the participant has the flexibility to develop, purchase, and manage their services and supports to implement their Individual Program Plan (IPP).

3. By a letter dated August 3, 2022, Service Agency notified Mother that her request to increase claimant's SDP budget to fund for a 1:1 behavioral aide at school was denied. The letter stated in pertinent part:

After careful review and consideration, the Regional Center did not approve your request for additional Self-Determination Program (SDP) funding for a 1:1 behavior aide at a special needs private school because you have not exhausted [claimant's] generic resources, he does not require this funding to meet the goals in his Individualized Program Plan, and [claimant's] circumstances, needs, and resources have not changed.

(Exh. 1, p. A2.)

4. On August 22, 2022, Mother filed a fair hearing request, on claimant's behalf, to appeal Service Agency's denial of her request. In the fair hearing request, Mother requested Service Agency "augment Self-Determination budget by \$73K to accommodate fully-funded 1:1 aide during school day/year." (Exh. 2.) Following an informal meeting held on August 25, 2022, Service Agency sent Mother a letter dated August 30, 2022, notifying her the denial was upheld. (Exh. 3.)

### **Claimant's Background**

5. Claimant lives at home with Parents and his two younger sisters (ages 8 and 6). Claimant's IPP dated January 24, 2022 (January 24, 2022 IPP) was presented at hearing. (See Exh. 9.) Claimant is verbal but only communicates his most basic wants and needs. Due to his expressive skills deficits, he is not able to communicate complete thoughts or details of events. Claimant's family privately funds "a personal

assistant with ABA Therapy experience who is working to help [claimant] develop his independent living skills.” (*Id.* at p. A43.) Claimant’s family has used healthcare insurance funded ABA therapy in the past but is no longer interested in that service.

6. Claimant requires close supervision during all his waking hours due to his challenging behaviors and safety skills deficits. The January 24, 2022 IPP states: “While in the community he is provided with close adult supervision as he is at risk of wandering away and does not know how to safely cross streets. Other challenging behaviors include tantrums, screaming and kicking when he does not get his way.... The family is aware of ABA funding eligibility through private insurance and ID Medi-Cal, but they prefer to continue to privately fund for client’s personal assistant instead of requesting ABA services.” (Exh. 9, p. A43.)

7. Claimant is generally healthy. Kaiser Permanente (Kaiser) is claimant’s primary health insurance. His secondary health insurance is Medi-Cal Anthem/L.A. Care. Claimant sees a psychiatrist at Kaiser every three months. He is prescribed psychotropic medication to treat Attention-Deficit/Hyperactivity Disorder (ADHD). Claimant’s family receives 204 hours per month of In-Home Supportive Services (IHSS).

8. Claimant qualifies for special education services from his school district as a student with autism. His initial Individualized Education Program (IEP) was dated February 28, 2013. Claimant’s most recent IEP is dated June 2, 2022 (2022 IEP). The 2022 IEP indicates the school district will provide claimant with occupational therapy (OT), language and speech therapy (LAS), and Resource Support Program (RSP) services for math and reading. (Exh. A, pp. B51-B53.) The 2022 IEP indicates claimant will spend zero percent of time outside of general education. (*Id.* at p. B53.)

9. Claimant has attended school with a 1:1 aide since preschool. Claimant attended the same private elementary school (Elementary School) for kindergarten through sixth grade and was in a general education classroom with a 1:1 aide. Parents privately funded claimant's tuition and his 1:1 aide. The school district reimbursed Parents for the cost of the 1:1 aide. Claimant completed sixth grade at the end of the 2021-2022 school year.

10. Claimant entered the seventh grade at the start of the 2022-2023 school year. Claimant currently attends a private middle school for students with various learning disabilities (Middle School). Parents privately fund claimant's tuition and his 1:1 aide. The school district is not reimbursing Parents for the cost of the 1:1 aide because Middle School is a school for students with special needs. The school district will pay for an aide in general education; however, it will not pay for an aide in a nonpublic school (NPS) or special needs school because it considers that support to be embedded in the program.

