

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of the Fair Hearing Request of:**

**CLAIMANT,**

**vs.**

**TRI-COUNTIES REGIONAL CENTER, SERVICE AGENCY.**

**OAH Case No. 2021060432**

**DECISION**

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 6, 2021, by videoconference.

Claimant was represented by his mother (Mother). Tri-Counties Regional Center, the Service Agency (TCRC or Service Agency) was represented by Esther Maya, Ventura Adult Team Manager.

Oral and documentary evidence was received. The record was held open until August 11, 2021, so that the parties could file written closing statements. Both parties timely filed their closing statements, Claimant's now identified as exhibit L, and the Service Agency's as exhibit 9. Thereafter, the record was closed and the matter submitted for decision on August 11, 2021.

The ALJ hereby makes his factual findings, legal conclusions, and orders.

### **ISSUE PRESENTED**

Should the Service Agency be ordered to pay for the purchase and installation of a pool lift to be installed at Claimant's home?<sup>1</sup>

### **EVIDENCE RELIED UPON**

Claimant's exhibits A through K; Service Agency's exhibit 1 to 8;<sup>2</sup> video clips presented at the hearing (and set forth on the thumb drive, exhibit F; testimony of Mother, Dr. Steven Graff, Ph.D., and Dr. Anne Little, M.D.

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<sup>1</sup> The case originally had two issues: the claim to obtain the pool lift, and a claim for the provision of a specialized tandem bicycle. The latter claim was resolved on the morning of the hearing. Some factual findings pertaining to the request for the bicycle may be made so as to provide background, the history of both requests and their documentation having been intertwined.

<sup>2</sup> Neither party submitted a copy of Claimant's Fair Hearing Request. The ALJ copied it from the OAH file, and labelled it as exhibit 8, so that all the exhibits establishing jurisdiction would be in the record.

## FACTUAL FINDINGS

### The Parties and Jurisdiction

1. Claimant is a 10-year-old boy who receives services from TCRC pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act or the Act), California Welfare and Institutions Code, section 4500 et seq.<sup>3</sup> He is eligible for services because he has Cerebral Palsy, an eligible condition under the Act.

2. (A) On May 20, 2021, TCRC issued a Notice of Proposed Action (NOPA) denying funding for both an adaptive bicycle and a pool lift. The NOPA stated, as the reason for the action, "Generic resources have not been accessed." (Ex. 1, p. 1.)<sup>4</sup> The NOPA was accompanied by a two-page letter which stated as its purpose "to review and summarize the information pertaining to your request for funding of an adaptive bike and pool lift." (*Id.* at p. 2.)

(B) The letter that accompanied the NOPA raised the claim that TCRC had previously asked for supporting documents as to how the requested adaptive equipment was related to Claimant's disability, as well as denials from applicable agencies "to gain a better understanding of the nature of the request." (Ex. 1, p. 2.) The

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<sup>3</sup> All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

<sup>4</sup> The parties did not paginate their exhibits, so the ALJ has in some instances added page numbers to the exhibits at the pages cited.

letter went on to state that TCRC needed more documentation of access to private insurance and Medi-Cal.

3. On June 4, 2021, Claimant's Mother submitted a Fair Hearing Request (FHR), seeking a hearing on the denial of the request for the tandem bike and pool lift. (Ex. 8.)

4. All jurisdictional requirements have been met. As noted above, the issue of the tandem bike has been resolved.

### **Claimant's Background**

5. Claimant lives with his twin brother and his parents. Mother does not work outside of the home, devoting her days to the care and education of Claimant. Claimant's father works full time in law enforcement. Mother's tasks amount to a full-time job, and more.

6. Claimant is non-ambulatory, and uses a mechanized wheelchair, a stander, and a gait trainer. According to his physical therapist, Claimant is able to stand and hold his own weight for transfers but must have assistance to move from one adaptive piece of equipment to another.

7. Claimant requires full assistance with all hygiene tasks, such as bathing, washing, and tooth brushing. He is not fully toilet trained and wears diapers. He can communicate to his Mother when he needs to move his bowels, but not when he urinates, which he informs her of after the fact. His diapers are provided through funding from Medi-Cal.

8. Claimant needs full assistance with dressing. Because of his spasticity, and especially on his left side, dressing is a difficult task.

