

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

v.

NORTH LOS ANGELES COUNTY

REGIONAL CENTER,

Service Agency.

OAH No. 2013100558

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on December 4, 2013, in Van Nuys, California.

Ruth Janka, Contract Administrator, represented the North Los Angeles County Regional Center (NLACRC or Service Agency). Claimant was represented by his mother (Mother).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on December 4, 2013.

ISSUE

Must the Service Agency provide funding to install a water jet system in Claimant's walk-in bathtub?

FINDINGS OF FACT

1. Claimant is a 30-year-old man, and a consumer of the Service Agency. Specifically, Claimant has been diagnosed with profound mental retardation and

cerebral palsy, with moderate hypotonia, and is eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.¹ Claimant requires total care assistance, as Claimant is non-verbal, not toilet-trained, cannot prepare meals, cannot read or write, cannot close fasteners, and is incapable of using public transportation. Claimant currently resides with his parents (Parents) within the Service Agency's catchment area, who provide Claimant with care and assistance with hygiene, toileting/diaper changing, feeding, and many other tasks.

2. The Service Agency issued a Notice of Proposed Action (NOPA) on September 26, 2013, denying Claimant's request for the Service Agency to fund the installation of water or Jacuzzi jets, and multicolored LED lights, in Claimant's pending bathroom construction. Mother believed that the water jets and the LED lights would produce a calming effect in Claimant, and thus reduce his aggressive and impulsive behaviors during the bathing process. On October 9, 2013, Claimant filed a Fair Hearing Request. All jurisdictional requirements have been met.

3. Claimant requires behavioral support, as he has intense tantrums, which consists of various forms of aggression. Specifically, Claimant bites himself and others, screams loudly, and hits himself. In addition, Claimant suffers from insomnia several times a week. Claimant attends an adult daycare behavioral program at the Therapeutic Living Centers (TLC) in Reseda, California. At TLC, Claimant requires one-on-one behavioral support, given the frequency and intensity of Claimant's tantrums and aggressive behavioral episodes.

¹ All statutory references are to the Welfare and Institutions Code.

4. On March 29, 2013, at the annual review of Claimant's March 28, 2011 Individual Program Plan (IPP) meeting, Mother advised Claimant's service coordinator, Royce Remelius, that she and her husband could no longer bathe Claimant safely. At hearing, Mother explained that Claimant is five feet, seven inches tall, 160 pounds, and becomes agitated and aggressive very easily, which impact her ability to bathe Claimant. Consequently, Mother advised Mr. Remelius that she intended to request regional center funding to upgrade their bathroom with a walk-in tub, and that she would gather estimates. Mr. Remelius recommended that Mother contact Claimant's provider, Kaiser Permanente (Kaiser), and request an in-home evaluation concerning home equipment.

OCCUPATIONAL THERAPIST'S HOME ASSESSMENT

5. On June 27, 2013, a Kaiser occupational therapist visited Claimant's home to assess for safety equipment needs. The occupational therapist noted that Claimant demonstrated sensory defensiveness and agitation to certain tactile stimulation, including running water and shower on his skin, but calmed down when immersed in warm water. The occupational therapist observed that Claimant would spontaneously slide forward off of the bench and into his shower-tub to seek immersion. The occupational therapist concluded that such behavior presented a high risk of falls for both Claimant and Parents, especially when attempting to transfer Claimant out of the tub. In addition, the occupational therapist noted that Claimant's bathroom floor consisted of slick tile, which posed a slip and fall risk, especially in light of Claimant's retrograde posture. The occupational therapist also noted that the standard height of Claimant's toilet required Claimant to be assisted to transfer off the toilet, which increased the risk of injury to Claimant and his parents. Consequently, the occupational therapist recommended certain bathroom modifications to lower the risk of injury: (1) a walk-in tub, in order for Claimant to walk in, sit upright and be immersed in bathwater; (2) a non-slip floor surface; and (3) an elevated toilet to reduce the fall risk during

transfer and improve parents' ability to transfer Claimant off of the toilet safely. The occupational therapist also anticipated that the sink vanity would need to be modified to allow for other equipment in the bathroom and to allow for Claimant to stand safely at the sink for light hygiene.

