

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

In the Matter of:

CHASE A.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2013080265

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 25, 2013, in Pomona.

Claimant was represented by his father and mother.¹

Daniela Santana, Fair Hearing Manager, represented San Gabriel/Pomona Regional Center (Service Agency).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on September 25, 2013.

ISSUE

Should the Service Agency be required to purchase an Aquatec bath lift chair for claimant?

¹ Claimant and his parents are identified by first name and last initial, or by title, to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-4; claimant's exhibits A-B.

Testimonial: Daniela Santana, Fair Hearing Manager; claimant's father and mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 15-year-old boy. He is a consumer of the Service Agency on the basis of his diagnosis of moderate mental retardation and seizure disorder. He is also diagnosed with mild cardio myopathy.

2. On July 24, 2013, the Service Agency sent claimant's parents a letter and a Notice of Proposed Action (NOPA), notifying them it was denying their request for the Service Agency to purchase an Aquatec bath lift chair for claimant. The reason for the Service Agency's action was that claimant "has a bath chair that can be used to bathe him" and the family's "current insurance provider denied [their] request for the [Aquatec bath lift chair] indicating it was not medically necessary." The letter and NOPA cited Welfare and Institutions Code section 4646.4.

3. On August 1, 2013, claimant's father filed a fair hearing request, on claimant's behalf, to appeal the Service Agency's decision. Jurisdiction in this matter was established.

Claimant's Background

4. Claimant lives at home with his parents and younger sister. Pursuant to his individual program plan (IPP) dated June 17, 2013, the Service Agency provides claimant and his family 58 hours per month of respite. Claimant attends high school and receives special education services, currently consisting of adaptive P.E. twice per week for 30 minutes, speech therapy twice a week for 30 minutes, and occupational therapy, which just started recently, twice a week for 30 minutes. Claimant and his family also receive 179 hours per month of In-Home Supportive Services (IHSS).

5. Claimant has severe seizure disorder. He gets clonic-tonic, drop, grand mal, and petite seizures. His mother reported that claimant may have up to eight seizures in one week. Due to the severity of his seizures, claimant wears a helmet at all times to protect his head from injury. He is prescribed five medications for the purpose of seizure control. Claimant's mother reported that claimant sometimes will

exhibit aggressive and anxious behaviors, or have an emotional outburst for no reason, right before he has a seizure. When claimant's parents or other family members notice these behaviors, they will provide additional supervision to ensure he is safe while he is having the seizure.

6. Claimant does not ambulate independently. He uses a wheelchair, walker, gait belt, and stroller to move around. Although the wheelchair is motorized, claimant needs assistance to maneuver it. Claimant has poor dexterity and does not have full use of his fine and gross motor skills. Claimant needs assistance with all of his self-help tasks. He is unable to make simple movements to assist his mother when she is dressing him. He does not have bladder or bowel control and uses diapers. He cannot feed himself independently. Claimant's mother purees his food and feeds it to him because he has difficulty chewing. Claimant is nonverbal but can say three words (Dada, Momma, and taco). He communicates by making noises, and his parents have learned to identify his noises and cries. He will reach and point to things he wants. Claimant requires supervision at all times to prevent injury or harm to himself.

7. Claimant cannot bathe independently. As stated in his IPP, "When it comes to bathing, this task is performed by two people. Mom reports that this task is getting harder as [claimant] gets older. Mom reports that the caregiver usually will bathe him. Mom requested that Medi-[C]al cover the costs for an Aquatec Bathlift shower chair, but it was denied. Mom provided SC [service coordinator] with the denial letters from her private insurance and Medi-[C]al as well. She is requesting that SC fund for The Aquatec Bathlift bath chair."

Current Service Request

8. Claimant's parents have requested the Service Agency to purchase an Aquatec bath lift chair for claimant. The Aquatec bath lift chair is described as "a battery powered lift where a person sits on the chair that is raised to the top level of the tub, then the chair is lowered to submerge the person in the tub for hygiene, then raises the person back to the top of the tub. The chair back reclines 35 degrees, and seat belts, chest belts, and rotary seats are available as accessories." (Exh. B.)

9. Claimant's parents contend that the Aquatec bath lift chair is necessary for ensuring claimant's safety and protection from injury during bathing. Claimant is 4 feet, 11 inches tall and weighs 80 pounds. He is continuing to grow and get heavier. Claimant is unable to walk on his own, he cannot manipulate his fingers, and his seizures are unpredictable. During his seizures, claimant's arms may flail around uncontrollably and/or his head may be thrown violently forward or backward.

