

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JOSEPH H.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2011111015

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on February 16, 2012 in Pomona, California.

Joseph H. (Claimant) was represented by his mother, Maria F.¹ Claimant did not attend the hearing.

Daniella Martinez, Program Manager, Fair Hearings, San Gabriel Pomona Regional Center (SGPRC or Regional Center)

Oral and documentary evidence was received. The matter was submitted for decision at the conclusion of the hearing.

ISSUE

Shall the Regional Center fund the purchase of an adult sized Rifton adaptive tricycle for Claimant?

¹ Claimant and his mother are identified by first name and last initial to protect their privacy.

FACTUAL FINDINGS

Jurisdictional Facts

1. Claimant is a thirteen-year-old boy who is a consumer of SGPRC based on his qualifying diagnoses of cerebral palsy/spastic diplegia² and severe mental retardation. Claimant also has a history of seizures while sleeping. These are currently controlled with medication.

2. Claimant lives with his mother and two older siblings. He attends the Danbury Elementary School located in the Claremont Unified School District and is eligible for special education services based on the criteria of severe orthopedic impairment and intellectual impairment. Claimant's Individualized Education Program includes goals related to self- help and movement. He receives adaptive physical education services due to his orthopedic impairment.

3. Claimant's mother asked SGPRC to provide funding for the purchase of an adult size Rifton³ adaptive tricycle for Claimant to use at home and in the community. Claimant has outgrown a similar child size tricycle SGPRC purchased for him in 2006.

4. SGPRC denied the request by a Notice of Proposed Action (NPA) and cover letter, dated November 11, 2011.

5. On November 22, 2011, mother filed a Fair Hearing Request on behalf of Claimant. This hearing ensued.

Claimant's Background Information

6. Claimant's last Individual Program Plan (2011 IPP) meeting was held on January 19, 2011 at Claimant's home. Mother, Claimant and Claimant's SGPRC service coordinator participated in the meeting. Claimant's 2011 IPP identifies several short and long terms goals including that Claimant will be walking and will attend to his self help needs. The 2011 IPP indicates Claimant is not receiving Medicare or Medi-Cal, although the NPA indicates that Claimant is receiving Medi-Cal. No In Home Support Services (IHSS) are

² Official notice is taken of the definition of spastic diplegia: "In this type of cerebral palsy, muscle stiffness is predominantly in the legs and less severely affects the arms and face, although the hands may be clumsy. Tendon reflexes are hyperactive. Toes point up. Tightness in certain leg muscles makes the legs move like the arms of a scissor. Children with this kind of cerebral palsy may require a walker or leg braces." <http://www.ninds.nih.gov/disorders/cerebralpalsy/detailcerebralpalsy.htm>

³ No evidence was presented regarding the efficacy or cost effectiveness of this particular brand of tricycle or of alternative tricycles suited to Claimant's needs.

being provided to the family. At the time of IPP, Claimant was receiving \$737.40 dollars per month in SSI benefits.

7. At the time of the 2011 IPP, SGPRC was not purchasing any services for Claimant. Respite was discontinued because mother did not need the service.

Facts Related to Claimant's Request

8. Claimant is able to ambulate for short distances with his walker. For longer distances he uses a wheelchair. According to Claimant's 2011 IPP, he is able to independently maneuver his wheelchair. Claimant wears braces to help support him when standing and wears mobilizers at night to prevent his knees from contracting. Mother exercises Claimant's legs daily to maintain flexibility. In addition to the equipment Claimant uses for mobility and to minimize his contractures, Claimant has a bath chair and a toilet seat. Claimant also receives twice weekly therapy from California Children's Services (CCS). According to mother, when Claimant does not ride the tricycle, he is more tired, complains about stiffness in his legs, has difficulty getting out of the shower and is unable to engage in as many activities.

