

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016080015

DECISION

On October 5, 2016, 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).

Brian Allen, Education Consultant/Advocate, represented claimant.

Oral and documentary evidence was introduced and the matter was submitted on October 5, 2016.

ISSUE

Is IRC required to fund a walk-in bath tub for claimant?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant receives services from IRC. She qualifies for services on the basis of diagnoses of autism, cerebral palsy, and intellectual disability. Claimant requested that IRC pay for a walk-in bath tub in her home because her current bath tub and seating apparatus provided by IRC does not meet her bathing needs. Claimant's request for funding for a walk-in tub in her home was submitted during the planning meeting of claimant's Individual Program Plan (IPP) on April 25, 2016.

2. On July 25, 2016, IRC notified claimant that IRC denied her request for the walk-in tub because IRC offered to fund more cost-effective means to make it possible for claimant to be fully bathed during the bathing process.

3. On August 1, 2016, Brian Allen, on behalf of claimant, filed a fair hearing request appealing IRC's decision. This hearing followed.

BACKGROUND

4. Claimant is a 46- year-old woman who lives with her mother. She suffers from autism, intellectual disability, cerebral palsy, and occasional seizures. Claimant currently bathes in the same standard full-size bath tub she has used for the past 30 years with the assistance of a chair placed inside the tub. Claimant's mother bathes her, as she is not able to bathe herself. Claimant requires constant supervision during all waking hours to prevent harm in all settings due to her disabilities.

5. Claimant's IPP dated April 25, 2016, sets out the plan for the support necessary for claimant's well-being. The IPP states that claimant is able to walk on her own, but is a little unsteady. It further states that claimant requires assistance in her personal care activities, including bathing. During bathing claimant's mother performs all scrubbing of claimant and has coached claimant on scrubbing herself, but claimant

has made little progress over the years. The IPP Planning Meeting held on April 25, 2016, was summarized in a Summary Sheet. The Summary Sheet stated that there were five IRC services to be included in the IPP with four of those services already in place, as stated in the IPP. The fifth service was characterized as a "new request" and was "walk-in tub for home." Additionally, the Summary Sheet, which was signed by claimant's mother and her representative, as well as a representative of IRC, included a written statement as follows:

Mother would like to be notified of all outcomes for services within 15 days. The 5 services above [sic].

CLAIMANT'S EVIDENCE

6. Claimant's mother testified at the hearing regarding claimant's bathing needs, her request for a walk-in bath made during the IPP planning meeting on April 25, 2016, IRC's evaluation of claimant's home, and her communications with IRC regarding the walk-in tub. Mother stated that she and claimant's representative, Brian Allen, attended the April 25, 2016, planning meeting regarding claimant's IPP. She stated that her request during the meeting that IRC inform her of any outcomes of her request for a walk-in tub within 15 days was written on the IRC Planning Meeting Summary Sheet that she signed and dated as a result of her advocate's request that the statement be written on the document. Mother testified that IRC did not provide her with "a response within 15 days of my bathtub request." Instead, the first time mother received notice that IRC would not fund the walk-in bathtub was in the July 25, 2016, Notice of Proposed Action letter sent to her by IRC. Mother reiterated that the July 25, 2016, letter "was not within 15 days of the IPP planning meeting."

7. Mother testified that on May 8, 2016, she sent a letter to IRC summarizing claimant's current physical condition and the reasons she believes that a walk-in bath tub is necessary for claimant. The letter stated:

[Claimant's] current physical condition is unsteady/episodes of falling backwards. She does not bathe herself. She will need to stand up facing me at times to get to the other side and with the falling creates safety issue for her.

Her falling is the main issue, climbing out and in the tub is also an issue for the same reason. I have a bath chair for her to sit on but she will still need to stand up some of the time. The tub is too narrow to place the chair facing me [and there is] no place to put her legs. I have also tried a swivel bath chair[;however,] she will not let the chair swivel she is to [sic] fearful she cannot lift her legs over the side of the tub so she can face me and keeps trying to put them back inside the tub she pushes me away stands up and will not want to be bathed and get very upset.

It is medically necessary for a walking [sic] tub/shower modification. That will would allow [Claimant] to face care provider/mother, seated while bathing keeping her clear of the fixtures preventing falling leading to serious injury and allowing for appropriate cleanliness.