9. Claimant must eat food that has been cut into small bites, and he cannot eat food that is too hard. He cannot use a spoon but can stab food with a fork. He needs help, however, to guide that food to his mouth. He is able to hold a cup, drinking from it with a straw. According to Claimant's last Individual Program Plan (IPP), written in May 2021, Claimant had been receiving occupational and physical therapy services, but they were suspended due to the Covid-19 pandemic. Mother works with Claimant to put what had been learned from prior therapy sessions into practice.

10. Claimant is visually impaired. Mother has described him as legally blind in correspondence with Service Agency staff. His physical therapist stated in a letter that he suffers from Cortical Vision Impairment. Claimant's visual abilities are increased through color contrasting; for example, using red lettering on an orange background. His poor eyesight effectively barred him from on-line education during the pandemic.

11. Mother took over home schooling of Claimant after the education provided through his local school district failed to advance his abilities, and it is plain that the pandemic and resulting closing of schools, did not further his education. Mother began using the Orton Gillingham Multi-Sensory method to improve his reading, which rapidly improved him from not being able to read, to reading at a second-grade level. Using another program, she has improved his math skills.

12. According to Mother, Claimant now weighs 70 pounds; that weight is confirmed in the physical therapists' letter of June 25, 2021, part of exhibit C.

13. Medical care and therapeutic treatments are provided to Claimant by a team of physicians and therapists. The team includes a pediatrician, an orthopedic surgeon who attends to Claimant's hip issues, another orthopedic surgeon who

attends to Claimant's arms and hands, a neurologist, a neuro-ophthalmologist, and physical, occupational, and speech therapists. Claimant has routine visits with these professionals, a time-consuming routine given the issues of transporting Claimant, sometimes to Los Angeles from his home in Ventura County.

14. Because of Claimant's limitations, there are not many opportunities for him to play as might his twin, who is not disabled. Mother attested that she and her husband used to hike, but they cannot do that with Claimant. With his old bike, they could go about the neighborhood, but Claimant's slow movement frustrated his brother, making the experience less than perfect. One opportunity he has for a physical outlet is going in the pool. Claimant cannot swim, but can grab onto a "floatie noodle," one that is about six inches in diameter.

### **Claimant's Access to the Swimming Pool**

15. The family's swimming pool is an in-ground pool, not especially large, with an adjacent in-ground spa. The two bodies of water are divided by a wall, with tile on the top of the wall.

16. Mom presented four short video clips during the examination of TCRC witness Dr. Little. They depicted the steps Mother must take to get Claimant into the pool. First, she lays out a moving pad and then a mat on top of that, both on the cement deck surrounding the spa and right up next to its edge. She then gets Claimant out of his wheelchair and onto his back on the mats, parallel to the wall of the spa, and near its edge. Then, being careful not to scrape his skin on the edges of the tile, she maneuvers Claimant into the spa, with her in the spa and controlling his body. Claimant is then moved onto the top of the wall that divides the pool from the spa. Mother then brings the floatie to him, with her in the pool, and she rolls him off

the wall and into the pool, placing his chest on the floatie. Exiting the pool is essentially a reversal of the entry steps: Claimant is moved out of the pool onto the wall diving pool and spa, then he is moved into the spa, then out of the spa and onto the deck. Plainly, the work is not done at that point, as Claimant now must be moved into the house, his swim attire taken off (this includes a rash guard for his upper torso), his diaper replaced, and dry clothing put onto him.

17. Dr. Little, who has worked with disabled persons for 35 years, acknowledged that the method currently being used to get Claimant into and out of the pool is not a safe one. She agreed that Mother shouldn't be lifting her 70-pound child, agreeing that the schools would restrict a single worker to lifting no more than 35 pounds, and that hospitals and OSHA would have one person lift no more than 50 pounds.

18. Dr. Little also testified on cross examination that the methodology currently used to get Claimant into the pool is not a dignified way to do it, and that it does not honor his dignity.

### **The Request for a Pool Lift**

19. According to Mother, she first requested a pool lift in March 2020, so that Claimant could enter and exit the family's swimming pool with safety, and in a manner that would avoid injury to Mother. Her request was renewed during the May 2020 IPP meeting. Her efforts to obtain the pool lift from TCRC culminated in this Fair Hearing, well over one year later. Indeed, TCRC did not issue a denial until the NOPA issued in May 2021.

20. There is a specific pool lift that Claimant requested. Mother believes the best option is the Mighty Lift 400. It rotates so that it could be used to place Claimant

in either the spa or the pool. It has an adjustable seat and other features. Mother obtained an estimate from a firm Call Before You Fall, for purchase and installation of the pool lift, which is \$13,311.49. (Ex. C, p. 5.)