NURSING EVALUATION

6. On July 9, 2013, the Service Agency issued a referral for a nursing evaluation of Claimant to assess health and safety issues related to bathing Claimant. On July 12, 2013, registered nurse, Bonnie Neely, conducted a nursing assessment of Claimant at his house, and prepared a report. Ms. Neely, who testified at hearing, has been a registered nurse consultant for the Service Agency for the past year, and has been a registered nurse since 1960. Ms. Neely observed that Claimant required assistance from Mother to get up off the couch, and get into a standing position. With physical assistance, Claimant was able to ambulate with a very wide gait. His hips were weak and his balance and coordination were poor, which posed an extreme risk for falls. Claimant required supervision 24 hours a day, seven days a week.

7. During Ms. Neely's assessment of Claimant, Mother served as the informant concerning Claimant's medical history and current needs. Mother advised that Claimant overreacted to environmental input, especially tactile stimuli, and had episodes of screaming, biting, head butting, and slapping himself. Claimant's behavioral episodes could last up to 14 hours, and was frequently agitated for days at a time. To help address Claimant's behaviors, Claimant's neurologist prescribed 250 milligrams of Depakote three times a day, and 25 milligrams of Seroquel five times a day, which did not seem to help.

8. Ms. Neely noted that Claimant was unable to participate in any part of his bathing, grooming, toileting, personal care, hygiene, and dressing. He was unable to climb in and out of the tub unassisted. Claimant disliked the feel of the water spray

when it hit him, which resulted in Claimant becoming agitated, and him sliding down into the tub into the water where he felt more comfortable. At hearing, Mother clarified that Claimant would become agitated as a result of the water stream hitting his head, and not simply hitting his skin. Ms. Neely's report noted that Parents could not lift him out of the tub safely, especially Mother, who had a history of back issues and pain.

9. Ms. Neely concluded that due to Claimant's severe mobility impairment, complicated by extreme behaviors interfering with safety, bathroom modifications were appropriate for Claimant.

ESTIMATES

10. A number companies prepared estimates to upgrade Claimant's bathroom. Specifically, Lowe's Home Improvement advised that the cost for an American Standard whirlpool walk-in tub was \$6,500, which included 12 adjustable massage jets. Galkos Construction prepared a \$14,986 estimate for the bathroom modifications, and Pacific Coast ReBath prepared a \$15,850 estimate.

11. Mr. Remelius reviewed the estimates to remodel Claimant's bathroom, and noticed that the estimates for a walk-in tub included the costs of a water jet system and LED lights. On August 22, 2013, Mr. Remelius advised Mother via email that the reasons for the bathroom remodel were due to safety and bathing concerns, and, as such, he requested a revised estimate from a contractor that excluded a water jet system and LED lights. Mother replied to Mr. Remelius' email and advised that the only reason she wanted the water jet system was to soothe and calm Claimant during periods of agitation, particularly during bath time. This was the first time Mother had communicated to the Service Agency that water jets, according to her, would help address Claimant's behavioral issues. Mother further advised that she would contact Claimant's neurologist and discuss with her whether water jets were a good option for Claimant.

12. On August 23, 2013, Dr. Gabrielle Glasser, who was Claimant's neurologist from Kaiser, wrote a letter at Mother's request, stating that Claimant took medications designed to help stabilize his severe mood cycling, and that it was likely that a bath tub with water jets could help Claimant calm down during periods of severe agitation and insomnia, which occurred frequently. However, on November 22, 2013, Dr. Glasser executed a declaration under penalty of perjury stating that she had no personal knowledge or clinical experience with the use of water jets, Jacuzzis, or whirlpool tubs as a form of treatment or intervention for individuals with profound intellectual disability, or whether their use would result in a decrease in agitation or improvement in sleep for Claimant. Dr. Glasser ended her declaration by stating that she did not clinically recommend the use of a Jacuzzi or whirlpool tub as a form of treatment or intervention for severe agitation or insomnia in her medical practice.