Her other conditions are autism, infantile cp, non verbal, severe mental retardation seizure and many other. I should say that the seizure did not start until she turned 34 years old and the episodes started some time after that.

8. Mother testified that in June 2016, IRC performed an observation at her home regarding the walk-in bath tub request. She stated that as a result of the observation, IRC recommended that claimant try a swivel chair and other chairs in the

existing bath tub. She stated that she attempted to use the swivel chair in the bath tub, as well as the other chairs, but that "they did not work because of her neurological problems." She further stated that claimant could not swivel around and putting her legs outside of the bath tub was too scary for her. Mother insisted that claimant needs to face mother when she is being bathed so that mother can reach all sides of claimant to bathe her.

9. Mother testified that claimant has had strong seizures in the past, but those are under control with her current treatment, and claimant has not had one of those seizures in about three years. However, since 2002 claimant has episodes when she falls backwards approximately once a month. Mother testified that because of the episodes of falling backwards, she tries to keep claimant sitting most of the time. However, claimant does walk from one room to another and mother follows claimant when she walks. Mother testified that because claimant has episodes of falling backwards, it is not safe for claimant to stand in the bath tub. Mother testified that if she had a walk-in tub, claimant would not have to stand at all in the tub. However, mother later testified that even if claimant was using a walk-in bath tub, claimant would have to stand in order for mother to properly clean claimant's private area, just as she is currently doing in the existing tub.

10. Mother provided a letter from her son. She stated that is claimant's half-brother but is not claimant's treating physician. Mother testified that she asked claimant's half-brother to write the letter to support her request for a walk-in tub. In the letter, claimant's half-brother stated that he is "a triple boarded physician with expertise in 'Disabilities.'" In his letter claimant's half-brother summarized claimant's neurological deficits and stated in part as follows:

It may be of interest to Regional Center as to why all of the sudden there is a "supposed additional need". To that

regard, it is clear that there was always a safety concern with [claimant] entering and exiting a standard bath tub/shower system typical of most homes which should have been addressed by the appropriate authorities in the remote past. Of late, [claimant's] Absence Seizure disorder has advanced such that she unpredictable frequent falls backwards. The falls are such that when [claimant] has an Absence Seizure (non-tonic-clonic seizure) she simply falls backwards like a log falling down. This coupled with the long standing fact that [claimant] could never bathe herself and the severe falls with subsequent injury risks to [claimant] and any care giver. In fact, [claimant], has had many many falls with injuries secondary to her worsening seizures with falls in the bath tub and shower. Alternatives to a "walkin shower/tub" are simply not practical, feasible or safe due to her abnormal balance, abnormal gait, panic disorder, agoraphobia, profound mental retardation, falls and inflexibility.

11. Additionally, mother provided copies of three handwritten prescriptions. One prescription appeared to be written by claimant's neurologist stating "walk-in tub for home." Two other prescriptions were written on the same internal medicine office prescription pad but had different signatures on each prescription. Mother stated that those prescriptions for "walk-in tub" were from claimant's primary care physician. She testified that she requested those prescriptions from each of those physicians and provided them to IRC per IRC's request. Mother testified that IRC requested that she provide prescriptions from physicians requiring the bathroom remodel, three quotes from different contractors on the price, a formal denial of payment from her insurance

company, and a description of why a bath chair will not meet claimant's needs. Mother provided an email communication from IRC informing her that this information would be needed in order for IRC to provide complete consideration for the walk-in bath for claimant.

12. In addition to the above documents, mother provided photographs of her current bath tub with chair system for bathing, as well as a contractor's estimate for the work to install a walk-in bath tub totaling \$12,540.

IRC'S EVIDENCE

Testimony of Michelle Knighten

13. Michelle Knighten is a licensed physical therapist and has worked at IRC for the past 13 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 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.

14. Ms. Knighten reviewed claimant's records in this matter, and performed a home assessment of claimant to evaluate functional abilities and the need for the walk-in tub. Ms. Knighten is familiar with claimant because in November 2014 she was asked to perform a bathroom assessment for claimant to determine claimant's abilities and appropriate equipment to use for bathing. Ms. Knighten went to the home along with an Occupational Therapist on January 27, 2015, and again in February 2015 to perform the assessments. During her visits Ms. Knighten determined that the home had two bathrooms, a main and a secondary. Claimant utilizes the secondary bathroom to bathe, and it has a narrow step to get into the tub and has grab bars on the side and back of the tub. Mother requested that claimant use the secondary tub for bathing. Ms.

