

BEFORE THE  
OFFICE ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2017110151

DECISION

Administrative Law Judge Carmen D. Snuggs, Office of Administrative Hearings (OAH), State of California, heard this matter in Torrance, California, on March 9, 2018.

Claimant, who was not present, was represented by her grandmother.<sup>1</sup>

Latrina Fannin, Manager of Rights and Quality Assurance, represented the Service Agency, Harbor Regional Center (HRC or Service Agency).

The ALJ held the record open until March 23, 2018, to allow Claimant to submit to OAH on a compact disc, a video of Claimant taken by Claimant's brother. A copy of the video was provided to HRC prior to the hearing and viewed by the parties at the hearing without objection by HRC. OAH received the compact disc on March 20, 2018, which was marked as Exhibit K and received into evidence.

The record was closed and the matter was submitted for decision on March 23, 2018.

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<sup>1</sup> Initials and family titles are used to protect the privacy of Claimant and her family.

## ISSUES

1. Shall HRC fund the purchase of a safety<sup>2</sup> bed for Claimant?
2. Shall HRC fund the purchase of a larger chair<sup>3</sup> in which the Claimant can receive breathing treatments and behavioral therapy?

## EVIDENCE CONSIDERED

The Service Agency's Exhibits and Witnesses: Service Agency's exhibits 2-18. Service Agency witnesses included Aboo Sahba, M.D. and Pablo Ibanez, HRC's Client Service Manager.

Claimant's Exhibits and Witnesses: Exhibits A-N. Claimant's witnesses included Claimant's father, Claimant's mother, and Claimant's grandmother.

## FACTUAL FINDINGS

1. On October 10, 2017, the Service Agency sent a Notice of Proposed Action to Claimant's parents indicating that Claimant's request for the Service Agency to fund the purchase of an enclosed bed and a larger toddler chair was denied. Claimant filed a timely request for fair hearing.

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<sup>2</sup> Claimant's Fair Hearing Request refers to both an enclosed bed and safety bed. Those terms are used interchangeably in this Decision.

<sup>3</sup> Claimant currently uses a toddler chair for this purpose.

2. Claimant is an 11 year-old female consumer of the Service Agency who is eligible for services due to Angelman Syndrome,<sup>4</sup> intellectual disability, and seizure disorder diagnoses. She is non-ambulatory and tracheostomy tube and gastrostomy tube (GT) dependent. Claimant attends a Special Day Class with the assistance of a one-on-one Licensed Vocational Nurse (LVN) provided by the school district. She also receives breathing treatments twice per day.

3. Claimant lives in the family home with her parents, older brother, and maternal grandparents. Claimant's Individual Family Service Plan (IFSP) dated July 26, 2017 and amended January 4, 2018, indicates that Claimant receives physical therapy once per week through private insurance. HRC funds 30 monthly hours of LVN respite services and six weekly hours of Applied Behavior Analysis (ABA) provided by Autism Spectrum Therapies. Claimant also receives nursing services from 10:00 p.m. to 6:00 a.m. Sunday through Friday through Medi-Cal's Early and Periodic Screening, Diagnostic, and Treatment program, and 157 hours per month of In-Home Supportive Services (IHSS). Claimant's mother is her approved IHSS worker. Claimant is eligible for 16 additional hours of nursing services but is not maximizing the total number of authorized hours because, as explained by Claimant's family, they want to spend time together as a family without other individuals in the home.

4. Claimant's home, health, and daily living needs were discussed during the July 5, 2017 IFSP meeting. Specifically, it was noted that Claimant used a toddler chair to receive her breathing treatments and that she could be "wiggly and resistive" while receiving the treatments. Claimant must be closely supervised to make sure she does not endanger herself or others by grabbing things and putting them in her mouth,

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<sup>4</sup> Angelman Syndrome symptoms include seizures, sleep deprivation, developmental delays and facial distortion.

pulling apart equipment, and pulling herself up with the risk of failing and getting her head stuck between objects. (Ex. 4, pp. 5, 9.) The plan for Claimant's behavioral health included the provision of ABA services with desired outcomes of a reduction of Claimant's maladaptive behavior and for Claimant to remain safely in her home.