21. (A) The record does not illuminate the actions by the parties regarding the issue of a pool lift between March 2020 and September 2020. On September 25, 2020, mom sent an email to the service coordinator, stating that they needed a pool lift, calling it a safety issue, and queried, "what do I need to obtain in order to have RC approve funding of this item?" (Ex. B, p. 9.)

(B) On September 28, 2020, Jody Bruno, the service coordinator wrote back, and stated that the general procedure for funding for adaptive equipment included an effort to contact non-profits that might fund for different equipment, because TCRC was the payor of last resort. As to specifics, Bruno wrote that the general procedure included obtaining a doctor's prescription and/or a letter confirming the need for the pool lift or adaptive bike, and make sure it was specifically related to the disability. Another step was to request funding "(and obtain possible denials)" from private insurance, Medi-Cal, California Children's Services (CCS) and other typical generic services. (Ex. B, p. 7, underlining in original.) A third step was to access possible funding from "generic and community resources." (*Id.*) Bruno then identified a number of charitable organizations. It should be noted that in most instances Bruno described the charities as providing mobility devices, including strollers, tricycles, and bicycles. None were identified as sources of a pool lift.

(C) As number four on the list of steps to be taken, Bruno wrote:

If the cost is a substantial amount, the regional center will request something from the family explaining why you are



unable to financially meet this need. They might also ask for income information.

(Ex. B, p. 8.)

(D) Bruno summed up by writing that once all the steps were complete and all the documentation was in, then they would start the request process.

22. The same day that Bruno communicated the aforementioned procedures, Mother wrote back, stating it did not make sense that she would be requested to reach out to charities. Mother pointed out that the charities had no obligation at all to Claimant; she juxtaposed their status with that of private insurance and Medi-Cal. Mother demanded an "excerpt" from TCRC's policy that required contacting charities for adaptive equipment. Mother labelled the procedure involving non-profits as ridiculous. (Ex. B, pp. 6-7.)

23. Within three hours of Mother's email, Mindy Mosher, a manager, wrote Mother, giving her a hyperlink to TCRC's website, regarding equipment and supplies. Mosher in her email stated that the requested equipment must be related to the child's disability, and that TCRC "must explore all generic and private resources." (Ex. B, p. 6.) Mosher stated that the agencies that Bruno had listed were ones that the Service Agency typically reached out to "to see about equipment that is not always in our purview." (*Id.*) Further, Mosher wrote "in addition to this, we will also need a letter of financial hardship and to know how much/if at all you would be able to contribute." (*Id.*) Mosher did write that Bruno would help in contacting the non-profit agencies, and she reiterated the need for doctor's notes and denials from private insurance and Medi-Cal.

24. On October 6, 2020, Bruno wrote Mother and asked for a signed consent form so that Bruno could contact the non-profits. Bruno repeated the request a few days later. On November 21, 2020, Mother stated in an email that she had signed a consent via DocuSign. Three days later Bruno wrote that she had received the consent and would contact some of the non-profits regarding adaptive equipment.

25. The next written communication in the record is an email from Bruno dated March 24, 2021. It speaks to a respite issue, and Bruno reported she had spoken to several non-profits, and she was awaiting responses. She then repeated what she identified as TCRC's "protocol for funding adaptive equipment." It is essentially the same as set out in Factual Finding 21(B), above. It calls for obtaining a doctor's prescription or letter, and denials from private insurance, Medi-Cal, or CCS, and she wrote the parents are "asked to access generic resources (like the non-profits [Bruno] had contacted, to see if there is a possibility of financial assistance (as TCRC is considered, by law, the payer of last resort)." (Ex. B, p. 1.) The matter of family income was again set forth.

26. It must be noted that in each instance that TCRC, through Bruno or Mosher, raised the issue of the family establishing financial inability to pay, and the possibility of being required to provide income information, such was not tied to the issue of obtaining help from non-profits. This is relevant, because at the fair hearing the Service Agency stated the financial information might be necessary to show need to the non-profits. TCRC staff apparently took that position in response to Mother's complaint to DDS under section 4731, because in its findings, DDS tied the financial-need information to the requests to the non-profits. (Ex. G, p. 4.) However, that cannot be discerned from the three emails found in exhibit B, and referenced above; showing financial need was clearly stated to be part of TCRC's "protocol." Further, there is no

evidence that TCRC staff communicated to Mother that a specific non-profit would consider supplying the bicycle or pool lift if Mother demonstrated financial need to that particular non-profit.

