

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH No. 2018020947

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on September 20, 2018, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by her mother.¹

Daniela Santana, Program Manager, Fair Hearings, represented the San Gabriel/Pomona Regional Center (service agency).

ISSUE

Shall the service agency provide funding for the purchase of a dynamic stander, balance control device, and body weight support gait?

¹ The names of claimant and her family are omitted to protect their privacy.

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon exhibits 1-10 submitted by the service agency, exhibits A and B submitted by claimant, as well as the testimony of claimant's mother and Ms. Santana.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a five-year-old female consumer of the service agency based on her qualifying diagnoses of cerebral palsy and moderate intellectual disability.
2. In October 2017, claimant's mother first requested the service agency for funding to purchase or rent a dynamic stander, balance control device, and body weight support gait (Lite Gait trainer). Claimant and the service agency engaged in subsequent discussions about this funding request. (Ex. 9.)
3. In a Notice of Proposed Action dated February 5, 2018, the service agency denied the funding request, advising claimant's mother that there was no medical justification for the equipment; it was not related to claimant's disability; and, according to the service agency's own policy, parents of minors are usually expected to provide for all medical care and equipment through insurance, California Children's Services or other generic resources. (Ex. 1.)
4. On February 20, 2018, claimant's mother submitted to the service agency a Fair Hearing Request in which she appealed the proposed denial of funding. (Ex. 2.)
5. In connection with claimant's two prior requests for a continuance of the hearing, claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

BACKGROUND INFORMATION

6. Claimant was enrolled in the California Early Intervention Program (also known as Early Start) before the age of three due to her significant delays as a result of her extremely premature birth. She was deemed eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) not long after turning three.

7. Claimant lives at home with her mother, who is a single parent. However, claimant's father is also part of her life, including assisting with some of claimant's therapeutic exercises done at home when he is visiting.

8. Due to her cerebral palsy, claimant is non-ambulatory. She wears ankle-foot orthosis (AFOs) on both legs and uses these for most of the day, except when sleeping. She can sit for short periods of time and can "combat crawl" when she needs to get somewhere on her own. She uses a stander to help her stand up on her feet. Claimant also uses a wheelchair, but cannot push it herself; she needs an adult to do that for her. (Ex. 3a, p. 2.)

9. Because claimant is non-ambulatory, her mother usually carries her around. Due to her inactivity, claimant has become heavier; she now weighs 50 pounds. (Ex. 8, p. 1.)

10. The individual program plan (IPP) in place for claimant contains a goal in which claimant is to "increase her mobility and to obtain more gross motor skills such as sitting and standing independence." (Ex. 3a, p. 13.) The listed supports needed to attain this goal include, "[p]arents will consult with Physical Therapist to review techniques that will facilitate motor development in the home." (*Id.* at addendum p. 4.)

11. In addition to receiving various special education services from her local school district, claimant also receives adaptive physical education (APE), during which time she is placed in a tricycle guided by an adult so she can interact with her peers

outside. The APE is done as a group activity, so claimant does not get individual attention during this time. One of the goals stated in her individualized education plan (IEP) is to “stand in a gait trainer for up to 30 minutes demonstrating the ability to take 10-12 fully prompted reciprocal steps to access her environment. . . .” (Ex. 5, p. 10.) While not entirely clear, it appears this goal is related to a standing device, and not to a Lite Gait trainer.

CLAIMANT’S FUNDING REQUEST

12. Much of the equipment claimant uses at home and school to stand or mobilize has been loaned to the family by California Children’s Services (CCS).

13. CCS also has provided physical therapy (PT) to claimant at one of its clinics. During that PT, claimant was placed on a Lite Gait trainer, which is essentially a treadmill, attached to which is a harness, in which is placed someone with little or no lower body control. The treadmill can go at very low speeds so the person in the harness can try to simulate walking or running. The Lite Gait trainer is made up of the following components: a dynamic stander, balance control device, and body weight support gait trainer. (Ex. 7.)

14. Claimant received PT at CCS for several months, which included using a Lite Gait trainer. Claimant’s mother testified the work on the Lite Gait trainer was very helpful. However, CCS discontinued the PT from February 2016 through January 2018, for reasons that are not clear from the record. CCS reinstated the PT from February 15, 2018, through May 18, 2018, at which time the PT was again discontinued, for reasons also not clear.