13. On August 29, 2013, the Valley Home Medical Supply home modification division prepared a \$13,730.21 estimate to modify Claimant's bathroom, which included \$4,495 for a walk-in tub without a water jet system and LED lights.

14. On September 9, 2013, Mr. Remelius held an IPP meeting with Mother concerning Claimant's request for bathroom modifications. Mother indicated she would like for Claimant to receive a walk-in tub with water jets and chromotherapy LED lights, as she believed they would reduce Claimant's negative behaviors while bathing. Mr. Remelius advised that the Service Agency would not fund any chromotherapy lights or water jets, but would fund that which was necessary to bathe and toilet Claimant. Specifically, the Service Agency agreed to fund a walk-in tub, a raised toilet, a smaller vanity to accommodate the walk-in tub, non-slip bathroom floor tiles, and related construction costs, at a cost of \$13,730.21.

15. On September 9, 2013, a board certified behavior analyst (BCBA) from TLC prepared a behavioral update report covering the period of March 1, 2013 through

September 1, 2013. The purpose of the report was to assess Claimant's current behavioral needs, determine appropriateness of placement, suggest intervention techniques, and develop goals and plans to be implemented. The report noted the following "problem behavior": (1) noncompliance, consisting of refusing to follow staff request to engage in program activities; (2) self-injurious behavior, consisting of biting his arm or banging his head with his hand; (3) disruptive behavior, consisting of screaming, yelling, and crying; and (4) physical aggression, consisting of striking out at others, grabbing, hitting, or scratching. Claimant functioned at the 24 to 30 month level, and could be easily angered. The BCBA recommended that Claimant continue attending TLC and receiving behavioral services there, and that intervention plans to be incorporated into Claimant's overall program.

16. On December 3, 2013, Mr. Remelius spoke with TLC to ascertain whether Claimant had ever used the Jacuzzi at its pool facility. TLC reported to Mr. Remelius that TLC staff had tried on several occasions to get Claimant into the Jacuzzi, but Claimant could not tolerate it and became resistive. However, Claimant enjoyed going into the pool.

MOTHER'S TESTIMONY

17. At hearing, Mother testified that Claimant required a water jet system because she believed it would have a calming effect on Claimant during bath time, and could help address Claimant's insomnia, which often occurred multiple nights in a row. Mother based this belief on a number of factors. First, when she priced walk-in bathtubs, the salesperson advised her that the water jets were calming. This information prompted Mother to conduct research about water jets, which resulted in her review of a number of reports. From the reports, she learned, in essence, (1) that water jets were used in hydrotherapy to address pain relief and treatment; (2) that it had tremendous healing

properties for the mind, body, and spirit; (3) that it was a trusted method of relaxation and stress management, and (4) that it helped to bring about restful sleep.

18. At hearing, Mother explained that she had reached the conclusion that medications had not been helpful in addressing Claimant's behaviors or insomnia, and to make matters worse, caused Claimant to suffer harsh side effects, such as extreme drowsiness, increased insomnia, increased agitation, constipation, or an inability to urinate. As such, Mother believed it was important to try something new and natural to afford Claimant some relief, like hydrotherapy, as it could help address Claimant's behaviors and insomnia, and it could help address any potential pain Claimant could be experiencing as a result of his hypotonia. Mother never expressed concerns about potential hypotonia pain to Mr. Remelius during their initial discussions concerning the necessity of remodeling Claimant's bathroom, or to Ms. Neely during her nursing assessment, and never advised either one of them during initial discussions that she wanted a water jet system to address potential hypotonia pain. In addition, Mother never expressed anything to Mr. Remelius until August 2013, five months after the March 2013 IPP meeting, about her desire for Claimant to have a water jet system to address Claimant's behavioral and insomnia issues.

19. On November 20, 2013, Claimant's parents took him to a hotel that had a community walk-in Jacuzzi. They wanted to see how Claimant would react in the water, since they had never placed him in a Jacuzzi before. In the days prior to placing Claimant in the Jacuzzi, Claimant had been agitated, and had not slept for two nights in a row, even though Mother had given Claimant more medication, as the doctor had instructed her to do. Mother videotaped portions of the 10 minute Jacuzzi visit, which depicted Claimant as happy, smiling, and playfully splashing the water with his arms and legs. After the Jacuzzi visit, Mother noted that Claimant was "totally calm."