27. (A) Claimant introduce in evidence a copy of TCRC service policies and guidelines that spoke to specialized equipment and supply services. From the written policy it is gleaned that such may be provided to meet needs directly related to the developmental disability, when necessary for the health and "functional ability of some individuals." (Ex. B, p. 11.) Then, TCRC may authorize funding for purchases related to the individual's disability, where there are no generic or private resources, including public and private insurance.

(B) Absent from the service policy is a requirement that a consumer tap charitable organizations, and there is no requirement that the consumer's family show financial inability to provide the requested service or equipment.

(C) Thus, it appears that Bruno and Mosher, in referring to the "protocol" for obtaining assistive devices, were referring not to TCRC service policies, but to some sort of unpublished rule or regulation, which is not controlling.

28. The record does not establish that doctor's prescriptions or letters of need were provided to TCRC before the NOPA was finally submitted. Such documents, found in exhibits C (regarding the pool lift) and D (regarding the specialized bicycle) were generated in June 2021. On the other hand, TCRC should be well aware of Claimant's condition, as he has obviously been a consumer for years, was unlikely to have received eligibility without TCRC medical staff having assessed him in some way, and prior IPP's would have considered his considerable disabilities.

## **The Prescription and Letter of Necessity**

29. Rachel Goldstein, M.D. of Children's Hospital wrote a prescription for a pool lift on June 3, 2021. It showed that Claimant had a diagnosis of Dystonic Cerebral Palsy, with a prognosis of "life long condition." (Ex. C, p. 1.) This became an issue for the TCRC expert, Dr. Little, as other documentation indicated that Claimant suffers from Cerebral Palsy, Spastic Quadriplegia. The letter of necessity found in exhibit C, written by a physical therapist, indicates that latter diagnosis. (Ex. C, p. 2.)<sup>5</sup>

30. (A) The letter of necessity was written by Kristie Zupancic PT, DPT, a pediatric physical therapist, Supervisor Rehabilitation/CDC at Adventist Health Simi Valley. She noted that Claimant receives physical therapy twice per month to continue to facilitate independence by engaging in tasks to address his functional gross motor delay, spasticity, limited ROM, weakness and limited overall volitional movement.

(B) Zupancic recommended providing Claimant with the Mighty 400 pool lift because it will allow him to enter the pool safely. She noted it rotates 360 degrees, has an adjustable seat lift and hand rests. She opined it will facilitate standing transfers and transitional motor planning, and that Claimant benefits from being in the water. Being in the pool improves Claimant's independence, improves his respiratory capacity and circulation, as well as his balance. She believes ready access to the pool will ensure progress. Zupancic also noted that use of the pool provides cognitive and social interaction opportunities with Claimant's brother, family, and friends. (Ex. C, pp. 2-3.)

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<sup>5</sup> The prescription for the adaptive tandem bicycle was written by Stephen Kundell, M.D., a pediatrician. He indicated a diagnosis of quadriplegic (sic) cerebral palsy. (Ex. D, p. 1.)

## **Dr. Little's Testimony**

31. Anne Little, M.D. has practiced medicine for approximately 38 years, and she has been consulting on developmental disabilities for approximately 35 years. She opined that the prescription by Dr. Goldstein alone was insufficient to support the provision of the pool lift, because it did not provide information about his condition, and because of the reference to dystonic cerebral palsy, whereas the letter of necessity, and the documentation for the tandem bicycle spoke to spastic quadriplegia. Dr. Little acknowledged that one could have both conditions. She pointed out a prescription should show duration and frequency of use.<sup>6</sup>

32. During her testimony, Dr. Little was asked about the difference between a device being therapeutic and recreational. She opined that assistive technology assists in participation in everyday life despite a disability. That did not bar the assistive technology as being therapeutic as well. When asked if Claimant's powered wheelchair is recreational or therapeutic, she noted that insurance deems it therapeutic. And while she noted that the letter of necessity submitted on Claimant's part tends to deem the pool lift as therapeutic, the pool lift meets the definition of assistive technology that she provided, that is, a device assisting in participation in everyday life despite a disability.

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<sup>6</sup> However, the prescription for the tandem bicycle did not show frequency or duration of use, nor did the related letter of necessity. Ultimately, those documents passed muster by the morning of the hearing.