15. Claimant’s mother has requested access to a Lite Gait trainer for use at home, especially for when claimant is not receiving PT at CCS. This is because claimant’s mother believes her daughter’s motor skills deteriorate when she is not receiving PT. Her prior request to CCS to borrow a Lite Gait trainer was summarily rejected because

CCS does not loan out Lite Gait trainers. Claimant's mother believes this piece of equipment will be instrumental in efforts to get claimant on her feet and walking. Thus, to bridge the gap when PT is discontinued, the family purchased a generic treadmill, and various family members attempted to hold claimant in place to mimic the action of a Lite Gait trainer. For various reasons, including claimant's safety and potential injury to the participating family members, the experiment has not been a success. The Lite Gait trainer is needed because it goes at a slow enough speed to accommodate claimant's ability, and the harness will hold her in place, thereby freeing up the family members to monitor her activity, move her legs, etc.

16. Claimant's mother has researched the cost of purchasing or renting a Lite Gait trainer. Purchasing the equipment would cost \$2,125, including shipping and handling. Renting the equipment for two years would cost about the same, but renting it for longer would end up being more expensive than purchasing it. Claimant's mother believes the equipment will be needed for longer than two years. Claimant's mother is willing to give the equipment back to the service agency when claimant no longer needs it.

SERVICE AGENCY'S CONCERNS WITH CLAIMANT'S FUNDING REQUEST

17. When the service agency originally reviewed the funding request in November 2017, staff advised claimant's mother they believed there was no medical justification for the equipment and it was not related to claimant's disability. However, the service agency has provided no evidence supporting these contentions. To the contrary, claimant's non-ambulatory condition is directly related to her cerebral palsy. The Lite Gait trainer has been used as a way of ameliorating claimant's physical disabilities caused by her cerebral palsy, as demonstrated by use of that equipment during claimant's PT. In addition, the goal stated in claimant's IPP to utilize techniques learned during PT would seem to encompass use of therapy equipment at home, like a

Lite Gait trainer, especially during periods when PT is not provided by CCS. Finally, claimant's neurologist, Dr. Nancy Niparko, recently prescribed pediatric PT for claimant "for gait training;" the fact of that prescription establishes the existence of a medical basis for the Lite Gait trainer. (Ex. B, p. 3.) It is thus established that the Lite Gait trainer is medically justified.

18. A. The service agency also points to generic sources of funding, such as CCS or claimant's local school district.

B. As explained above, while CCS has provided the PT services and loaned some equipment to the family, it has denied the family's request to borrow a Lite Gait trainer. (Ex. 6.) Claimant's mother decided not to pursue an appeal of CCS' denial because she was told by CCS there would be no way she could get such equipment.

C. Claimant's mother has not requested funding from the school district, mainly because she did not know she could do so; claimant's service coordinator never told her she could make such a request, and the service agency has never offered to make available an advocate to assist in requesting such funding through the IEP process. The service agency should not be able to rely on a generic resource for funding when it has not made a consumer or the consumer's family aware of the existence of the claimed generic resource, and when the family never was afforded an opportunity to pursue it. In any event, given that special education services are limited to the school environment and ensuring access to educational opportunities, it is highly doubtful the school district would loan to or purchase for claimant a Lite Gait trainer for use outside the context of school. (See, e.g., Ed. Code, § 56345 [special education services are intended only "to enable the pupil to be involved in and make progress in the general education curriculum"].)

19. According to the service agency's Purchase of Service Policy (POS):

Medical, dental, equipment and supply services and supports may be purchased to improve or maintain an individual's health status. . . .

General health care needs for regional center clients are similar to the needs of all members of the community.

Ordinarily, parents of minors are expected to provide for all medical and dental care, equipment, and supplies for their children through private insurance, California Children's Services, or other sources of health care and funding available to the general public. The regional center may purchase medical, dental, equipment, and supplies for either children or adults if the following criteria are met:

1. The needed treatment or equipment is associated with, or has resulted from a developmental disability, developmental delay or an established risk condition.

AND

2. The requested treatment or equipment is deemed to be medically necessary.

AND

3. The regional center consultants or clinicians have reviewed and approved the need for such treatment or equipment.

AND

4. The individual is not eligible for Medi-Cal, California Children's Services, private insurance or another third party payer coverage or these funding

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

(Ex. 10, p. 20.)