EXPERT TESTIMONY

20. Fred Plessner, who has been a physical therapist for 40 years, testified on the Service Agency's behalf concerning the topic of hydrotherapy or water therapy. Mr. Plessner is licensed by the State of California, and conducted the bulk of his work at Providence Saint Joseph Medical Center in Burbank, California. He has also worked at Children's Hospital, and has worked with children with developmental disabilities. Mr. Plessner explained that hydrotherapy helps to increase a person's range of motion, decrease spasms, and promote wound management, to name a few. Hydrotherapy serves to compliment medical treatment, and depends on what the patient can tolerate, particularly in the areas of temperature, volume of water, and sensitivity to touch. Mr. Plessner explained that the most important aspect of hydrotherapy related to the temperature of the water, and not to the water jets. For someone who responded negatively to tactile stimulation, Mr. Plessner would not recommend a water jets, because he would be concerned about that person's ability to tolerate the whirlpool jets and the movement of the water.

21. Mr. Plessner conceded he had never met Claimant, and did not know whether hydrotherapy would benefit him, because he did not know the purpose for which the hydrotherapy would be used. If Claimant used hydrotherapy for relaxation purposes, it could potentially provide temporary relief. However, because Claimant suffers from hypotonia, which involves low muscle tone, he would not generally need hydrotherapy to relax his muscles, because people with hypotonia have decreased movement, and are not generally plagued by muscle spasms. If Claimant intended to use hydrotherapy to address his negative behaviors, Mr. Plessner explained he neither has the clinical training nor heard of any practice of using hydrotherapy to reduce negative behaviors. However, Mr. Plessner acknowledged that whether a person

responded favorably to hydrotherapy or any other therapy depended entirely on the individual.

22. Dr. John Youngbauer, who has served as the Service Agency's supervisor of behavioral services since 2000, testified at hearing. Dr. Youngbauer earned his bachelor's degree in psychology in 1974 from California State University at Northridge (CSUN), his master's degree in educational psychology in 1976 from CSUN, his master's degree in human development in 1986 from the University of Kansas (UK), and his doctorate in developmental and child psychology in 1997 from UK. Dr. Youngbauer is a licensed marriage and family therapist, but the bulk of his work has involved developmentally disabled people. In addition, Dr. Youngbauer has served as an adjunct professor, a behavioral consultant, a research director, a project manager, a data analyst, a behavior analyst, a research assistant, a counselor, and in other psychology-related positions.

23. Since 1979, Dr. Youngbauer has worked with individuals with behavioral challenges, such as self-injurious individuals, and those who aggress toward others. He also has experience in working with individuals with severe to profound retardation, and has found that people with severe to profound retardation can acquire skills through behavior modification methods, particularly through applied behavior analysis (ABA). Dr. Youngbauer found that through ABA, adults can learn how to become toilet trained, and learn other skills that ultimately serve to reduce the level of severe behavior. Unlike ABA, Dr. Youngbauer explained that hydrotherapy was not an evidenced-based method to address behavior modification and analysis.

24. Dr. Youngbauer never met Claimant. However, he reviewed Claimant's records to determine whether hydrotherapy would be an effective intervention for tantrum-like behavior, including those set forth in the report prepared by TLC. Dr. Youngbauer noted that Claimant's problem behaviors (i.e., noncompliance, self-injurious

behavior; disruptive behavior, and physical aggression) occurred at rates significantly lower than baseline rates, with the exception of physical aggression, which occurred at a frequency slightly higher than baseline. At the time of his review, Dr. Youngbauer understood that Mother had not yet placed Claimant into a Jacuzzi to see how he would react to it, and opined the getting Claimant into a Jacuzzi could go well, but it could go badly, given his tactile sensitivity. Instead, Dr. Youngbauer recommended that Claimant be observed before and during bath time to determine the antecedents to Claimant's negative behaviors, and then implement a behavior plan that would focus on Claimant's caregivers learning how to diffuse problem behavior as opposed to making the behaviors worse.

