

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2014090797

DECISION

On November 6, 2014, Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

Claimant's mother represented claimant.

Oral and documentary evidence was introduced and the matter was submitted on November 6, 2014.

ISSUE

Is Inland Regional Center required to fund a SleepSafe2 Medium – Articulated & Hi-Lo Safety bed for claimant?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant receives services from the Inland Regional Center. She qualifies for services from IRC on the basis of mental retardation and cerebral palsy¹. Claimant requested that IRC pay for the SleepSafe 2 Medium - Articulated & Hi-Lo Safety bed ("the SleepSafe bed") because she has outgrown a crib and is unsafe in her current bed. Claimant's request for payment of the SleepSafe bed was submitted on July 24, 2014.

2. On September 3, 2014, IRC notified claimant that IRC denied her request for the SleepSafe bed.

3. On September 17, 2014, claimant's mother filed a fair hearing request appealing IRC's decision.

BACKGROUND

4. Claimant is a five-year, eleven-month old girl who lives with her mother. She suffers from Edwards Syndrome, Complete Trisomy 18, various cardiac and circulatory defects, and cerebral palsy. Claimant currently sleeps in a standard full size bed with a Summer Infant Sure & Secure bed rail on one side of the mattress with the other side of the mattress against a wall. Claimant also requires oxygen therapy at all times, including when she sleeps. A nasal cannula provides her oxygen when she sleeps. Claimant does not have functional use of her arms and legs, is unable to walk independently, and does not have the ability to lift herself.

¹ Although the terminology for these diagnoses recently changed from mental retardation in DSM-IV to intellectual disability in DSM-V, this decision will use the language contained in the claimant's Individual Program Plan.

5. Claimant has an individual program plan (IPP) dated January 29, 2014, that sets out the plan for the support necessary for claimant's well-being.

CLAIMANT'S EVIDENCE

6. Claimant has seen at least two physical therapists and at least two physicians who have assessed claimant's physical needs. On April 2, 2014, claimant's physical therapist, Mary Mertz, wrote that claimant requires a safety bed. Dr. William McKown, claimant's primary care physician, signed off on this letter. Ms. Mertz has been a physical therapist for over ten years with experience in pediatric and adult neurological disabilities. In her April 2nd letter Ms. Mertz evaluated claimant's physical abilities and needs regarding a bed. According to Ms. Mertz, claimant has a complex medical history, continues to grow slowly with functional mobility, and can now roll right and left independently and is moving and exploring in her bed. Ms. Mertz stated that "due to her size/age, lack of safety awareness and limitations in motor skills, she is VERY UNSAFE sleeping in a typical bed with rails," such as the bed she currently uses. Ms. Mertz further stated that "with [her] increasing size {currently weighing approximately 30 pounds}, the risk of self-injury and caregiver injury is imminent." Ms. Mertz noted that claimant has already crawled out of bed unsafely on several occasions and was found by her mother on the floor, hanging upside down off the bed, and stuck between the rails. Ms. Mertz's recommendation was the use of the SleepSafe 2 Medium Bed – Full Size Hi Lo Adjustable Foundation because it provided the necessary components to keep claimant safe and allowed visual interaction so that claimant would not feel trapped or confined.

7. Ms. Mertz stated in her letter, which was also signed by Dr. McKown, that claimant's "MDs have determined that if the head of her bed is not elevated, her tongue relaxes to the back of her throat which blocks her airway causing her oxygen saturation to drop into the 40s-50s%." Ms. Mertz's letter, with Dr. McKown's signature, was

submitted to claimant's insurance carrier and to Medi-Cal as part of a claim for payment for the SleepSafe bed.

8. On January 31, 2014, claimant's insurance rejected claimant's claim for payment for the SleepSafe bed based on the determination that the requested item "is considered to be a comfort, convenience or luxury item." On March 21, 2014, Medi-Cal also rejected claimant's claim for payment for the SleepSafe bed based on a determination that "the documentation submitted does not substantiate medical necessity for such a complex bed. . . . [l]ess costly equipment could meet the patient's needs."