Knighthen determined that a swivel bath chair should be utilized to avoid claimant's use of the narrow step into the bath tub. The swivel chair was delivered to claimant's home on September 18, 2015.

15. Ms. Knighthen received a request in May 2016 to provide an assessment of the bathrooms of the home to evaluate claimant's request for a remodel to provide a walk-in tub. On June 14, 2016, Ms. Knighthen performed another home visit to assess the functional abilities of claimant and the bathrooms. When she arrived at the home, Ms. Knighthen observed that the swivel seat was not present and mother informed her that the swivel seat did not work. Ms. Knighthen stated that mother had never previously reported to her or to IRC that the swivel chair was not working. Ms. Knighthen again observed that the main bath tub is much easier to access for claimant because it does not have a step up into the tub. Accordingly, the utilization of a simple sliding transfer bath bench would work for claimant because she could sit on the bench outside of the tub and slip into the tub by simply lifting her legs. With the sliding transfer bath bench claimant would not need to step into the tub and it would eliminate the possibility of her falling backwards when stepping into the tub.

16. Ms. Knighthen testified that mother is concerned that she has to sit across from claimant to bath her, instead of sitting directly facing her. Ms. Knighthen stated that most caregivers must reach around to wash the side of the body facing the wall regardless of the seating configuration, and the amount of work that mother does to wash claimant is reasonable and not unusual. Ms. Knighthen stated that because claimant receives in-home supportive services already, mother could hire someone to assist her with bathing claimant if it is too physically strenuous for her.

17. Ms. Knighthen stated that the type of walk-in tub that mother is requesting fills with water during use. Accordingly, mother would have to be outside of the tub

reaching in to bath claimant and it would be difficult for mother to access claimant. Ms. Knighten stated that the walk-in tub would be less safe than the current tub if it fills with water and claimant falls. If that happened, the only option would be to push open the door and flood the house with water in order to get claimant out of the water. Ms. Knighten stated that she believed that the walk-in tub would not be a safe option for claimant.

Based on her assessment, Ms. Knighten determined that the walk-in tub is not necessary to meet the services and supports identified in claimant's IPP and that the walk-in tub is not medical necessity for claimant, but instead is a parent request or choice.

Testimony of Devin Morris

18. Devin Morris is a consumer services coordinator (CSC) at IRC. He has held that position for the past year and a half. His responsibilities include meeting with clients on a quarterly basis, advocating for the consumer to get the supports needed, and making referrals for services needed. Mr. Morris is claimant's CSC and was present during the IPP planning meeting on April 25, 2016, as well as during the home assessment on June 14, 2016.

Mr. Morris stated that claimant currently receives 30 hours of respite care, transportation to and from a day program, acupuncture reimbursement, and 60 hours of support while at the day program. Claimant also receives in-home services and has a personal assistant named Cynthia for her day program. Mr. Morris testified that claimant uses a pool and spa at her day program and goes into the pool and spa by using a ramp and steps. Claimant is able to use steps and safety bars to get into the pool.

19. Mr. Morris reviewed an ISP/Progress Report provided by Pathway, Inc., the vendor who is responsible for administering claimant's day program, which is called Community Integration Training Program. The ISP/Progress Report provides claimant's

history, current status, goals, and progress in the day program.¹ According to that document, claimant has had three “spells” over the past six months. Each of those “spells” lasted about 10 seconds during which claimant was alert and aware, she tilted her head and crossed her arms. There is no mention in the ISP/Progress Report of any falls of claimant. Mr. Morris stated that he asked Cynthia about claimant’s history at the day program and she informed him that over the last few years, claimant has fallen two to three times at the day program. Mr. Morris also stated that during the day program, claimant is able to change into her swimsuit with no assistance. Mr. Morris has observed claimant walking around her home with no assistance. According to Mr. Morris, claimant sits and stands independently, uses a manual wheelchair for long distances, and walks unassisted for short distances. Mr. Morris testified that mother has never reported to him over the last year and a half that claimant has ever fallen. Mr. Morris stated that mother did report to him on one occasion over the past year that claimant had a seizure.