25. At hearing, Ms. Neely, who conducted the nurse assessment in July 2013, explained she would not recommend the use of water jets in Claimant's walk-in tub, because, given Claimant's tactile sensitivity issues, as well as his inability to tolerate a shower stream, she would be concerned that Claimant would not be able to tolerate water jets. Instead, Ms. Neely would recommend that Claimant have his medication dosages reassessed, because she felt they were too low. In addition, Ms. Neely recommended that Claimant participate in a behavior modification program at home to address his behavior difficulties, particularly during bath time.

LEGAL CONCLUSIONS

The Service Agency is not required to fund the installation of a water jet system in Claimant's walk-in bathtub, as discussed in more detail below:

1. Services are to be provided to regional center clients in conformity with section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

2. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

3. Section 4512, subdivision (b), of the Lanterman Act states in part:

"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 independent, productive, normal lives. 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's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis,

evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training, . . .

4. Services provided must be cost effective (§ 4512, subd. (b), *ante*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) The regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

5. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or his or her parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

6. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable an adult person with developmental disabilities to live as independently in the community as possible. (§

4648, subd. (a)(1).) Services and supports are subject to regular periodic review and reevaluation, particularly in response to a consumer's changing needs. (§ 4646.5, subds. (a)(7) and (b).)

7. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the state budget crisis of that time. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. However, a 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* (1985) 38 Cal.3d 384, 390-393.)

8. Section 4648, subdivision (a) (16) provides that, "effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. Experimental treatments or therapeutic services include experimental medical or nutritional therapy when the use of the product for that purpose is not a general physician practice."

9. Here, Claimant failed to meet the burden of establishing that the Service Agency should be compelled to fund the installation of a water jet system and LED lights for his walk-in tub. The evidence showed that the purpose for remodeling Claimant's bathroom was to address safety concerns, specifically those related to the risk of injury to Claimant and his parents when transferring Claimant in and out of the bathtub, and on and off the toilet. While Mother argued that the water jets would help reduce potential injury by producing a calming effect in Claimant, particularly during his frequent periods of agitation and aggressive behaviors, as she had concluded from her hydrotherapy research, Mother presented no convincing evidence to show that

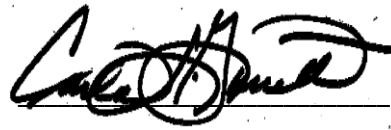
hydrotherapy was clinically determined or scientifically proven to be effective for the purpose of modifying Claimant's negative behaviors, as required by Section 4648, subdivision (a) (16). Indeed, the Service Agency's experts, Dr. Youngbauer and Mr. Plessner, both established that hydrotherapy was not known as a method to modify behaviors. Specifically, Dr. Youngbauer explained that hydrotherapy was not an evidenced-based method to address behavior modification and analysis, and Mr. Plessner explained he had not heard of any practice of using hydrotherapy to reduce negative behaviors. Even Claimant's neurologist, Dr. Glasser, stated in her declaration that she had no personal knowledge or clinical experience that the use of a Jacuzzi or whirlpool tub would result in a decrease in agitation or improvement of sleep in Claimant, and that she did not clinically recommend the use of a Jacuzzi or whirlpool tub as a form of treatment or intervention for severe agitation or insomnia.

10. Notwithstanding the lack of scientific proof concerning the impact of hydrotherapy on negative behaviors, Mother has been steadfast in her desire for Claimant to receive a water jet system. Even though she had not determined how receptive Claimant would be to a water jet system at the time she made her request to the Service Agency, Mother later discovered that Claimant would be receptive to water jets, given how well he took to his Jacuzzi session at the hotel, despite Claimant's tactile sensitivity that interfered with his ability to enjoy water streams in the past. However, as set forth in Legal Conclusion 4, the Service Agency is not required to meet a consumer's every possible desire. For this and the foregoing reasons, Claimant's appeal is denied.

ORDER

Claimant's appeal is denied.

Date: January 22, 2014

A handwritten signature in black ink, appearing to read 'Carla L. Garrett', written over a horizontal line.

CARLA L. GARRETT

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.