11. The IEP meeting that resulted in the 2022 IEP was held on June 2, 2022. Mother attended the IEP meeting with a special education attorney. The following topics were discussed at the meeting: "present levels, goals, proper placement, reports from LAS, OT, Academics and School Psychologist." (Exh. A, p. B54.) Regarding claimant's placement in the upcoming 2022-2023 school year, the IEP team "agreed that exploring NPS options would be beneficial." (*Ibid.*) The IEP meeting was recessed and would "be reconvened following the identification of an appropriate NPS and the completion of the intake process." (*Ibid.*) The 2022 IEP noted: "To be accepted at a Nonpublic School (NPS), the student and parent must interview and the student must meet admission criteria of the NPS." (*Ibid.*) The 2022 IEP also noted: "It was discussed with the parent that the AAA [Additional Adult Assistant] at the NPS will most likely be

group AAA. BII/BID services [i.e., behavior intervention] will cease upon NPS enrollment.” (*Ibid.*)

12. On an unspecified date between June 2 and August 25, 2022, Mother “entered into a confidential settlement agreement with the school district for the 2022-23 academic year which did not include funding for [claimant’s] 1:1 aide.” (Exh. 24, p. B726; Exh. 3, p. A10.) Service Agency was not made aware of Mother’s settlement agreement with the school district until after the August 25, 2022 informal meeting. To date, Parents have not provided any details about the settlement to Service Agency, other than it did not include funding for a 1:1 aide.

13. On July 28, 2022, at Mother’s request, Middle School sent a letter to Service Agency indicating that claimant’s acceptance to Middle School was conditioned upon him having a 1:1 aide. The letter stated: “In reviewing the acceptance for [claimant], we want to clarify that we are accepting [claimant] with the understanding that he will receive 1:1 support during his attendance at [Middle School]. We further understand that the family will be providing this resource for [claimant].” (Exh. H.)

### **Claimant’s Transition to SDP**

14. In March 2022, claimant’s service coordinator, Mr. Simon, met with Mother to discuss claimant’s transition to the SDP. A Self-Determination Program IPP dated March 30, 2022 (SDP-IPP), was developed for claimant. (Exh. 4.)

15. Desired Outcome #3 of the SDP-IPP states claimant “will have an appropriate educational program to make progress in cognitive growth, communication skills and social development.” (*Id.* at p. A19.) The SDP-IPP states

Desired Outcome #3 will be met when claimant and Parents “express general satisfaction with the school program and classroom placement.” (*Ibid.*)

16. The SDP-IPP states, for Desired Outcome #3, Parents “will fund for [claimant’s] private educational program” and “will collaborate with the private educational program to develop goals that focus on his progress in cognitive, communication and social skills.” (*Ibid.*) The SDP-IPP states Service Agency will support claimant with Desired Outcome #3 by “assisting parents with a referral for educational advocacy support for services in a public education program, if needed.” (*Ibid.*)

17. On April 1, 2022, claimant entered the SDP and his individual budget was certified in the amount of \$38,424.60. (Exh. 6.) Claimant’s most recent spending plan was signed by Mother and Service Agency in September 2022. (Exh. 7.) The spending plan is a document that identifies the services accessed by the client in the SDP. The regional center uses the spending plan to confirm that all services are federally reimbursable and generic resources have been accessed. Claimant’s spending plan allowed Parents to purchase respite services, community integration services, financial management services, and summer camp programming, from their preferred providers.

18. Claimant’s service coordinator, Mr. Simon, testified Mother has not yet signed and returned the agreement page for the SDP-IPP. The SDP-IPP was sent to Mother by electronic correspondence on April 11, 2022. (Exh. 17, p. A176.) Mr. Simon testified claimant’s SDP-IPP is being implemented despite the absence of Mother’s signature. He noted Mother signed claimant’s SDP budget and spending plan, and claimant’s SDP funds are being used as approved in April 2022.

## **Request to Increase SDP Budget**

19. In July 2022, Mother requested Service Agency increase claimant's SDP budget to fund a 1:1 behavioral aide at school for the upcoming 2022-2023 school year. Mother reported the school district did not provide 1:1 aides in NPS placements because that support is embedded in the NPS classroom setting. Mother reported claimant's aide would be removed from his IEP if he attended a NPS because it was not in the school district's contract to provide 1:1 aides to a district-contracted NPS. The school district, however, would provide claimant with an aide if he received academic instruction on a comprehensive public school campus.

