

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH Nos. 2021050767 and 2021060215

DECISION

Thomas Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by telephone and videoconference on September 10, 2021

Jacob Romero, Fair Hearings Representative, appeared on behalf of the Eastern Los Angeles Regional Center (Service Agency or ELARC). Claimant and her family members are identified by titles to protect their privacy.

This matter is a consolidation of two separate cases. They arise under the Lanterman Act, that is, the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885, and more specifically under the

Lanterman Act's provisions for a Self-Determination Program (SDP) as outlined in Welfare and Institutions Code section 4685.8. The page numbers of exhibits referred to below are those, if provided, inserted in exhibits by the parties for purposes of the fair hearing.

Testimony and documents were received in evidence. The record was closed and the matter was submitted for decision at the conclusion of the fair hearing.

STATEMENT OF THE CASE

Claimant is nine years old and, notwithstanding her developmental disability, participates with friends in many activities such as Girl Scouts and visits to local parks. She and her family recently transitioned to the Self-Determination Program (SDP) from the traditional model under which the Service Agency chose services and supports. Claimant's independent Community Integrationist and mother have made two proposals which the Service Agency has denied as inappropriate for claimant's SDP individual budget: (i) electronic devices, specifically an iPad tablet computer (iPad) and Nintendo Switch, which claimant could use to communicate electronically with others and play games; and (ii) field trips to museums and amusement parks like Knott's Berry Farm. Claimant contends that what she proposes will aid in communication and socialization. The Service Agency's position is that the electronic devices will be detrimental to in-person communications and claimant's physical activity and both proposals are primarily recreational, such that funding would violate state and federal guidelines.

ISSUES

1. Whether the SDP may fund the purchase of electronic devices if their primary purpose will be participation in electronic games and communications with game participants, or whether such funding would contravene the state and federal laws and regulations (or agency directives in the absence of regulations) that guide expenditures by the Department of Developmental Services (Department or DDS) and the service agencies the Department directs.

2. Whether field trips that have no academic purpose may be funded by a consumer's SDP as promoting socialization and physical activity, or whether, like the proposed purchase of electronic devices, SDP funding would contravene state and federal laws and regulations (or state directives).

SUMMARY OF DECISION

Claimant has proposed purchases in good faith that would have some utility in promoting her physical activity and socialization, but such utility is strongly outweighed by their primary purpose and likely use, for recreation and diversion. They are not a proper item in claimant's SDP budget. Claimant's appeal is properly denied.

FINDINGS OF FACT

3. On April 28, 2021, the Service Agency sent claimant a Notice of Proposed Action (NOPA), Exhibit 1, denying a request to allocate funds in her SDP budget for the purchase of electronic devices, a Nintendo Switch and an iPad. On May 9, 2021, claimant timely appealed, submitting a Fair Hearing Request, Exhibit 2, regarding her

proposed use of the funds. This matter, OAH case number 2021050767, is consolidated with OAH case number 2021060215.

4. On May 20, 2021, the Service Agency sent claimant a NOPA, Exhibit 3, denying a request to use SDP funds for field trips, such as to amusement parks. On May 21, 2021, claimant timely submitted a Fair Hearing Request, Exhibit 4, OAH case number 2021060215, which is consolidated with OAH case number 2021050767.

5. Claimant, nine years old, is eligible for services based on a diagnosis of autism spectrum disorder (ASD). She has also been diagnosed with Down Syndrome. She lives with her parents, older brother, and her fraternal twin brother, who is also a client of the Service Agency.

6. The SDP was established in 2013 as a pilot program not available at ELARC. The program was expanded in 2021 to all regional centers and implemented by DDS. As set out in Welfare and Institutions Code section 4648.8, subdivision (a):

The department shall implement a statewide Self-Determination Program. The Self-Determination Program shall be available in every regional center catchment area to provide participants and their families, within an individual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP [Individual Program Plan]. As of July 1, 2021, the program shall begin to be available on a voluntary basis to all regional center consumers who are eligible for the Self-Determination Program.