5. Also on July 5, 2017, Claimant's mother reported that Claimant was in need of a larger toddler chair because Claimant had outgrown it. She also reported that Claimant was in need of a bigger enclosed bed to prevent falls because Claimant was able to crawl on and hang over the toddler bed that she was currently using. Claimant's parents previously requested from Kaiser Permanente (Kaiser) an enclosed bed to prevent falls. On June 28, 2017, Kaiser denied the request on the grounds that an enclosed bed was not medically necessary. However, Kaiser offered to fund a standard hospital bed. Claimant's family refused the standard hospital bed because they believed that Claimant would not be safe based on their experience during Claimant's prior hospitalization. Claimant's grandmother took time off work in order to be continually present in Claimant's room because hospital staff was unable to remain with Claimant around the clock. Claimant's family was concerned that she would crawl out of the hospital bed if she was unattended.

6. After consulting with HRC nurse Kim Chvotkin, Antoinette Perez, HRC's Director of Family Services, HRC Client Service Manager, Pablo Ibanez, and HRC physician consultant Ahoo Sahba, M.D. regarding Claimant's mother's requests, HRC determined that an equipment evaluation was required to assess Claimant's needs.

7. On September 18, 2017, Mr. Ibanez and Dr. Sahba visited Claimant's home, where they met with Claimant's mother and grandfather. They observed Claimant's toddler bed, which was in the living room. They were also informed by Claimant's mother that Claimant frequently wakes up at night and is very active. Someone always sleeps on the couch to make sure Claimant does not fall out of bed. It was reported

during the visit that Claimant had recently fallen out of bed but was not injured. In addition, it was noted that Claimant has a high pain tolerance threshold. In 2011, Claimant fractured her tibia but the family was not aware of it until later in the day when Claimant began to cry because of the pain. Mr. Ibanez and Dr. Sahba told Claimant's family during the visit that HRC viewed an enclosed bed as a restrictive option and asked whether the family had considered a mattress or a futon bed. Claimant's mother was adamant that a futon or mattress were not options and an enclosed bed was the only safe alternative. Claimant's mother also provided HRC with consent to explore other options through Medi-Cal and Kaiser. However, the next day Claimant's grandmother withdrew the consent as to Medi-Cal and reiterated Claimant's mother's assertion that an enclosed bed is the only safe option for Claimant. She also informed HRC that she intended to obtain a prescription from Dr. Azcueta for the bed and chair.

8. During the visit to Claimant's home, Mr. Ibanez and Dr. Sahba also viewed the toddler chair Claimant used to receive breathing treatments and behavior therapy. Claimant's mother explained that Claimant has grown accustomed to the chair and the chair's tray allowed her to play with toys during the treatment.

9. On September 20, 2017, Dr. Azcueta prescribed a safety bed and safety chair for Claimant.

10. On October 11, 2017, Laurie Garabedian, R.N., B.S.N., a HRC nurse vendor, conducted an assessment of Claimant and subsequently provided a report containing her findings and recommendations. She described Claimant as medically fragile and as requiring skilled intervention with GT feedings, administering medications, tracheostomy tube care, respiratory monitoring, and administration of respiratory treatments. Ms. Garabedian also described Claimant as extremely active, that she twisted and turned and kicked, and rolled around on the floor. She opined that Claimant needed constant supervision because Claimant did not have a sense of danger or safety, she engaged in

self-injuring behavior, and she was subject to pulling out her GT and tracheostomy tube. Ms. Garabedian recommended that HRC provide assistance to Claimant's family in investigating possible options of a more enclosed bed to ensure her safety while sleeping.

11. On October 23, 2017, HRC contacted Kaiser regarding Claimant's request for an enclosed bed. A Kaiser durable medical equipment representative indicated that Kaiser considered an enclosed bed a restraint and the representative characterized Claimant's family's concern about her falling out of bed a caregiver or custodial issue. The Kaiser representative suggested placing the mattress on the floor or ensuring supervision at all times. Claimant was not eligible for a full length rail hospital bed because Kaiser typically only offered that type of bed to individuals in hospice care.