20. During communications between Mother and Service Agency in July 2022, claimant's service coordinator, Mr. Simon, asked Mother if she had exhausted claimant's generic resources and if she requested funding from the school district for a 1:1 aide at Middle School. Mother claimed she did not have legal standing to request funding from the school district because Middle School was a special needs private school and did not have a contract with the school district. Mother also claimed Middle School was similar to a NPS placement with embedded supports, so the school district would not provide claimant with an aide even if the school district had a contract with Middle School. Mother also reported claimant's health insurance plan will not fund a 1:1 behavior aide at school.

21. On July 27, 2022, Mr. Simon informed Mother that claimant's SDP budget could not be increased to fund for a 1:1 behavioral aide at school because she had not exhausted the school district as a generic resource. The school district was an available resource to provide appropriate educational placement and support for claimant. Mr. Simon offered to refer Mother to Service Agency's special education law clinic to assist with pursuing those supports from the school district. Mother declined the offer.



Thereafter, Service Agency sent Mother a notice of action letter on August 3, 2022, and Mother filed a fair hearing request on August 22, 2022. (See Exhs. 1, 2.)

## **Service Agency's Evidence and Contentions**

22. Service Agency contends a 1:1 aide for school is not a service or support that may be purchased with SDP funds.

A. SDP funds may be used to purchase services and supports only when generic services are not available. Regional center funds cannot be used to supplant the budget of an agency that is responsible to serve the public and receives public funds to provide services. The school district is a generic resource available to school-age children to provide services during school hours.

B. The California Department of Developmental Services (DDS) has created a list of approved services and definitions for the SDP. (Exh. 16.) A 1:1 aide for school is not included on the list of approved SDP services.

C. The use of SDP funds for a 1:1 aide at school is prohibited because it is not a federally reimbursable service. A DDS Directive dated January 13, 2022, states, in part: "The SDP is part of a federal government Medicaid waiver. This waiver approved a list of goods and services that may be purchased. SDP participants may only purchase goods and services that are allowed by the waiver." (Exh. 15, p. A121.) The DDS Directive includes a non-inclusive list of services that are allowed and not allowed under the Medicaid waiver. The services are broadly categorized as "Home and Living Expenses," "Vehicles," "Community Integration," and "Goods and Services Outside of Spending Plan." (*Id.* at pp. A124-A127.)

23. Under the SDP, an adjustment may be made to a client's individual budget if both of the following occur: (1) there is "a change in the participant's circumstances, needs or resources" or there are "prior needs or resources that were unaddressed in the IPP," and (2) the expenditures for the individual budget, including adjustments, "would have occurred regardless of the individual's participation in the Self-Determination Program." (See Legal Conclusion 16.)

24. Service Agency contends claimant's SDP budget cannot be increased to fund the \$73,000 cost of a 1:1 behavioral aide at school.

A. Service Agency contends there has been no change in claimant's circumstances, needs, or resources. Claimant is continuing to attend private school with a 1:1 aide funded by his parents, which he has done since kindergarten. Claimant's change of schools is what routinely occurs when a student transitions from elementary school to middle school. His need for assistance during the school day has not changed. Service Agency contends there has been no change in resources. The school district remains a generic resource available to provide services and supports during the school day. Parents have chosen not to access the school district as a generic resource and instead unilaterally decided to place claimant in private school with an aide, both of which they are privately funding.

B. As discussed in Factual Findings 15 and 16, claimant's educational needs are addressed in his SDP-IPP. Mr. Simon testified Desired Outcome #3 in the SDP-IPP is not a new goal and has been included in claimant's IPPs since 2019.

C. An expenditure by Service Agency for a 1:1 aide at school would not have occurred regardless of claimant's participation in the SDP, for the reasons discussed in Factual Finding 22A, above.