9. Claimant received his current child size adaptive tricycle from the Regional Center in 2006. Mother is requesting an adult size tricycle because Claimant has outgrown the one he currently has. Mother discussed the need for an adult tricycle with Claimant's California Children's Service (CCS) therapist. The therapist told mother that an adult tricycle would be beneficial for Claimant because it would help to strengthen his legs and keep his knees from contracting. Mother has observed the beneficial effect when Claimant was using the child-size tricycle. Mother also described Claimant's enthusiasm when riding his tricycle. Claimant continues to ask to use his child-size tricycle even though he has outgrown it. Claimant always uses his tricycle under the supervision of an adult.

10. Regional Center does not dispute that Claimant benefits from the use of a tricycle. In its NPA and cover letter, Regional Center stated as its sole basis for denying the purchase the following reasoning:

According to Welfare & Institutions Code 4646.4(2) [*sic*]⁴, Regional Centers shall ensure utilization of generic services and supports when appropriate. [Claimant] has used an adapted tricycle since 2006. You have shared that CCS recommends that [Claimant] continue to use the tricycle, but he has almost outgrown the one he has. [Claimant] is Medi-Cal and CCS eligible. If the use of the tricycle is required for continued strength training or recommended by his Occupational Therapist, funding for this type of equipment should be requested by those agencies.

⁴ This appears to be a reference to Welfare and Institutions Code section 4646.4, subdivision (a) (2).

11. At the commencement of the hearing on this matter, without objection, a letter dated January 19, 2012 from the County of Los Angeles, Department of Public Health, Children's Medical Services, California Children's Service division, regarding claimant's request for the purchase of a tricycle was received into evidence. The letter states as follows:

The [tricycle] is not a CCS . . . benefit. TITLE 22, CHAPTER 1 Sect. 41518[.⁵] "Medically necessary benefits "are those services, equipment tests, and drugs which are required to meet the medical needs of the client's CCS eligible medical condition as prescribed, ordered or requested by a CCS physician and which are approved within the scope of benefits provided by the CCS program.

The January 19, 2012, CCS letter states that a copy was sent to the SGPRC.

12. In its NPA, Regional Center did not cite to Welfare and Institutions section 4646.4, subdivision (a)(1) or otherwise indicate that it was basing its denial of Claimant's request for a tricycle on the grounds that the purchase was not authorized under the agency's purchase of service policy (POS Policy or Policy). Nor did it provide a copy of the Policy as an enclosure with the NPA. It did include a copy of the POS Policy to mother in advance of the hearing as part of the agency's evidence package and the Policy was received into evidence. Although the Regional Center did not cite the Policy as the basis of its denial, after the CCS denial letter was received into evidence, SGPRC argued that the purchase was not permitted under the provisions of its POS Policy governing medical devices because there is no evidence that the tricycle is "medically necessary."

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁶ An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal Regional Center's denial of his funding request. Jurisdiction in this case was therefore established.

⁵ The letter incorrectly cites section 41518 for the definition of "medically necessary benefits." The correction citation is California Code of Regulation, title 22, section 41452.

⁶ Further statutory citations are to the Welfare and Institutions Code, unless indicated.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

3. When one seeks government benefits or services, the burden of proof is on him or her. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant bears burden of proof because the tricycle is a new benefit or service.

Law Applicable to Claimant's Funding Request

4. The Lanterman Act is a comprehensive scheme to provide “an array of services and supports . . . 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.” (§ 4501.) The purposes of the scheme are twofold: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685) and (2) to enable developmentally disabled persons to approximate the pattern of living of non-disabled persons of the same age and to lead more independent and productive lives in the community.” (§§ 4501, 4750-4751; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. The consumer’s needs are determined through the IPP process. The process “is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments.” (§ 4646, subd. (a).)

6. Section 4512, subdivision (b), generally defines services and supports that can be funded by regional centers as being those that are “specialized . . . or special adaptations of generic services and supports directed toward the alleviation of a developmental disability . . . or toward the achievement and maintenance of independent, productive, normal lives” Pursuant to that same provision, such services and supports may include “adaptive equipment and supplies.” Section 4685, subdivision (c)(1), similarly provides that in order to provide opportunities for children to live with their families, regional centers shall give a very high priority to services and supports designed to assist families care for their children, including “special adaptive equipment such as wheelchairs, hospital beds, communication devices, and other necessary appliances and supplies”

7. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are also directed by the Legislature to provide the services in a cost-effective manner. (§§ 4512, subd. (b), 4640.7, subd. (b), and 4646, subd. (a).)