12. Mr. Ibanez testified at the hearing. He obtained Bachelor and Master of Arts degrees in psychology. He has worked at HRC for 15 years, and has been a Client Service Manager for 11 years. Mr. Ibanez currently manages nine Service Coordinators including Claimant's Service Coordinator. He is familiar with the statutes governing the provision of HRC services as well as HRC's Durable and Non-Durable Equipment and Supplies and General Standards policies. His testimony established that, consistent with the General Standard Policy, HRC may purchase durable equipment if a) an HRC specialist had reviewed the request and has indicated that the specific equipment would enable an HRC client to live a more independent and productive life at home; and b) the equipment to be purchased has been denied by, or the client is not eligible for, Medi-Cal, private insurance or any other third party payer. Services and supports may only be purchased if the HRC Planning Team determines that such services will accomplish all or any part of the client's IFSP.

13. Mr. Ibanez explained that HRC determined that Claimant failed to establish the need for an enclosed bed and a bigger toddler chair based on the determination of

Dr. Sahba as set forth in Factual Findings 15 and 16. HRC nurse Kim Chovtkin also opined that Claimant did not need a special chair to receive breathing treatments, but that Claimant can sit on the couch or Claimant's mother can hold Claimant on her lap. He expressed a willingness to work with Claimant's family to obtain more information regarding the hospital bed authorized by Kaiser to determine whether it will satisfy Claimant's needs and her family's safety concerns. Mr. Ibanez further expressed a willingness to explore Claimant's eligibility for protective supervision hours. He also offered to engage Claimant's ABA provider, AST, to address Claimant's behavior while receiving breathing treatments in order to satisfy concerns regarding Claimant's inability to receive the treatments other than in the toddler chair.

14. Dr. Sahba testified on behalf of HRC. She obtained her undergraduate degree from the University of California, Los Angeles and her medical degree from Chicago Medical School. She became licensed to practice medicine in California in 2008 and became board certified in pediatrics in 2010. She was in private practice for five and one-half years and has treated patients who suffer from Angelman Syndrome and developmental disabilities. Dr. Sahba has been a HRC physician consultant for two and one-half years. Dr. Sahba's opinions are given substantial weight given her education and experience.

15. Dr. Sahba reviewed Claimant's medical records, spoke with Claimant's treating physician, Dr. Azcueta, observed Claimant during the September 18, 2017 visit to Claimant's home, and reviewed Ms. Garabedian's nursing assessment. She also reviewed letters offered by Claimant's nurses describing the care provided to Claimant throughout the night and expressing a need for a safe bed. Dr. Sahba explained that she was most concerned about Claimant's need for constant supervision to ensure sustained placement of Claimant's GT and tracheostomy tube. Claimant's ear, nose, and throat physician stated that Claimant would be in danger of suffering respiratory distress if her

tracheostomy tube were out longer than several minutes. Dr. Sahba agreed that Claimant needs a safe sleep environment and opined that an enclosed bed would not address the need for constant supervision or safety. Rather, an enclosed bed would make it difficult to access Claimant in the event that Claimant's GT or tracheostomy became displaced. Dr. Sahba also offered that an enclosed bed may give Claimant's caregivers and her family a false sense of security, causing them to be less attentive. Finally, Dr. Sahba did not agree that an enclosed bed was a good option for Claimant because it is restrictive. Claimant offered articles containing samples of different safety beds. Dr. Sahba testified that she would not recommend any of the beds depicted because there is no medical necessity for them and they would not address Claimant's medical needs.

16. Dr. Sahba explained that the best way to keep Claimant safe is constant supervision and a low laying mattress or futon. Claimant's caregiver would have unfettered access to her and she would be safe from falls. Dr. Sahba opined that the hospital bed approved by Kaiser would meet Claimant's family's safety concerns. She clarified that the hospital bed's plastic rails could be adjusted to prevent Claimant from crawling or falling out of the bed, and explained that hospital beds were designed to keep clients safe.