25. On September 13, 2022, Mother signed the consent form for the school district to release "School reports" and a "Copy of last IEP" to Service Agency. (Exh. O.) On September 22, 2022, Service Agency received a draft copy of the 2022 IEP, which was stamped with a watermark "Worksheet" and "Not an Official Document," and a Functional Behavior Assessment Report. (See Exhs. 10, 11.) Mr. Simon testified this was the first time Service Agency had been provided the 2022 IEP.

26. Mr. Simon discussed the 2022 IEP with his supervisor, Service Agency Regional Manager Frank Chavez. They noted that, based on the information provided in the 2022 IEP, Mother decided to enroll claimant in a private school (Middle School) with the understanding Parents would pay for claimant's services. They noted the letter from Middle School indicated claimant could attend with a 1:1 aide. They concluded Service Agency could not fund for a 1:1 aide at school because the school district is a generic resource to fund the service. They also found claimant's circumstances had not changed just because Parents decided to enroll him in a new private school.

27. Mr. Chavez testified Service Agency was not notified of Mother's confidential settlement agreement with the school district until after the informal meeting decision was made at the end of August 2022. On cross-examination, Mr. Chavez acknowledged there was a change in resources due to the school district no longer reimbursing Parents for the cost of the 1:1 aide in middle school. However, any decision regarding Service Agency funding for a 1:1 aide would have to go through Service Agency's funding review process.

## **Mother's Evidence and Contentions**

28. Mother contends she has exhausted private insurance as a generic resource to fund a 1:1 aide for claimant. Mother testified claimant's primary health

insurance, Kaiser, will not pay for a 1:1 aide for school. She presented an excerpt from Kaiser's policy handbook for behavioral health treatment for autism spectrum disorder, which states that the treatment plan may not be used "for purposes of providing (or for the reimbursement of) . . . educational services." (Exh. G.)

29. Mother contends she has exhausted the school district as a generic resource to fund a 1:1 aide for claimant at school. During the development of claimant's 2022 IEP, Mother asked the school district to provide a 1:1 aide for the upcoming school year. She went through the IEP process in May and June 2021 assisted by a special education attorney with 13 years' experience. The school district denied Mother's funding request for a 1:1 aide. The IEP team recommended that a nonpublic school placement was appropriate for claimant. The school district, by policy, does not provide a 1:1 aide in a nonpublic school placement because that support is already embedded in the program. Mother contends, however, that claimant's "unique needs require individual support to help him access the curriculum, remain safe and aware in his environment, and interact appropriately with others." (Exh. X, p. B725.)

30. As part of the development of the 2022 IEP, the school district identified four nonpublic school (NPS) placements that might be appropriate for claimant. Mother visited the placements in-person and was interviewed by telephone and Zoom. Two of the NPS placements declined to accept claimant. The third placement asked Mother if claimant could defend himself against aggressive students. At the fourth placement, Mother saw students who were aggressive and not engaged in the curriculum, and she found the environment was too restrictive. Parents found none of the four NPS placement identified by the school district were appropriate for claimant.

31. Claimant was accepted at Middle School on the condition he have a 1:1 aide provided by the family. Parents chose to enroll claimant in Middle School and privately fund his tuition and 1:1 aide. Parents believe Middle School is the most appropriate fit for claimant's educational and social/emotional needs and provides the least restrictive and safest environment. Parents contend claimant "has a unique need for behavioral support in order to access his curriculum, remain safe, and interact appropriately, which does not fall into typical educational program planning." (Exh. X.)

32. In August 2022, Mother requested Service Agency to amend Desired Outcome #3 of the SDP-IPP, which was a goal that claimant "will have an appropriate educational program to make progress in cognitive growth, communications skills and social development." (Exh. 4, p. A19.) Mother wanted to add language to Desired Outcome #3 that claimant's educational program will enable him to "maintain appropriate behavior, health and safety while at school" and to graduate with a high school diploma. (Exh. J.) Service Agency denied Mother's request to amend Desired Outcome #3. Mr. Chavez denied the request because of the pending fair hearing regarding Mother's request to increase the SDP budget for a 1:1 aide at school. (Exh. L.) At hearing, Mr. Chavez testified if Mother asked for the health and safety language now, he would include it in the education section of the SDP-IPP. Mother contends that if the SDP-IPP is amended as she requests, then the SDP-IPP would support claimant having a 1:1 aide at school.