## **Inability to Obtain the Assistance from Generic Services**

33. Mother produced a letter from California Children's Services stating that it could not provide a pool lift because the Medi-Cal manual for Durable Medical Equipment showed that such device was not a covered benefit. (A similar letter denied provision of the adaptive bicycle.)

34. As to private insurance, Mother documented six attempts to obtain coverage from Claimant's health insurance, Anthem. She could not obtain coverage in part because there is no CPT code for a pool lift. CPT stands for Current Procedural Terminology system, developed by the American Medical Association to be a standardized coding system for medical care professionals; it provides a standard language for a variety of persons and firms to use in medical claims and other communications. (Ex. E, p. 6.) Without a CPT code, Mother could not get to first base with the health insurer.

35. There is no evidence that any non-profit would assist, in whole or in part, with obtaining a pool lift.

36. Through the testimony of Stephen Graff, Ph.D., TCRC raised the issue of taking Claimant to a public pool, such as one maintained by the YMCA. Mother pointed out that such facilities do not have a changing area that will accommodate a 70-pound disabled boy, who would have to be laid out on the pool deck or floor of a bathroom or shower area to be changed in and out of his swim togs. Of course, the suggestion did not take into account the logistics of loading Claimant into the family

car, taking him to the public pool, and moving him to the pool area. At bottom, trying to access a public pool is not practicable.<sup>7</sup>

## **LEGAL CONCLUSIONS**

### **Jurisdiction**

1. Jurisdiction was established to proceed in this matter pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

### **General Rules Applicable to Resolving Service Disputes**

2. 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).)

3. 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*

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<sup>7</sup> It must be observed that Claimant wears a diaper, into which he urinates without warning, and the operators of a public pool would likely object to a diaper-clad child using its pool.

*Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388; hereafter, *ARC v. DDS*.)

4. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d). 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 decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

5. Regional centers must develop and implement IPP's, 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.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2), 4648, subd. (a)(1), (2).) The IPP must be updated at least every three years. (§4646.5)

6. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible for the consumer. (§ 4646; *ARC v. DDS, supra*, 38 Cal.3d at 389.) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646; 4646.5, subd. (a)(1), (2) and (4), 4512, subd. (b); and 4648, subd. (a)(6)(E).)



7. (A) Section 4512, subdivision (b), defines “services and supports for persons with developmental disabilities” broadly, as meaning

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 an independent, productive, and normal life.

(B) Section 4512, subdivision (b) provides a list of services that may be provided, in appropriate circumstances, to a consumer of regional center services. The services and supports that may be provided are not limited to those set out in the statute. The list is extensive, running the gamut from diagnosis to advocacy to supported and sheltered employment to paid roommates. “Adaptive equipment and supplies” are services recognized by section 4512, subdivision (b).

(C) Other statutes, and regulations, may impinge upon the provision of the services set out in section 4512, subdivision (b). One rule that can limit the obligation of a regional center to provide these services is the general rule that the regional centers may not supply services and supports available from generic services.

8. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so 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.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the

law is that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many people and families.

9. The IPP is to be prepared jointly by the planning team, and any 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 utilized, is made up of the disabled individual or their 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).)

10. 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 . . . ." In the planning process, the planning team is to give the highest preference to services and supports that will enable a minor to live with his or her family. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

11. In developing or modifying an IPP, a regional center is obligated to have a process that ensures compliance with applicable laws and regulations, and when purchasing services and supports, a regional center is to ensure that it is acting in conformity with its approved policies, that generic resources are being utilized where appropriate, and there must be compliance with section 4659, which requires regional centers to pursue generic resources. Finally, the process must consider the family's

responsibility to provide similar services and supports to a minor child without disabilities, although it must consider the consumer's need for extraordinary care, services, supports and supervision. (§ 4646.4, subd. (a).)

12. The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals . . . . Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies." (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer's needs, it is plain that assessments must be made so that services can be properly provided in a cost-efficient manner.

13. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client 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) & (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (2), 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that "maximize opportunities and choices for living, working, learning, and recreating in the community."

14. Reliance on a fixed policy "is inconsistent with the Act's stated purpose of providing services 'sufficiently complete to meet the needs of each person with developmental disabilities. (§ 4501.)" (*Williams v. Macomber* (1990) 226 Cal.App.3d

225, 232-233.) The services to be provided to each consumer are to be selected on an individual basis. (*ARC v. DDS, supra*, 38 Cal.3d at 388.)

15. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed in many different ways in the Lanterman Act. Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (§ 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), 4791).