7. Claimant proposes to purchase the following items under her SDP individual budget:

A. Two electronic devices (at issue in OAH case number 2021050767):

i. An iPad with accessories, such as a protective case. The iPad is an Apple Computers tablet small enough to be highly portable. Equipped with a touchscreen, it is easy to use and allows for electronic messaging and videoconferencing, which could support social activities such as remote chatting with friends.

ii. A Nintendo Switch. This is a small electronic game console. It may be linked to a television or computer monitor, which would allow for as many as 12 people to participate in a game, or it may be used as an individual's handheld game controller. It has motion sensors for games that incorporate movements by a player. Keri Wilmot, self-described as a toy expert trained in Occupational Therapy (OT), wrote of the device in a December 11, 2017 article, "Nintendo Switch and Learning and Thinking Differences: 6 Things to Know," Exhibit C, which was published online on Understood.org. Claimant agreed with Ms. Wilmot's statements that:

a) "The game system encourages group play."

b) "[A] . . . popular game [on the system] . . . allows up to four players to work cooperatively as a team to solve puzzles. This group interaction can open the door for interaction and communication."

c) "Because of the social gaming involved . . ., playing could help **improve conversation skills**." (Emphasis in original.)

B. Field trips (at issue in OAH case number 2021060215): A list of places to go is set out in Exhibit L: "Community Integration Activities (Field trips) – to replace summer camp activities as the pandemic has not allowed for reopening. . . . Support provider led visits in the community." Examples of possible "daytrips" are listed as, among others: (i) the Los Angeles Zoo; (ii) the Orange County Fair; (iii) Knott's Berry Farm and Soak City; (iv) Discovery Cube Los Angeles; (v) Raging Waters; and (vi) Aquarium of the Pacific.

8. Claimant's proposed purchases were developed in consultation with Kelly Kulzer-Reyes.

A. Ms. Kulzer-Reyes is claimant's Community Integrationist. Her job duties are described in Exhibit 14. The purchase proposals at issue were developed primarily by Ms. Kulzer-Reyes. She was thus acting comparably to an independent facilitator under the Lanterman Act. As provided in pertinent part in Welfare and Institutions Code section 4685.8, subdivision (c)(2):

"Independent facilitator" means a person, selected and directed by the participant, who is not otherwise providing services to the participant pursuant to their IPP and is not employed by a person providing services to the participant. The independent facilitator may assist the participant in making informed decisions about the individual budget, and in locating, accessing, and coordinating services and supports consistent with the participant's IPP. The independent facilitator is available to assist in identifying immediate and long-term needs, developing options to meet those needs, leading, participating, or advocating on

behalf of the participant in the person-centered planning process and development of the IPP, and obtaining identified services and supports. . . . The independent facilitator shall meet standards and certification requirements established by the department.

B. As Ms. Kulzer-Reyes testified, she has a daughter with Down Syndrome and met claimant and claimant's mother at Club 21 Learning and Resource Center in Pasadena, California, which makes resources available to those with Down Syndrome. Claimant was then one year old and Ms. Kulzer-Reyes's daughter was six months old. The daughters are friends.

C. Ms. Kulzer-Reyes has been an advocate for the disability community since 2012, the year of her daughter's birth. She has served as an advisor at the Kern Regional Center for five years. She has been an independent facilitator for families with members who are clients of that regional center and has trained other facilitators. Ms. Kulzer-Reyes has been a graduate student in Disability Studies at Taft College in Taft, California, where she also teaches.

D. In addition to the article about the Nintendo Switch by Ms. Wilmot, described above, Ms. Kulzer-Reyes expressed her agreement with a position statement, Exhibit D, published by the Canadian Pediatric Society, entitled "Digital media: Promoting healthy screen use in school-aged children and adolescents." The position statement notes that "Digital media are integrated into the everyday lives of children and adolescents Current evidence shows that digital media differ in their impacts on cognition, psychosocial function, and physical health, and that benefits and risks are nuanced." It sets out very general recommendations on "healthy screen use." The position statement is given little weight, however, because the evidence did not

indicate whether or how claimant's screen use might be managed. In addition, at the outset, there is this caution: "[A]lthough high screen use levels have been associated with underlying or, possibly, not-yet-diagnosed neurodevelopmental disorders, potential benefits and risks for this population . . . fall beyond the scope of this statement." (Footnotes omitted.)