10. In their testimony, claimant's parents described the bathing process for their son. Since claimant cannot stand on his own, his parents stand and hold him up to take off his clothes and remove his diaper, while also adjusting the shower head and water temperature. The parents must then move claimant's legs to make him step

over the top edge of the tub and move his legs and body into tub, where they then must position him in the tub. Because claimant could have a seizure at any time during this process, one bather must hold on to claimant's torso to prevent him from moving around and banging against the tub and injuring himself. This can be difficult, especially when Claimant is lathered up with soap, making him slippery and difficult for the bather to hold on to him.

11. Claimant's parents believe that the Aquatec bath lift chair will make the bathing process safer for their son and protect him from injury. The bath lift chair has features that will safely lift claimant in and out of the tub, and also keep him safely and securely in place in the tub. The parents are interested in getting an appropriate bath lift chair for their son; it does not have to be the Aquatec bath lift chair. They requested the Aquatec bath lift chair because it was the chair suggested by claimant's occupational therapist during one of his occupational therapy sessions. Mother told the therapist about her concerns with bathing, and the therapist looked through a catalog of medical equipment and suggested the Aquatec bath lift chair.

12. Claimant's parents are no longer using the bath chair mentioned in the Service Agency's denial letter and NOPA. The bath chair was purchased by claimant's parents on their own from a medical supply store. The bath chair is a plastic chair with a seat and back and four legs. The back of the chair does not recline. There are no straps to hold claimant in the chair during bathing. Although the parents could get claimant seated in the chair, the chair was unstable as claimant would move and rock back-and-forth in the chair. The bather would have to hold claimant down in the chair, which was made more difficult because of claimant's tendency to reach forward for the water in the tub. The parents tried to tie a strap around claimant's waist and the chair but this did not work, as claimant could still move around in the chair.

13. The Service Agency's Purchase of Service (POS) Policy provides that "medical, dental, equipment, and supplies" may be purchased for a consumer if the following four criteria are met:

- (1) The needed treatment or equipment is associated with, or has resulted from a developmental disability, developmental delay or an established risk condition;
- (2) The requested treatment or equipment is deemed to be medically necessary;
- (3) The regional center consultants or clinicians have reviewed and approved the need for such equipment; and
- (4) The individual is not eligible for Medi-Cal, California Children's Services, private insurance or another third

party payer coverage or these funding resources have denied the necessary equipment or services in writing and the regional center has determined that an appeal of the denial is not warranted.

14. The Service Agency denied the parents' funding request because the requirements of the above POS Policy have not been met. Specifically, the Aquatec bath lift chair requested by claimant's parents has not been deemed medically necessary for claimant. Ms. Santana testified that the Service Agency's information is that the family's private insurance denied coverage for lack of medical necessity. Ms. Santana also pointed out that there is no doctor's report or prescription to establish that the requested bath lift chair is medically necessary for claimant. Ms. Santana noted that another assessment regarding claimant's needs regarding bathing "seems necessary," since the DHCS decision indicated that claimant's assessments were almost two years old and his needs may have changed since then.

Other Funding Sources

15. Prior to requesting regional center funding, claimant's parents made requests to their private insurance and to Medi-Cal to purchase the Aquatec bath lift chair for their son. Both requests were denied on the basis that the requested bath lift chair was not medically necessary.

16. The letter from the claimant's private insurance denying the request for coverage of the Aquatec bathlift chair was not presented at the hearing. The Service Agency's information indicates that the family's private insurance determined the Aquatec bathlift chair was not "medically necessary" for claimant.

17. Subsequently, claimant's parents requested Medi-Cal funding for the Aquatec Bathlift chair on May 27, 2011. The request was denied on September 13, 2011, by the California Department of Health Care Services (DHCS), which is the state agency that administers the Medi-Cal program. Claimant's parents appealed the denial. A hearing on the appeal was held before an administrative law judge for DHCS on May 13, 2013.² A decision upholding the denial was adopted by DHCS on May 21, 2013. A copy of the DHCS decision adopted on May 21, 2013, was presented at this hearing. (Exh. B.)

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² The DHCS decision does not explain the two-year passage of time between the denial of the request for Medi-Cal funding on September 13, 2011, and the May 2013 hearing and decision on the parents' appeal of the denial.

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18. (A) A Treatment Authorization Request (TAR) for Medi-Cal funding of the Aquatec bath lift chair for claimant was submitted to DHCS on May 27, 2011. The TAR was supported by a "Certificate of Medical Necessity" signed by claimant's physician on May 19, 2011. In the Certificate, the physician described claimant as having a "very severe developmental delay" and "cannot be left alone or he may fall." The physician described claimant as "severely handicapped with seizures from grand mal to 'drop/clonic/tonic'," that "he is cognitively impaired, has the functional abilities of a 6 year old, and is transferred using a mechanical/person lift", and that "there is a high probability of injury to the child because he is not able to get in and out of the bathtub by himself due to an increase in seizures."