33. Mother contends regional centers may now pay for educational services for clients. She notes the provision in the Lanterman Act that did not allow regional centers to pay for educational services (i.e., Welfare and Institutions Code section 4648.5) became inoperative on July 1, 2021, and was repealed as of January 1, 2022. (See Exh. V, pp. B666-B667.) Mother also contends Service Agency should fund the 1:1

aide for claimant because regional centers are "payers of last resort" and Parents "have no other avenue to turn to in order to secure this type of funding." (Exh. X, p. B733.) Mother contends claimant has a "gap" in services and supports which Service Agency is responsible for bridging when generic resources are denied. Mr. Chavez, in his testimony, explained that gap funding is a temporary service to help parents in the process of accessing a generic resource. For example, IHSS is a generic resource that takes time to apply for and obtain. In that situation, Service Agency might, for example, increase respite hours temporarily until parents receive the IHSS. As another example, Service Agency might provide gap funding for services provided during after school hours, temporarily, until permanent services are secured.

34. Morgan Thomas is claimant's current teacher at Middle School. Mr. Thomas testified regarding claimant's behavioral challenges and his need for a 1:1 aide. Mr. Thomas teaches a class of six students who are in grades 6, 7, and 8. There is also one teaching assistant for the class. Mr. Thomas testified claimant's 1:1 aide assists claimant in the classroom, and during lunch and recess. Mr. Thomas testified claimant is doing well in his current situation with a 1:1 aide. He has made academic progress and benefits from peer interactions facilitated by his 1:1 aide. Mr. Thomas does not believe claimant can successfully attend Middle School without his 1:1 aide.

35. Kim Petrarca is the Lead Teacher and Supervisor at Middle School. Ms. Petrarca testified she works in the admissions process. She does not work directly with claimant but does see him at school approximately three hours per day. Ms. Petrarca testified the types of students Middle School accepts include those with mild to moderate learning disabilities, autism spectrum disorder, and auditory processing disorders. Ms. Petrarca testified Middle School accepted claimant on the condition he attend school with a 1:1 aide. Ms. Petrarca testified claimant's 1:1 aide provides

behavioral support. In the classroom, the 1:1 aide makes sure claimant is attentive to the lesson, he stays on task, he speaks in turn, and he does not elope. The 1:1 aide also provides support for claimant during recess and lunch. Ms. Petrarca believes claimant needs his 1:1 aide in order to successfully attend Middle School. He requires more support than the school can provide. With his 1:1 aide, claimant is doing well academically and has friends and peers like himself.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. The Lanterman Act, Welfare and Institutions Code section 4500 et seq., governs this case. (All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant timely requested a fair hearing and, therefore, jurisdiction for this case was established. (Factual Findings 1-4.)

2. When one seeks government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) This standard is met when the party bearing the burden of proof presents evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In this case, claimant bears the burden of proving by a preponderance of the evidence he is entitled to the requested increase in his SDP budget. (See Evid. Code, § 500.)

## **Traditional Service Delivery**

3. A regional center is required to secure services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) 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 IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

4. The Lanterman Act contemplates that the provision of services shall be a mutual effort by and between regional centers and the consumer and their family. The foundation of this mutual effort is the development of a consumer's IPP. As explained in section 4646, subdivision (d):

Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, if appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.



5. Thus, the Lanterman Act contemplates cooperation between the parties and the sharing of information in determining services and supports for a consumer and their family. The preferences of the consumer and their family are an important factor, but not the only factor, to be considered in the IPP process.

6. A regional center may purchase services or supports for a consumer from an individual or agency pursuant to vendorization or a contract. (§ 4648, subd. (a)(3).) "Vendorization or contracting is the process for identification, selection, and utilization of service vendors or contractors, based on the qualifications and other requirements necessary in order to provide the service." (§ 4648, subd. (a)(3)(A).) The requirements for vendorization are set forth in detail at California Code of Regulations, title 17 (CCR), section 54302 et seq.