9. Claimant's mother testified that she has found claimant in very unsafe positions on her bed on numerous occasions. Specifically, she has found claimant hanging off the bed upside down, caught between the mattress and the bed rail, and on the floor after falling out of bed. Claimant's mother is concerned that without the SleepSafe bed claimant will injure herself while sleeping. Claimant's mother has considered putting her current mattress on the floor. However, because there are other risks to claimant rolling on the floor, this was not a viable option.

10. Claimant's pediatric cardiologist, Dr. Denis Levy, wrote a letter dated October 20, 2014, regarding claimant's cardiac and pulmonary system needs. In his letter, Dr. Levy stated that, due to claimant's complex heart condition and propensity to aspiration pneumonia with a history of multiple chest infections and pneumonias, the SleepSafe 2 Medium bed would keep her safe, optimize her respiratory status and overall medical condition, and keep her as healthy as possible with the goal to minimize medical visits and hospital admissions. Notably, Dr. Levy's letter was not submitted to claimant's medical insurance or to Medi-Cal requesting payment for the SleepSafe bed.

11. Additionally, another physical therapist, Jan Cunningham, drafted a letter in October 2014 regarding claimant's need for the SleepSafe bed. Ms. Cunningham's

letter was also never provided to claimant's insurance carrier or Medi-Cal for consideration when claimant submitted her claim for payment for the SleepSafe bed. In her letter, Ms. Cunningham stated that claimant is required to have the head of her bed elevated to support her respiratory needs. She further stated that "due to her size and age, lack of safety awareness and limitation of motor skills, [complainant] is very unsafe sleeping in a typical bed with bed rails." Ms. Cunningham also recommended that complainant use the SleepSafe bed.

IRC'S EVIDENCE

12. Michelle Knighten is a licensed physical therapist and has worked at IRC for the past ten and a half years. She received her Master's degree in physical therapy in 1998 from Loma Linda University and became licensed in California as a physical therapist in 1998. At IRC, Ms. Knighten assesses pediatric patients to determine whether or not services are needed. As part of her assessment for services, Ms. Knighten reviews records of patients and makes home visits to patients.

13. Ms. Knighten reviewed claimant's records in this matter, but did not do a home assessment of claimant to evaluate the need for the SleepSafe bed. Ms. Knighten is familiar with claimant because about one year ago she did an assessment for vehicle access equipment for claimant. The last time Ms. Knighten saw claimant was about one year ago. Ms. Knighten based her assessment of claimant's need for the SleepSafe bed solely on the documents in her file prior to the submission of the letter from Dr. Levy and from Ms. Cunningham. Based on her review of claimant's file, Ms. Knighten determined that the SleepSafe bed is not necessary to meet the services and supports identified in claimant's IPP and that the SleepSafe bed is not medical necessity for claimant, but instead is a parent request or choice. Ms. Cunningham stated that claimant's file establishes that claimant has a need for a safety bed based on the

documentation showing that claimant needs an enclosure on her bed, but not necessarily a need for the SleepSafe bed, which has additional features.

14. On November 3, 2014, Ms. Knighten reviewed Dr. Levy's letter and the letter from Ms. Cunningham for the first time. After her review of those letters, Ms. Knighten stated that the letters validated a medical need for the SleepSafe bed, particularly in light of Dr. Levy's statements regarding the cardiac and respiratory needs of claimant for a lifting and lowering feature. Ms. Knighten stated that in light of the new letters from Dr. Levy and Ms. Cunningham, claimant should resubmit her request for the SleepSafe bed to her insurance carrier for payment because these letters provide more support for the medical necessity of the SleepSafe bed that was not previously provided.