(B) On September 13, 2011, DCHS denied the TAR on the grounds that "medical necessity was not substantiated for the requested DME [durable medical equipment]." The material submitted in support of the TAR did "not provide sufficient information to determine the most appropriate bath equipment for the child," and did "not contain sufficient information to determine if the Aquatic Bath Lift with accessories is the appropriate and only equipment that will provide safety and hygiene for the child. Lacking in the submitted material is any explanation of why this particular equipment is necessary for the child's safety and health."

(C) At the May 13, 2013 DHCS hearing, DHCS noted that the TAR was submitted and denied in 2011 and, therefore, was based on assessments that were almost two years old. DHCS suggested that claimant's parents "may file a more current request for bath equipment with a more current assessment of medical necessity." DHCS indicated other bath equipment was available but were not part of the TAR because parents were unaware of such equipment.

(D) The 2013 DHCS decision concluded as follows: "[Father's] request is founded on the contention that his son will fall and injure himself in the bath because the boy has a lack of motor control and seizures, and because the caregivers cannot safely bathe him without equipment. The child's medical diagnoses are undisputed. However, there is inadequate documentation and witness testimony to support the claim that the claimant's condition requires the use of the Aquatic Bath Lift, particularly in light of the fact the medical assessment of need was made almost two years ago. The [son's] medical condition may have changed, and there may be other products on the market that would better serve the needs of the child and his caregivers."

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LEGAL CONCLUSIONS

1. For the reasons set forth below, grounds do not exist to require the Service Agency to purchase an Aquatec bath lift chair for claimant at this time. However, grounds exist to require the Service Agency to fund an appropriate assessment for the purpose of determining, through the IPP process, the adaptive equipment and supplies that are necessary, effective, and cost-effective in meeting claimant's needs with regard to bathing.

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)³ 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 properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

3. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan (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 individual program plan participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).) The services and supports that may be provided under an IPP include adaptive equipment and supplies, and assessment. (§ 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/or the consumer's family. The foundation of this mutual effort is the formulation of a consumer's IPP. A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The creation of an IPP is a collaborative process. (§ 4646.) The IPP is created after a conference consisting of the consumer, the consumer's representatives, regional center representatives, and other appropriate participants. (§§ 4646 and 4648.)

5. The planning process relative to an IPP shall include "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities. For children with developmental

³ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies.” (§ 4646.5, subd. (a)(1).)

6. Under section 4646.4, subdivision (a), when purchasing services and supports, regional centers must ensure conformance with its purchase of service policies, utilization of generic services and supports when appropriate, utilization of other sources of funding as contained in section 4659, and consideration of a family's responsibility for providing similar services and supports for a minor child without disabilities, taking into account a consumer's need for extraordinary care, services, supports and supervision. Section 4659 requires regional centers to "identify and pursue all possible sources of funding for consumers receiving regional center services," including but not limited to governmental programs such as Medi-Cal and "[p]rivate entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer."

7. In this case, the evidence did not establish that claimant is entitled to regional center funding for the purchase of an Aquatec bath lift chair at this time. Under the Lanterman Act, the Service Agency is required to provide services and supports to claimant based on his needs as determined in his IPP. According to his IPP, claimant has extraordinary needs with regard to bathing resulting from his disability. He requires the assistance of two people for bathing. He is unable to move on his own and has a serious risk of injury due to his severe seizure disorder. Claimant has a need for adaptive equipment and supplies to ensure his safety during bathing. However, it has not been determined, through the IPP process, that the Aquatec bath lift chair requested by his parents is necessary, effective, and cost-effective in meeting claimant's needs. Nor has it been determined, through the IPP process, what other available adaptive equipment and supplies may be necessary, effective, and cost-effective in meeting claimant's needs. Such determinations cannot be made without a proper assessment. In this case, it is appropriate for the Service Agency to fund a proper assessment of claimant's need for adaptive equipment and supplies that will ensure his safety during bathing. (Factual Findings 4-18.)

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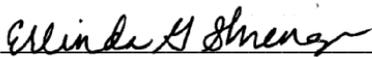
ORDER

Claimant's appeal is granted in part and denied in part as follows:

1. The appeal is granted in that, within 30 days of the date of this Decision, the Service Agency shall fund an appropriate assessment to determine the services and supports that are necessary, effective, and cost-effective in meeting claimant's needs with regard to bathing. Such services and supports may include, but are not limited to, adaptive equipment and supplies. Within 30 days of the completion of the assessment, the Service Agency shall convene an IPP planning meeting with claimant's parents to discuss the results of the assessment and the Service Agency's obligations, if any, for providing required services and supports.

2. In all other respects, claimant's appeal is denied. The Service Agency is not required to purchase an Aquatec bath lift chair for claimant at this time.

DATED: October 8, 2013



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.