7. When purchasing services and supports for a consumer, a regional center shall ensure conformance with its purchase of services policies, utilization of generic services and supports when appropriate, utilization of other sources of funding as contained in section 4659, and 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. (§ 4646.4, subd. (a).)

8. Under section 4659, regional centers are required to identify and pursue all possible sources of funding for consumers receiving regional center services. Such sources of funding include governmental entities or programs required to provide or pay for the cost of providing services, such as school districts, and private entities, to the extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

9. Regional center funds "shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§ 4648, subd. (a)(8).)

### **Self-Determination Program (SDP)**

10. The SDP is an alternative model of service delivery provided under section 4685.8. A regional center consumer who has been deemed eligible for, and has voluntarily agreed to participate in, the SDP is referred to as a "participant." (§ 4685.8, subd. (c)(5).) "A participant may choose to participate in, and may choose to leave, the Self-Determination Program at any time." (§ 4685.8, subd. (d).)

11. "Self-determination" means "a voluntary delivery system consisting of a defined and comprehensive mix of services and supports, selected and directed by a participant through person-centered planning, in order to meet the objectives in their IPP." (§ 4685.8, subd. (c)(6).) The SDP "shall only fund services and supports . . . that the federal Centers for Medicare and Medicaid Services determines are eligible for federal financial participation." (*Ibid.*)

12. Under section 4685.8, subdivision (d)(1)-(3), participation in the SDP is available to any regional center consumer who meets the following eligibility requirements:

- (1) The participant has a developmental disability, as defined in Section 4512, and is receiving services pursuant to this division.
- (2) The consumer does not live in a licensed long-term health care facility . . .

(3) The participant agrees to all of the . . . terms and conditions [set forth in subparagraphs (A) through (G)].

13. The terms and conditions set forth in section 4685.8, subdivision (d)(3), subparagraphs (A) through (G), to which a SDP participant must agree, state, in pertinent part, as follows:

(A) The participant shall receive an orientation that meets the standards set or developed by the [Department of Developmental Services] to the Self-Determination Program prior to enrollment. . . .

(B) The participant shall utilize the services and supports available within the Self-Determination Program only when generic services and supports are not available.

(C) The participant shall only purchase services and supports necessary to implement their IPP and shall comply with any and all other terms and conditions for participation in the Self-Determination Program described in this section.

(D) The participant shall manage Self-Determination Program services and supports within the participant's individual budget.

(E) The participant shall utilize the services of a financial management services provider of their own choosing and who is vendored by a regional center and who meets the qualifications in paragraph (1) of subdivision (c).

(F) The participant may utilize the services of an independent facilitator of their own choosing . . . [or] may use their regional center service coordinator[,] to provide the services and functions described in paragraph (2) of subdivision (c).

(G) If eligible, with the assistance of the regional center, if needed, timely apply for Medi-Cal in order to maximize federal funding. The participant may consider institutional deeming in order to qualify for Medi-Cal services.

14. The IPP team shall use the person-centered planning process to develop an IPP for the SDP participant. (§ 4685.8, subd. (j).) "The IPP shall detail the goals and objectives of the participant that are to be met through the purchase of participant-selected services and supports. The IPP team shall determine the individual budget to ensure the budget assists the participant to achieve the outcomes set forth in the participant's IPP and ensures their health and safety. The completed individual budget shall be attached to the IPP." (*Ibid.*) "The participant shall implement their IPP, including choosing and purchasing the services and supports allowable under this section necessary to implement the plan." (§ 4685.8, subd. (k).)

15. The IPP team shall determine the initial and any revised individual budget for the participant using the methodology specified in section 4685.8, subdivision (m). "'Individual budget' means the amount of regional center purchase of service funding available to the participant for the purchase of services and supports necessary to implement the IPP." (§ 4685.8, subd. (c)(3).) For a participant who is a current consumer of the regional center, their individual budget shall be the total amount of the most

recently available 12 months of purchase of service expenditures for the participant. (§ 4685.8, subd. (m)(1)(A)(i).)