E. Ms. Kulzer-Reyes expressed her confidence in claimant's benefitting greatly from both the iPad and Nintendo Switch. She believes they will increase claimant's independence and claimant will have incentive, indeed be excited, to communicate and play with others, such as Ms. Kulzer-Reyes's daughter. At present, as Ms. Kulzer-Reyes observed, the two girls are relatively isolated, which the pandemic has made worse, so that claimant is unable to benefit from old resources, like Club 21. The electronic devices, in Ms. Kulzer-Reyes's opinion, would go far safely to counteract current disadvantages.

F. Ms. Kulzer-Reyes envisions a growing community as claimant and other children are empowered to play together and communicate electronically with the devices proposed. The devices, Ms. Kulzer-Reyes believes, will help to alleviate claimant's struggles with socializing, as she will be able to see, appreciate, and mimic others' behavior in building friendships.

G. Asked why the Service Agency did not agree to purchase the devices with insurance funds, Ms. Kulzer-Reyes stated that though that would be a use of generic resources, insurance funds were not available because the devices would not be used for medical purposes.

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H. Regarding the field trips proposed, Ms. Kulzer-Reyes sees them as likewise providing needed opportunities for socialization and integration into the community, though the community would be less well-defined, namely the public that visits stimulating venues like amusement parks and museums. Ms. Kulzer-Reyes pointed out that the proposed expenditures would be modest. The electronic devices are estimated to cost no more than \$400, the field trips probably less.

I. Claimant's current SDP budget is \$84,468.82, as set out in the Self-Determination Program Individual Budget Calculation and Certification Tool, Exhibit 10. The budget allocates several thousands of dollars to Personal Assistance. To fund the proposed purchases, claimant transferred funds from the Personal Assistance category. Thus, the purchases would be a small fraction of the budget and less than 10 percent of the Personal Assistance category. As Ms. Kulzer-Reyes summarized, in her estimation the proposed purchases would cost little but deliver significant benefit, so that a decision in favor of the purchases should be easy and without qualms.

9. Ms. Kulzer-Reyes believes claimant's proposals are steps toward achieving the goals of her IPP. Claimant's March 19, 2021 IPP, Exhibit 5, page 22, has this description of her need and desire for socializing:

It is important for [claimant] to engage in activities [of] . . . a typical nine-year-old . . . to advocate for self . . . to continue to play in the water parks, participate in karate, and dance class, Girl Scouts, socialize with peers, attend parties, be with friends, live with her family and engage with items, events and people that she likes and feels more comfortable [with] . . . improve her communication skills

10. Like the IPP, claimant's December 30, 2020 Person-Centered Plan (PCP), Exhibits 9 and F, describes on page 102 of Exhibit 9 how claimant "likes to be part of the group" and "loves to spend time with her community at parks and rec camp," among other public venues, but "struggles with fine motor control" The PCP is goal-oriented more obviously than the IPP. Goal 1 of the PCP, Exhibit 9, page 104, is that claimant "will be included and active in her community while increasing her independence through activities she chooses." Claimant's being with peers is also stressed, such as in the PCP's section entitled, "Family Vision Statement," Exhibit 9, page 109: "Our ultimate vision for [claimant] is for her to be educated alongside her general education peers This means being with her peers for lunch, recess, and special area classes, but more importantly, all academic subjects with the appropriate accommodations and supports."

11. Claimant is in the third grade at a local elementary school of the Los Angeles Unified School District (LAUSD or the District). Claimant's January 29, 2021 Individualized Education Program (IEP), Exhibit H, shows that she receives District-funded services of different kinds, such as OT, as noted on page 7. The District also provides claimant access to electronic resources. Thus, Exhibit H, page 6, shows that, to assist claimant with communication, the District provides an iPad or a computer with features similar to an iPad:

[Claimant] received an AAC [Alternative and Augmentative Communication] evaluation last year and the results . . . showed that [claimant] was most successful when using a communication system with the following features: dynamic display, synthesized voice-output touchscreen tablet with appropriate software for phrase construction, with access to

approximately 20 icons per screen with phrase-branching, core and fringe vocabulary, direct access, camera access, and portable in a protective case. The new software was not implemented yet as the late activation of new IEP and Covid-19.

But as Ms. Kulzer-Reyes testified, claimant may not use District-supplied computers or electronic resources except at school and only for academic purposes.