20. Mr. Morris testified that he was aware of the statement written in the IPP Planning Meeting Summary Sheet dated April 25, 2016, regarding mother’s request to be notified of the IRC decision regarding the walk-in tub. He stated that Mr. Allen requested that the sentence be added to the IPP. However, Mr. Morris reiterated that the sentence simply stated that mother “would like” to be notified. Regardless of the sentence, Mr. Morris stated that there was no such requirement that IRC notify mother within 15 days of the April 25, 2016, meeting of anything. According to Mr. Morris, once the IRC makes a determination regarding a request, IRC has five days to notify the family of the decision. Mr. Morris stated that IRC complied with that requirement in this case.

¹ The document reviewed was also admitted into evidence in this matter.

THE PARTIES ARGUMENT

21. IRC argued that claimant has failed to establish a need for the walk-in tub because there are less expensive alternatives available to claimant that will meet her needs. Additionally, IRC asserted that the walk-in bath tub is less safe than the current tub because if claimant falls in the walk-in tub she would be submerged in water and could easily drown. IRC further argues that there is no legal requirement that mother be notified of the outcome of her request for the walk-in tub within 15 days of April 25, 2016, and regardless, the statement written in the IPP Meeting Summary document does not require notification within that time frame.

22. Claimant's representative disagreed with IRC's position and asserted that claimant has a medical need for the walk-in tub based on her disabilities. Claimant's representative further argued that because IRC failed to inform mother of their decision regarding the walk-in tub within 15 days of the April 25, 2016, request, as required by the statement written in the IPP, IRC has committed a "procedural flaw" and must pay for the walk-in tub.

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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 funding for a bathroom remodel to provide a walk-in tub.

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, subdivision (a) 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.

[¶] . . . [¶]

(6) The regional center and the consumer, or when appropriate, his or her parents, legal guardian, conservator, or authorized representative, including

those appointed pursuant to subdivision (a) of Section 4541, subdivision (b) of Section 4701.6, or subdivision (e) of Section 4705, shall, pursuant to the individual program plan, consider all of the following when selecting a provider of consumer services and supports:

[¶] . . . [¶]

- (D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected. In determining the least costly provider, the availability of federal financial participation shall be considered. The consumer shall not be required to use the least costly provider if it will result in the consumer moving from an existing provider of services or supports to more restrictive or less integrated services or supports.

EVALUATION

A preponderance of the evidence demonstrated that the requested remodel of the home bathroom to provide a walk-in tub is not medically necessary to ensure claimant's health and safety as outlined in her IPP. Mother admitted that claimant would need to stand in the walk-in tub to be properly bathed just as she is currently doing in the existing tub. Accordingly, the risk of fall from standing in the tub is not eliminated by the use of a walk-in tub. Additionally Michelle Knighten testified that the requested walk-in tub fills with water during use, causing risk of drowning if claimant were to fall in the walk-in tub. Ms. Knighten also established that the use of a slider bench or swivel chair in the existing main tub would reduce claimant's risk of fall without the excessive

cost of a bathroom remodel. The letter presented by claimant from her half-brother was given little weight because he is not her treating physician. Additionally, claimant's half-brother failed to mention or address the possibility of using a slider chair or swivel chair to address the concerns of a fall by claimant. Claimant failed to present sufficient evidence to establish that she has a legitimate medical need for the walk-in tub.

Additionally, claimant's argument that the handwritten sentence in the April 25, 2016, IPP Meeting Summary Statement required IRC to provide its decision regarding the request for the walk-in tub to mother within 15 days is rejected. Notably, the sentence at issue simply states that mother "would like" to be notified, but the sentence does not require notification. Further, nothing in the Lanterman Act or applicable regulations required IRC to notify mother within 15 days. Accordingly, IRC had no obligation to provide notification to mother within 15 days of the April 25, 2016, meeting. Claimant's argument that IRC "failed to implement the IPP" and as a result must fund the walk-in tub is also rejected.

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ORDER

Claimant's appeal is denied.

DATED: October 18, 2016

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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.