16. Pursuant to section 4685.8, subdivision (m)(1)(A)(ii), an adjustment may be made to the individual budget if both of the following requirements, designated herein as Requirement I and Requirement II, occur:

(I) The IPP team determines that an adjustment to this amount is necessary due to a change in the participant's circumstances, needs, or resources that would result in an increase or decrease in purchase of service expenditures, or the IPP team identifies prior needs or resources that were unaddressed in the IPP, which would have resulted in an increase or decrease in purchase of service expenditures. When adjusting the budget, the IPP team shall document the specific reason for the adjustment in the IPP.

(II) The regional center certifies on the individual budget document that regional center expenditures for the individual budget, including any adjustment, would have occurred regardless of the individual's participation in the Self-Determination Program.

## **Analysis**

17. Service Agency properly denied Mother's request to increase claimant's SDP budget to fund the cost of a 1:1 behavioral aide at school. A 1:1 behavioral aide at school is not an allowed service under the SDP. It is not a federally reimbursable service under the Medicaid waiver. In addition, the school district is a generic resource

available to fund the requested service, which parents have not exhausted. Mother entered into a settlement agreement with the school district that does not include funding for a 1:1 behavioral aide. As such, the school district remains an available generic funding source for a 1:1 aide at school. Parents have not exhausted the school district as a generic resource because they have not completed the IEP appeals process under special education law. By entering into the settlement agreement, Mother, in effect, has chosen not to pursue the school district as a generic resource to fund for a 1:1 aide.

18. Claimant's evidence did not establish compliance with both Requirement I and Requirement II under section 4685.8, subdivision (m)(1)(A)(ii), to qualify for an adjustment to his SDP budget. (See Legal Conclusion 16.) Claimant meets Requirement I, in that he has had a change in resources due to the school district no longer reimbursing Parents for the cost of the 1:1 aide as it had done previously. However, claimant cannot meet Requirement II because Service Agency would not be allowed to fund the requested 1:1 aide at school whether claimant participates in the SDP or were to revert to the traditional service delivery model.

19. Under the traditional service delivery model, Service Agency is prohibited from funding services and supports that are available from generic resources. One generic resource available to children is the public school system, which is required by law to provide a free and appropriate public education to students with disabilities pursuant to the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.). Under section 4659, Service Agency is required to pursue all possible sources of funding from governmental entities or programs required to provide or pay for the cost of providing services, such as school districts. Here, Service Agency's purchase of a 1:1 aide for claimant during the school day would supplant the budget of the school

district, which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services. (§ 4648, subd. (a)(8).)

20. Mother contends Service Agency may now fund educational services because of the January 1, 2022 repeal of section 4648.5, which previously prohibited regional centers from purchasing educational services for children. This contention is incorrect. Although section 4648.5 was repealed, other provisions of the Lanterman Act still in effect prohibit Service Agency from purchasing services that are the school district's responsibility to provide.

21. Mother also contends Service Agency should fund a 1:1 aide at school as a form of "gap" funding. This contention is not convincing. Section 4648, subdivision (g), states: "If there are identified gaps in the system of services and supports consumers for whom no provider will provide services and supports contained in their individual program plan, the department may provide the services and supports directly." Service Agency persuasively argued section 4648, subdivision (g), is not applicable because claimant participates in the SDP, and there is no gap in service or shortage of providers within the meaning of the statute. Here, Parents chose to have claimant attend a private middle school where his acceptance was conditioned on the family providing an aide, and Mother signed a confidential settlement agreement with the school district that did not provide for an aide. Any gap in service is due to Parents' choice to not fully exhaust the school district as a funding source specifically for a 1:1 aide. Furthermore, gap funding is temporary, typically while the client awaits pending services; for example, Service Agency providing a temporary increase in respite to fill the gap while a family's IHSS application is in process.

22. Based on the foregoing, Service Agency is not required to adjust claimant's SDP budget to fund the cost of a 1:1 aide at school. (Factual Findings 1-35; Legal Conclusions 1-21.)

## **ORDER**

Claimant's appeal is denied. Service Agency is not required to increase claimant's Self-Determination Program budget by \$73,000 to pay for a behavioral aide for claimant at school.

DATE:

ERLINDA G. SHRENGER

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.