12. The District's prohibition of non-academic use of computers accords with policy as set out in a March 5, 2019 LAUSD Policy Bulletin, Exhibit J, entitled Responsible Use Policy (RUP) for District Computer and Network Systems, number BUL-999.13. The RUP, Exhibit J, page 1, states:

The purpose of this bulletin is to ensure that teachers, students, parents, administrators and other District and school personnel use District data systems in a responsible, efficient, ethical, and legal manner, and that such use is in support of the District's business and education objectives.

The RUP, Exhibit J, page 2, cites several laws and implementing regulations as authority for its strictures, including: (i) the Children's Internet Protection Act (CIPA), Pub. L. 106-554, 20 U.S.C. § 9134; 47 U.S.C. § 254; (ii) Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. 6501–6505, 16 Code Federal Regulations Part 312; (iii) the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 Code of Federal Regulations, Part 99; and (iv) California Business and Professions Code, Chapter 22.1, Privacy Rights for California Minors in the Digital World, sections 22580 through 22582.

13. Attachment A to the RUP, Exhibit K, page 1, sets out District restrictions on computers and electronic devices, networks, and systems. The District may, for instance, monitor a person's use of such resources, recognizing no privacy right in their use, and retains the right to take back a computer or other device at any time. Claimant proposed no restriction on uses to which an iPad provided by the Service Agency might be put, although, as Ms. Wilmot wrote in her article, Exhibit C, the Nintendo Switch offers parental controls that could be used to restrict its use in various ways, such as with time limits.

14. Comparable to the strictures in the RUP, but more complex, are regulatory constraints on the Service Agency. Under Welfare and Institutions Code section 4621, "The department . . . shall contract with appropriate private nonprofit corporations for the establishment of regional centers." Like other regional centers, the Service Agency receives state funding with which to provide and coordinate services and supports for the developmentally disabled who are eligible under the Lanterman Act. A significant source of funds allocated to regional centers is federal. All agencies and entities such as the regional centers under contract with them must by law ensure conformity to federal regulations in the disbursement of federal funds. In practice, this means that the Service Agency is constrained by both state and federal laws and regulations.

15. DDS provides the Service Agency and all the regional centers with guidance, such as the Self-Determination Service Program Service Definitions, Exhibit G, available on DDS's website, as Mr. Romero noted in his letter, Exhibit A, page 4. Pertinent here are these definitions:

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Communication Support

Communication support services includes communication aides necessary to facilitate and assist persons with hearing, speech, or vision impairment

This service also includes supports for the participant to use computer technology to assist in communication. Such supports include training in the use of the technology, assessment of need for ongoing training and support, and identification of resources for the support. This service is limited to personnel providing assistance and does not include the purchase of equipment or supplies.

Technology

Allowable technology services, as specified in the participant's IPP include: [¶] . . . [¶]

2. Purchasing, leasing, or otherwise providing for the acquisition of any technology device: cell phones (monthly bill, cell phone apps), iPads, tablets, and laptops. Service includes insurance and training on the use of any technology device. [¶] . . . [¶]

Technology may only be purchased under the SDP Waiver if it is not available through the state plan.

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16. Pertinent here regarding federal law and regulation is the Medicaid Home- and Community-Based Services (HCBS) waiver program, which was authorized under section 1915(c) of the Social Security Act. Through this program, states may provide, through the regional centers, different services that allow those who need care to receive services in their homes or communities.

17. In January 2019, the Centers for Medicare & Medicaid Services (CMS) issued "Instructions, Technical Guide and Review Criteria regarding Application for a § 1915(c) Home and Community-Based Waiver" (CMS Guide). The portion of the CMS Guide pertinent here is Appendix C-3, Waiver Services Specifications, Exhibit 8, which states on page 83:

When new services are proposed, CMS reviews the proposed service to ascertain whether the service:

- Contributes to the community functioning of waiver participants and thereby avoids institutionalization;
- Is reasonably related to addressing waiver participant needs that arise as a result of functional limitations and/or conditions; and/or
- Falls within the scope of § 1915(c) of the Act and is not at odds with other provisions of the Act.

Services that are diversional/recreational in nature fall outside the scope of § 1915(c) of the Act.