17. With respect to Claimant's request for a bigger toddler chair, Dr. Sahba opined that Claimant can receive breathing treatments in any type of chair as long as her back is supported and, therefore, a toddler chair or a special type of chair is not required. She explained that there is no medical reason that requires the breathing treatments to be given in a toddler chair. Dr. Sahba recommended that Claimant's resistance to the breathing treatments be addressed by a behaviorist.

18. Claimant's mother, father, and grandmother expressed concern for Claimant's safety. They want Claimant to be protected and have the dignity of sleeping



in a bed like a child without special needs, and not on the floor. Claimant's family also expressed concern that Claimant's nurses cannot provide care while Claimant is on the floor. Claimant offered a letter from her nurse, Millicent Vereen, who provides care for Claimant from 10:00 p.m. to 6:00 p.m. She opined that Claimant would be at a high risk of injury if she slept on a futon or a mattress on the floor, and that a safety bed is appropriate for Claimant. She explained that there are times where she has to walk away from Claimant to get medicine or GT feedings twice per night and if Claimant slept on a futon or mattress, Claimant could engage in an unsafe act while Ms. Vereen is away. However, Dr. Sahba's testimony established Claimant's care providers can ensure Claimant's safety and still complete their duties by calling a family member or using an intercom device before leaving the room. This would allow someone to have eyes on Claimant at all times. She also testified that care could very well be provided while Claimant was on a futon or mattress.

19. Claimant's grandmother clarified that the family does not want an enclosed bed, but a bed with rails similar to a crib with sides that can be lowered, but high enough so that Claimant cannot climb over them. Claimant's grandmother expressed openness to receiving information regarding the hospital bed approved by Kaiser to determine whether it would satisfy the family's safety concerns.

20. Claimant's grandmother also explained that a larger toddler chair would not only allow Claimant to properly receive breathing treatments by allowing Claimant to be in an upright position, it would also allow Claimant to sit and interact with the family. She also explained that the couch or other type of chair is not an option because of the behavior displayed by Claimant when her breathing treatment is administered in a different location. For example, when Claimant receives her breathing treatment on the couch, she has to be physically restrained. She has bitten providers on three occasions. However, as established by Dr. Sahba and Mr. Ibanez, Claimant's family's

concerns raise behavioral issues and can be addressed by AST. Claimant failed to establish that a larger toddler chair is medically necessary.

## DISCUSSION

21. From the testimony presented at the hearing, it was evident that Claimant's parents and grandparents love Claimant and are devoted to ensuring that she is well taken care of and safe. Their dedication and commitment to Claimant are commendable. It was clear that their request that HRC purchase an enclosed or safety bed and larger chair was motivated by a sincere belief that it was in Claimant's best interest in order to ensure her comfort and safety, and to allow Claimant to properly receive breathing treatments and behavior therapy.

22. But when all the evidence is considered in light of the applicable law cited in the Legal Conclusions below, Claimant's grandmother did not demonstrate that HRC should be ordered to purchase an enclosed or safety bed for Claimant. The testimony of Dr. Sahba and Mr. Ibanez was compelling that an enclosed or safety bed is a restraint and that the hospital bed approved by Kaiser may be effective in allowing Claimant to sleep in a less restrictive and safe environment than an enclosed or safety bed. In addition, behavioral interventions may be effective in ensuring Claimant's breathing treatments are successfully administered in a chair or other seat other than a toddler chair. HRC's concern that the enclosed bed would restrict access to Claimant in the event of GT and tracheostomy tube displacement was persuasive. The expertise and experience that Dr. Sahba and Mr. Ibanez demonstrated regarding the effectiveness and value of behavioral interventions, the possibility of Claimant's eligibility for protective services, and the appropriateness of the hospital bed made their recommendations very convincing. Until the behavioral intervention services and the hospital bed are tried, HRC cannot be ordered to purchase a restraint as restrictive as the enclosed bed or safety bed as Claimant's family has requested.