THE PARTIES ARGUMENT

15. IRC argued that claimant has failed to establish a need for the SleepSafe bed because there are less expensive alternatives available to claimant that will meet her needs, and claimant has failed to pursue medical insurance payment for those less expensive options. Additionally, claimant has provided documents showing that insurance and Medi-Cal have denied coverage for payment of the SleepSafe bed, but claimant failed to provide the insurance company and Medi-Cal the additional letters from Dr. Levy and Ms. Cunningham that provide evidence of a medical need for the SleepSafe bed. IRC argues that the additional letters demonstrate that an appeal to claimant's medical insurance and/or Medi-Cal for payment for the SleepSafe bed has merit.

16. Claimant's mother disagreed with IRC's position that she needs to resubmit the additional evidence from Dr. Levy and Ms. Cunningham to her medical insurance for consideration before coming to IRC for payment for the SleepSafe bed. She asserts that the denials that she has already received from medical insurance and

Medi-Cal are sufficient for IRC to pay for the SleepSafe bed now. Claimant's mother also stated that with regard to less expensive alternatives, she was never presented with options for less expensive alternatives by IRC and she only requested the SleepSafe bed based upon the recommendation of Mary Mertz and Dr. McKown.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 500.) In this case, claimant bears the burden to demonstrate that she is entitled to receive the SleepSafe bed.

2. The standard by which each party must prove those matters is the "preponderance of the evidence" standard. (Evid. Code, § 115.)

3. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

4. "Services and supports" are defined in Welfare and Institutions Code section 4512, subdivision (b), as:

"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, and 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 or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. . . .

5. In order to be authorized, a service or support must be included in the consumer's IPP. (Welf. & Inst. Code, § 4512, subd. (b).)

6. Section 4646.4, subdivision (a)(4), requires that the Regional Center take into consideration: "[T]he family's responsibility for providing similar services and supports for a minor child without disabilities . . ." when developing, reviewing or modifying the IPP.

7. Welfare and Institutions Code section 4648 provides in pertinent part:

[¶] . . . [¶]

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure

services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan....

[¶] . . . [¶]

- (3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from any individual or agency which the regional center and consumer or, where appropriate, his or her parents ... determines will best accomplish all or any part of that consumer's program plan.

8. Welfare and Institutions Code section 4659, subdivision (d)(1) provides in pertinent part:

Effective July 1, 2009, notwithstanding any other provision of law or regulations to the contrary, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of 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. . . .

EVALUATION

The preponderance of the evidence demonstrates that the requested SleepSafe bed is medically necessary to ensure claimant's health and safety as outlined in her IPP. The SleepSafe bed will provide claimant a safe environment for sleep without the risk of entanglement or falling, and it will reduce claimant's risk of developing more serious respiratory or cardiac problems, as Dr. Levy described. IRC's witness, Michelle Knighten, admitted that the SleepSafe bed is medically necessary as Dr. Levy stated. Accordingly,

claimant has met her burden to show that the SleepSafe bed is a medically necessary support to ensure her well-being consistent with her IPP.

However, claimant did not submit Dr. Levy's letter and Ms. Cunningham's letter to claimant's medical insurance or Medi-Cal. While claimant provided a denial of a claim for payment for the SleepSafe bed by her medical insurer and Medi-Cal as required by Welfare and Institutions Code section 4659, subdivision (d)(1), the medical insurer and Medi-Cal did not have the benefit of the information provided by Dr. Levy or Ms. Cunningham for consideration. Accordingly, claimant failed to establish that an appeal to the medical insurer would be without merit as required by Welfare and Institutions Code section 4659, subdivision (d)(1).

The regional center is, therefore, not required to fund the cost of the SleepSafe bed at this time. Claimant needs to exhaust all of her appeals to her medical insurer and Medi-Cal prior to requesting that IRC pay for the SleepSafe bed.

ORDER

Claimant's appeal is denied.

DATED: November 20, 2014

DEBRA D. NYE-PERKINS
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 ninety days.