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18. An April 23, 2021 email, Exhibit L, from Consumer Services Coordinator (CSC) Veronica Nunez to mother is concerned with a number of items, including both the Nintendo Switch and iPad. As CSC Nunez wrote, each device: "conflicts with general goal of being active and included in her [claimant's] community. It further prompts isolation. Cannot agree to this item in spending plan."

19. Explaining the Service Agency's denial of claimant's proposed purchases are two letters, Exhibits A and B, both dated June 1, 2021, in which Jacob Romero cited Welfare and Institutions Code section 4648.5, subdivision (a)(4) of which prohibited a Service Agency's funding "[n]onmedical therapies, including . . . specialized recreation . . ." Welfare and Institutions Code section 4648.5, however, became ineffective by operation of law on July 1, 2021 and is set to be repealed.

PRINCIPLES OF LAW

1. The party asserting a claim, generally has the burden of proof in administrative proceedings such as those here. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365; see also, Evid. Code §§ 115 and 500.) No appellate case found addresses the applicability of this general principle to fair hearings under the Lanterman Act. But by analogy the party in such proceedings who seeks to change the status quo has the burden of proof. In this case, claimant seeks to change the services funded by the SDP individual budget. Accordingly, claimant has the burden of proof.

2. In the absence of a statute to the contrary, the standard of proof under Evidence Code section 115 is a preponderance of the evidence. "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g.,

'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, Burden of Proof and Presumptions § 35 (4th ed. 2000).)

3. The proof burden is a matter of procedure. But it is worth noting here that it affects a status quo that is shaped by policy newly formulated, or re-formulated in the SDP. The policy underlying the SDP supports an individual family's choices, because choice, the ability to choose for oneself, or for one's family, is fundamental to self-determination. That is the import of Welfare and Institutions Code section 4685, subdivision (b), quoted below. But a claimant's and claimant's family's ability to choose is not only integral to the SDP, but to the Lanterman Act as a whole, as set out in Welfare and Institutions Code section 4512, subdivision (b), also quoted below. The policy that prompted adoption of the SDP is thus not really new, though the program is new to ELARC. The burden of proof cannot change policy, whether deemed new or old. What must be proved has likewise not really changed. Claimant's burden of proof in these consolidated matters is to show by means of preponderating facts that her choices are necessary and effective to mitigate her disability, and not simply desirable.

4. Welfare and Institutions Code section 4512 provides:

Under subdivision (b):

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

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

Under subdivision (c):

Notwithstanding subdivisions (a) and (b), for any organization or agency receiving federal financial participation under the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, as amended, "developmental disability" and "services for persons with developmental disabilities" mean the terms as defined in the federal act to the extent required by federal law.

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5. Welfare and Institutions Code section 4620.3, subdivision (b), provides:

In developing regional center administrative management best practices, the department shall consider the establishment of policies and procedures to ensure prudent fiscal and program management by regional centers; effective and efficient use of public resources; consistent practices to maximize the use of federal funds; detection and prevention of fraud, waste, and abuse; and proper contracting protocols.

6. Welfare and Institutions Code section 4685 declares the policy that prompted changes in the Lanterman Act and how the regional centers should accommodate individual choice under the SDP:

A. Subdivision (a) provides that implementation of the Lanterman Act must be “[c]onsistent with state and federal law,” and that the Lanterman Act’s “high priority” is to enable the developmentally disabled to live at home, rather than in institutions.

B. Subdivision (b) requires that regional centers provide or secure family support services, each of which must:

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

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

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

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

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

7. Welfare and Institutions Code section 4685.7 outlines a program similar to SDP, the Self-Directed Services Program SDS Program, which is “[c]ontingent upon approval of a federal waiver,” and directs the Department to implement the SDS Program by adopting regulations “consistent with federal law.”

8. Welfare and Institutions Code section 4685.8, subdivision (b)(2), provides that in implementing the SDP, the Department must ensure:

(A) Oversight of expenditure of self-determined funds

[¶] . . . [¶]

(C) Comprehensive person-centered planning, including an individual budget and services that are outcome based.

[¶] . . . [¶]

(G) Innovation that will more effectively allow participants to achieve their goals.

(H) Long-term sustainability of the Self-Determination Program by doing all of the following:

(i) Requiring IPP teams, when developing the individual budget, to determine the services, supports and goods necessary for each consumer based on the needs and preferences of the consumer, and when appropriate the consumer's family, and the effectiveness of each option in meeting the goals specified in the IPP, and the cost effectiveness of each option, as specified in subparagraph (D) of paragraph (6) of subdivision (a) of Section 4648.