20. In this case, the purchase of a Lite Gait trainer will improve claimant's health by helping her stay active, reducing further weight gain, and facilitating greater use of her legs debilitated by cerebral palsy. There is no other funding source available. The four prongs of the POS policy in question are satisfied: the equipment is associated with claimant's non-ambulatory condition caused by her cerebral palsy; the equipment is medically necessary to such a task; and, CCS and insurance are not available to pay for this equipment. Finally, while the service agency consultants have not approved the request, claimant's appeal of the funding has taken that decision out of their hands.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant's mother timely submitted a fair hearing request to appeal the service agency's proposed denial of her funding request. Jurisdiction in this case was thus established. (Factual Findings 1-5.)

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.) When one seeks government benefits or services, the burden of proof is on her. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In this case, claimant bears the burden of proving by a

² Undesignated statutory references are to the Welfare and Institutions Code.

preponderance of the evidence that she is entitled to the requested funding. (Factual Findings 1-5.)

3. Section 4512, subdivision (b), generally defines services that can be funded under the Lanterman Act as those that are “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability. . . .” Services and supports specifically identified by the Lanterman Act include “adaptive equipment and supplies, [and] . . . specialized medical and dental care. . . .” (§ 4512, subd. (b).) This language is broad enough to encompass medical and/or therapeutic equipment, such as the Lite Gait trainer. This is especially true when considering the service agency’s own POS, which specifically notes that medical equipment may be purchased to maintain or improve a consumer’s health status. In this case, it was established that the Lite Gait trainer is adaptive equipment which is medically necessary and justified to alleviate disabilities caused by claimant’s cerebral palsy. The funding request therefore falls within the parameters of the Lanterman Act.

4. It is the intent of the Legislature that the Department of Developmental Services (DDS) and the regional centers “shall continue to be the payers of last resort consistent with the requirements of this division [establishing the Lanterman Act] and the California Early Intervention Program.” (§ 4659.10.) The term “payer of last resort” has been interpreted to mean that when other providers or generic resources will not fund a service or support otherwise required by the Lanterman Act, DDS or a regional center shall. As applied to this case, the fact that CCS and claimant’s school district are unlikely to loan a Lite Gait trainer to claimant’s family for claimant’s use at home means that the funding responsibility should fall to the service agency through its role as the payer of last resort.

5. The service agency has cited section 4646.4 as a reason to deny the request. According to subdivision (a) of that statute, regional centers are required to ensure, for purposes of a consumer's IPP, "[u]tilization of generic services and supports when appropriate" (*id.* at subd. (a)(2)); and "[c]onsideration of the family's responsibility for providing similar services and supports for a minor child without disabilities" (*id.* at subd. (a)(4)). However, as concluded above, there are no known generic resources available to fund this request. Also, families of minor children without disabilities typically do not rent or purchase this type of therapeutic equipment. Therefore, section 4646.4 is not a reason to deny the request.

6. The service agency has also cited its POS as a reason to deny the request. A service policy established by a regional center to generally govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390–393.) Nor may a regional center decide which services and supports it will provide based solely upon a fixed policy. (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232–233, reh'g denied and opinion modified.) This means that funding for the request in this case must be provided so long as it meets the mandates of the Lanterman Act, even if the service agency's POS otherwise specifically precludes it. In any event, it appears that the service agency's POS actually supports claimant's funding request in this case.

7. In conclusion, claimant has established as a matter of fact and law that her funding request is supported by the Lanterman Act. The reasons specified by the service agency, factual and legal, do not provide a barrier to such funding. Under these unique circumstances, claimant has met her burden of establishing by a preponderance of the evidence that she is entitled to funding for the purchase of a Lite Gait trainer. (Factual Findings 1-20, Legal Conclusions 1-6.) However, claimant's mother shall advise the

service agency when claimant no longer needs the equipment, at which time, at the service agency's election, (a) the family shall sell the equipment for a fair market price and remit the proceeds to the service agency, or (b) shall donate the equipment to the service agency or other recipient designated by the service agency.

ORDER

Claimant's appeal is granted. The San Gabriel/Pomona Regional Center shall provide funding for the purchase for claimant of a dynamic stander, balance control device, and body weight support gait, i.e., a Lite Gait trainer.

DATED: October 2, 2018

ERIC SAWYER
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.