8. In 2008, the Legislature enacted section 4646.4. Effective September 1, 2008, that section requires regional centers to establish an “internal process” to be applied at the

time of development, scheduled review, or modification of a consumer's IPP. The "internal process" must adhere to federal and state law and regulation, and when purchasing services and supports, must ensure (1) conformance with purchase of service policies, as approved by the Department of Developmental Services; (2) utilization of generic services and supports when appropriate; (3) utilization of other services and sources of funding as contained in section 4659; and (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 determining the family's responsibility, the service agency must, "take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care." (§ 4646.4, subd. (a).)

9. A purchase of service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at pp. 390-393.)

10. As noted above, SGPRC argued for the first time in the hearing that its POS Policy requires that the equipment be deemed "medically necessary." There is no evidence that SGPRC informed mother of this requirement before the commencement of the hearing. Nor did SGPRC make an independent assessment regarding whether an adaptive tricycle for Claimant is medically necessary. Instead, during the hearing, SGPRC relied upon CCS's determination that an adaptive tricycle is not medically necessary under CCS standards. Although the Policy provides for exceptions to be considered by SGPRC, the agency did not make a determination whether Claimant was entitled to an exception to its requirement that adaptive equipment be medically necessary. Presumably, an exception under the Policy does not contravene the holding in *Association of Retarded Citizens*, 38 Cal.3d 384, *supra*. The consequence of not considering an exception in Claimant's case resulted in a determination that Claimant was not eligible for an adaptive tricycle no matter how beneficial it might be because it was not medically necessary under CCS's standards. Implementation of the Policy without consideration of an exception in such a fashion is inconsistent with the principle of individual choice afforded consumers under the Lanterman Act. (§ 4646, subd. (a).)

11. Claimant's 2011 IPP identifies being able to walk and attend to his self-care needs. These two goals are furthered by maintaining flexibility and strength in Claimant's legs. This can be achieved by a combination of therapy and exercise provided by mother, and the exercise and strength building provided by riding a tricycle. Due to his cerebral palsy, Claimant cannot use a regular tricycle, but instead needs an adaptive one. Thus, the need for an adaptive tricycle is related to his developmental disability. By definition, a typical minor child would not need an adaptive tricycle. Claimant needs one due to his cerebral palsy. The purchase of such specialized adaptive equipment is specifically provided for in the Lanterman Act. (§ 4512, subd. (b).)

12. In 2006 SGPRC purchased an adaptive tricycle for Claimant. There is no evidence as to the basis for this decision. There is also no evidence that Claimant does not

need an age appropriate version of the tricycle SGPRC purchased for him in 2006. Given that SGPRC never informed mother that she would have to show medical necessity in order to obtain a tricycle for Claimant, and the fact that the RC purchased such equipment in the past, coupled with SGPRC acknowledgement that a tricycle is beneficial for Claimant, and the un-rebutted positive effect a tricycle has on Claimant's strength and flexibility, there is no reason that an exception to the POS Policy requiring a showing of medical necessity should not be granted. Mindful that SGPRC is required to operate in a cost effective manner, Regional Center may select the appropriate adaptive adult size tricycle to purchase in consultation with Claimant's CCS therapist or another professional with specialized knowledge of such equipment.

13 In light of Factual Findings 1 through 12 and Legal Conclusions 1 through 12, SGPRC's decision to not purchase an adult size adaptive tricycle for Claimant was erroneous. San Gabriel Pomona Regional Center may select the appropriate tricycle for Claimant, taking into consideration cost-effectiveness in making the purchase.

ORDER

Claimant's appeal is granted. The San Gabriel/Pomona Regional Center shall fund an appropriate adaptive adult size tricycle for Claimant.

DATED: March 2, 2010

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this Decision, and either party may appeal it to a court of competent jurisdiction within 90 days.