(ii) The department may review final individual budgets . . . and verify compliance with federal and state laws and other requirements.

9. Welfare and Institutions Code section 4685.8, subdivision (c)(6), provides in pertinent part that the SDP "shall only fund services and supports provided pursuant to this division that the federal Centers for Medicare and Medicaid Services determines are eligible for federal financial participation."

10. Welfare and Institutions Code section 4685.8, subdivision (d)(3)(C), provides that a participant in the SDP "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."

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11. Welfare and Institutions Code section 4685.8, subdivision (k), provides:

The participant shall implement their IPP, including choosing and purchasing the services and supports allowable under this section necessary to implement the plan. A participant is exempt from the cost control restrictions regarding the purchases of services and supports pursuant to Section 4648.5. A regional center shall not prohibit the purchase of any service or support that is otherwise allowable under this section.

12. Welfare and Institutions Code section 4685.8, subdivision (n), provides:

Annually, participants may transfer up to 10 percent of the funds originally distributed to any budget category set forth in paragraph (3) of subdivision(m) to another budget category or categories. Transfers in excess of 10 percent of the original amount allocated to any budget category may be made upon the approval of the regional center or the participant's IPP team.

13. Welfare and Institutions Code section 4685.8, subdivision (p), provides:

(1) The department, as it determines necessary, may adopt regulations to implement the procedures set forth in this section. Any regulations shall be adopted in accordance with the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Notwithstanding paragraph (1) and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and only to the extent that all necessary federal approvals are obtained, the department, without taking any further regulatory action, shall implement, interpret, or make specific this section by means of program directives or similar instructions until the time regulations are adopted. It is the intent of the Legislature that the department be allowed this temporary authority as necessary to implement program changes only until completion of the regulatory process.

ANALYSIS

1. In compliance with Welfare and Institutions Code section 4685.8, subdivision (n), the transfer of funds from one of claimant's SDP budget categories to the proposed purchases does not exceed 10 percent of the funds originally distributed to any budget category.

2. The evidence did not establish that any of the proposed purchases, the iPad, the Nintendo Switch, or field trips, are beneficial. Consider OT, the benefits from which may include the consumer's increased motor skills and strength. These benefits assist claimant in her struggles, as noted in her PCP, with fine motor control. Benefits of this sort allow a consumer to live a life more like peers and be better able to take a place in the community. It is not clear on this record that any of the proposed purchases have similar benefits. The position statement the Canadian Pediatric Society, Exhibit D, discussed benefits from the sort of screen use available on devices like the

iPad and Nintendo Switch, but it discussed adverse effects of screen use as well. As already noted, however, the position statement disclaimed applicability to some of the disabled, such as claimant.

3. The proposed electronic devices may represent innovation, which is recognized as beneficial in Welfare and Institutions Code section 4685.8, subdivision (b)(2)(G). But the evidence did not establish that the devices will more effectively allow a participant in the SDP like claimant to achieve her goals. It is not clear on this record that the proposed electronic devices or field trips with claimant's Community Integrationist will be effective in meeting her goal of involvement in her community. Electronic devices in particular, like those proposed, are known to be isolating for some users, even as they open opportunities for extensive communication with others, such as that relating to games. As Welfare and Institutions Code section 4685.8, subdivision (b)(2)(G) makes clear, innovation without achievement of this type is unavailing. To the extent the devices pose the danger of isolation, the statement of CSC Nunez in her April 23, 2021 email, Exhibit L, is correct.

4. With respect to the use of electronic devices, there is a significant difference between the District's policy, as articulated in the RUP, and the SDP. Concerns for the education of the thousands of elementary and secondary students in a metropolis like Los Angeles is more likely to make strict usage rules necessary, not only to promote educational use, but also to ban abuse. Fewer rules may be necessary under the SDP, since a significant amount of freedom is a main goal of the program. But the example of District is still instructive, cautioning against unregulated use of electronic devices, such as those proposed.