16. Under section 4502, persons with developmental disabilities have certain rights, including the right to treatment services and supports in the least restrictive environment. Those services and supports should foster “the developmental potential of the person and be directed toward the achievement of the most independent, productive and normal lives possible.” (Subd. (b)(1).) There is also a right to dignity, privacy and humane care. (Subd. (b)(2).) The person also has the right to make choices, including where and with whom they live, and the pursuit of their personal future. (Subd. (b)(10).)

17. The regional centers are to pursue generic services as part of service coordination. The core rule has long resided in section 4648, subdivision (a)(8), which provides that “Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.” Traditionally, generic services or agencies were defined as those described above, agencies using public funds to serve members of the general public. Hence, public schools were and are generic sources.

18. Section 4659 has long provided that the regional centers shall identify and pursue all possible sources of funding for consumers receiving services. Section 4659 underwent substantial revision in 2009. The statute retained its mandate for the regional centers to pursue sources of funding for their consumers, such as generic resources (school systems, Medi-Cal, etc.). The statute now provides that the regional centers shall not purchase services that could be obtained by the consumer from traditional generic resources, as well as "private insurance, or a health care service plan when a consumer or family meets criteria of this coverage but chooses not to pursue that coverage." (§ 4659, subd. (c).) Glaringly absent from the list of sources that must be pursued before a regional center must provide funding as payor of last resort are charities and non-profit organizations.

## **Dispositive Legal Conclusions**

19. The pool lift requested by Claimant is a piece of adaptive equipment within the meaning of section 4512, subdivision (b). It can be "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 an independent, productive, and normal life." (See Legal Conclusion 7.) Further, as noted by Dr. Little, it is assistive technology because it can assist in participation in everyday life despite Claimant's significant disability. (Factual Finding 32.)

20. Provision of a pool lift is needed so that Claimant can safely participate in an activity of everyday life with his family, in the family home, and he will be able to participate in pool play with dignity, which he is deprived of now, per the testimony of Dr. Little. Further, the pool lift will limit Mother's exposure to injury. An injury would be deleterious to Mother's ability to care for Claimant.

21. There are no generic resources available to supply the pool lift. The letter from Children's Services establishes that Medi-Cal does not recognize the device, and the fact that there is no CPT code made it clear that such a device would not be forthcoming from the private insurance company. As to taking the Claimant to a public pool, that is impractical, as noted in Factual Finding 36.

22. Claimant's family was not obligated under the law to pursue charitable organizations for funding, nor were they obligated to provide evidence of financial need. Per Legal Conclusions 17 and 18, such charitable agencies are not among the traditional generic resources that a consumer must approach before a regional center can provide assistance. As to demonstrating financial need, which TCRC staff stated was part of some "protocol," no citation of authority has been provided here, and it is not part of the TCRC service policies. As noted by the ALJ during the hearing, the Lanterman Act has not contained such financial need requirements, with one or two exceptions, such as where a consumer's family seeks assistance with making co-payments. To make such need requirements an obligation of the family is of rather questionable legality in light of the entire Lanterman Act.

23. Injected into this process was the idea that the requested device had to have some therapeutic purpose and validity; hence, the requirement of a prescription and letter of necessity. This ignores Dr. Little's definition of adaptive equipment, and injects a requirement not found in the Lanterman Act. This also turned the Service Agency into the likes of a health insurer, plainly not its role under the Act. That the Service Agency believes there should be some connection between the disability and the request for the device is not unreasonable; its service policies require as much. But the device does not have to be "therapeutic"; as noted by Mother during the hearing, a wheelchair is more than a therapeutic device. Likewise, grab bars installed in a

bathroom, or a ramp installed at the front and backdoor for the wheelchair are not just therapeutic devices. And the circumstance that Claimant's twin brother can access the pool without a pool lift or other assistance supports the conclusion that a pool lift is directly related to Claimant's developmental disability.

24. The Service Agency will be ordered to purchase the Mighty 400 pool lift as the provision of adaptive equipment, so that Claimant may approximate the pattern of everyday living of nondisabled persons of the same age (Legal Conclusion 2) and to assist him in the achievement of the most independent, productive and normal life possible. (Legal Conclusion 16.)

## **ORDER**

Claimant's appeal is granted. The Service Agency shall pay for the purchase and installation of a Mighty 400 pool lift, with the accessories and equipment described in the estimate found at exhibit C, page 5.

DATE:

JOSEPH D. MONTOYA

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.