## LEGAL CONCLUSIONS

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act Lanterman Act).<sup>5</sup> Under the Lanterman Act, an administrative “fair hearing” is available to determine the rights and obligations of the parties. (§ 4710.5.) Claimant requested a fair hearing to appeal the Service Agency’s proposed denial of funding for an enclosed bed and chair. Jurisdiction in this case was thus established.

2. 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.) Claimant is requesting that the Service Agency fund the purchase of an enclosed or safety bed and a larger toddler chair. Under these circumstances, Claimant bears the burden of proof.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4. The California Legislature enacted the Lanterman Act “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (*Association for Retarded Citizens*

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<sup>5</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

*v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) In addition, persons with developmental disabilities have a right to be treatment and habilitation services and supports provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, and supports, and a right to be free from unnecessary physical restraint. (§ 4502, subd. (b)(1) & (b)(8).)

5. Regional centers must develop and implement IPPs, which shall identify services and supports “on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of . . . the cost-effectiveness of each option . . . .” (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) Regional centers shall also consider the family’s responsibility for providing similar services and supports for a minor child without disabilities identifying the consumer’s service and supports needs as provided in the least restrictive and most appropriate setting, taking into account the consumer’s need for extraordinary care, services, supports and supervision. (§ 4646.4, subd. (a)(4).)

6. Regional centers have a duty to identify and pursue all possible sources of funding for consumers receiving regional centers, including Medi-Cal. (§ 4659, subd. (a).) They are prohibited from purchasing any service that would otherwise be available from Medi-Cal, private insurance, or a health care services plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. (§ 4659, subd. (c).) In addition, a regional center is prohibited from purchasing medical services for a consumer unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial, and the regional center determines that an appeal by the consumer or family of the denial does not have merit. (§ 4659, subd. (d)(1).) HRC’s General Standards and Durable and Non-Durable Equipment and Supplies policies are consistent with the foregoing statutes in that HRC is prohibited from purchasing durable medical equipment where the equipment or

supplies are otherwise available through Medi-Cal or another program, private insurance, or a health care service plan. (Exs. 14 & 15.)

7. Claimant has not met her burden of proving that HRC should fund the purchase of an enclosed bed or safety bed. The evidence established that such a bed is restrictive and would not address Claimant's propensity for, and risk of, displacing her GT and tracheostomy tube. Rather, constant supervision and a futon or low mattress would address those concerns as well as prevent falls. Moreover, a hospital bed has been approved by Claimant's private insurer but was rejected by Claimant's family sight unseen. It is undisputed that Claimant needs a safe sleeping environment. Should Claimant's parents reaffirm consent for HRC to obtain more information regarding the hospital bed approved by Kaiser, HRC should make best efforts to do so. In addition, should Claimant's parents cooperate with HRC and authorize HRC to communicate with, request information from, or give information to other agencies, institutions, or persons concerning Claimant's eligibility for protective supervision hours, HRC should make best efforts to do so.

8. Claimant has not met her burden of proving that HRC should fund the purchase of a larger toddler chair or any other chair for the administration of Claimant's breathing treatments and behavior therapy. While it may be more convenient or preferable for the treatments and therapy to be provided in this matter, it is not medically necessary. The evidence established that the care can be provided to Claimant in any seat that supports Claimant's back and that Claimant's resistance to behavior therapy and breathing treatments can be addressed by Claimant's ABA provider.

9. For the foregoing reasons, Claimant's appeal shall be denied.

## ORDER

1. Claimant's appeal is denied. The Service Agency's denial of Claimant's request for the Service Agency to fund the purchase of an enclosed or safety bed and a larger toddler chair is affirmed.

2. In the event Claimant's parents authorize HRC to communicate with Kaiser to obtain further information regarding the approved hospital bed and to request information from, or give information to other agencies, institutions, or persons concerning Claimant to obtain information regarding Claimant's eligibility for protective supervision hours, HRC shall make best efforts to do so.

DATED:

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CARMEN D. SNUGGS  
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.