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5. Claimant is correct that all of the proposed purchases would assist in some way in her socialization, her communications and interactions with her peers especially. As the IPP, PCP, and IEP indicate, claimant's participating in social events and being friends with peers are worthwhile goals. Claimant would likely gain thereby self-assurance and confidence and so have the opportunity and be enabled to live a life more like peers who are not disabled. Such a life is just what the Lanterman Act is meant to promote and the Service Agency is meant to bring about.

6. It is also most likely, as Ms. Kulzer-Reyes acknowledged, that claimant would have fun while socializing by means of electronic devices, especially the Nintendo Switch, the main purpose of which is to play games. She would likewise probably be amused and enjoy the diversion of visiting amusement parks, museums, and the other points of interest she has proposed.

A. It is a misreading of claimant's IPP, however, to conclude that the Service Agency should ensure that claimant is amused or engages in pleasing experiences. Claimant's March 19, 2021 IPP, Exhibit 5, page 22, quoted above, recognizes the importance for claimant of participating in Girl Scouts, for instance, or dancing with peers. But that does not mean that the Service Agency should fund for participation in those activities.

B. One reason that an activity like participation in Girl Scouts is not properly an SDP category or an item for funding in an SDP individual budget is that it is not necessary or needful. The one thing needful and necessary is that claimant grow up among peers and be a part of the society and community of which they are members. If claimant is able to achieve this goal without participation in Girl Scouts, because for instance she could without undue difficulty participate in some other group, then Girl Scouts is not an item whose funding the Service Agency should

approve in an SDP individual budget as a service or support that is "necessary" within the meaning of Welfare and Institutions Code section 4685.8, subdivisions (b)(2)(H)(i), (d)(3)(C), or (k).

C. Similarly, the evidence does not establish that an option like purchasing an iPad or field trips meets the requirement of "cost-effectiveness" within the meaning of Welfare and Institutions Code sections 4512, subdivision (b), and 4685.8, subdivision (b)(2)(H)(i). As Ms. Kulzer-Reyes noted, the costs are relatively small, so that theoretically their effectiveness need only be small. But the real question is whether the proposals are aimed at the right type of effectiveness. It was not shown that the devices or field trips are materially effective at achieving the goals of claimant's IPP and PCP.

D. The aim of the Lanterman Act is not to ensure that a consumer has fun or is amused or diverted. The Service Agency is not operating an enterprise the main objective of which is the amusement of its consumers, but if the Service Agency provides a legally sanctioned service or support that happens to cause amusement for the consumer, that is no reason to deny such a service or support.

E. On the other hand, to the extent the main purpose of a proposed service or support is not socialization, or assistance to a consumer to be more independent, or some other goal recognized by the Lanterman Act, its place in the SDP is suspect. The more fun or amusement outweighs the practical utility of a service or support, the stronger the case for its being excluded from an SDP individual budget, no matter how little its cost.

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7. The Service Agency has, under Welfare and Institutions Code section 4685.8, subdivisions (b)(2)(A) and (b)(2)(H)(ii), exercised appropriate oversight of claimant's purchases, including the proposed purchases. That oversight flagged the proposed purchases not only as unnecessary and out of keeping with claimant's IPP and PCP goals, but also as contrary to federal laws and regulations, precisely because amusement would be so much a part of their use.

8. All of the proposed purchases are impermissible, as explained in the CMS Guide, as services that are diversional or recreational in nature. They fall outside the scope of § 1915(c) of the Social Security Act. As a result, funding the proposed purchases under claimant's SDP individual budget would be contrary to Welfare and Institutions Code sections 4685.8, subdivision (c)(6) and 4685.7, as inconsistent with federal law as applied by DDS directive.

9. The evidence did not establish that claimant meets criteria for allowable Communication Services or Technology under the Self-Determination Program Service Definitions, Exhibit G.

CONCLUSIONS OF LAW

1. It is contrary to state and federal law that the SDP should fund the purchase of electronic devices, the primary purpose of which is participation in electronic games and communications with game participants. Expenditures on such items would contravene guidance by DDS in accord with its directives to Service Agencies and federal laws and regulations.

2. Field trips are like the proposed electronic devices, They may not be funded by a consumer's SDP as promoting socialization and physical activity. Their funding would contravene state and federal laws and DDS directives.

ORDER

Claimant's appeals are denied.

DATE:

THOMAS LUCERO
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.