APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the "Ministry") reconsideration decision of November 19, 2019 (the "Reconsideration Decision"), which denied the Appellant's request for a health supplement in respect of a replacement custom mattress for the Appellant's enclosure bed on the basis that a custom mattress is not eligible medical equipment or an eligible medical supply under section 3 of Schedule C to the *Employment and Assistance For Persons With Disabilities Regulation* ("EAPWDR and the Appellant had not established eligibility for a replacement custom mattress as a life threatening need, pursuant to section 69 of the EAPWDR, or as a crisis supplement, under section 57 of the EAPWDR.

PART D – RELEVANT LEGISLATION

EAPWDR, sections 57, 62, and 69
Schedule C to the EAPWDR, sections 2 and 3

APPEAL NUMBER

PART E – SUMMARY OF FACTS

The Appellant is a sole recipient of disability assistance who has cerebral palsy.

The information before the Ministry at the time of the Reconsideration Decision included the following:

- A funding request to a local health authority, dated April 25, 2019 and completed by the Appellant's occupational therapist (the "OT"), for replacement of the flip down side of the Appellant's enclosure bed and a mattress for the Appellant's enclosure bed;
- a quotation, dated April 16, 2019, (the "Quotation") for the cost of a custom mattress for the Appellant's enclosure bed and repair of the enclosure bed's rail pad;
- a referral, dated March 5, 2019, from the Appellant's doctor, recommending replacement of the Appellant's current mattress (the "Mattress") due to the Mattress no longer being in "working order" as it was "ripped and lacking support";
- the Appellant's Medical Equipment Request and Justification (the "Request") to the Ministry, dated February 15, 2019 and completed by the OT, setting out that the Appellant's doctor was recommending a "foam mattress for custom enclosed bed";
- the Ministry's letter to the Appellant, dated October 3, 2019, denying the Appellant's request for a custom gate pad and custom made mattress;
- the Appellant's Request For Reconsideration ("RFR"), dated November 1, 2019, which included:
    - all of the above documentation;
    - a new letter from the Appellant's doctor, dated October 22, 2019, recommending a custom mattress and gate pad and noting that a mattress for a hospital bed was not appropriate because the Appellant requires a bed with high railings;
    - a subsequent funding request to a local health authority, dated October 22, 2019 and completed by the OT, noting that the Appellant's current enclosure bed was working well for the Appellant, who had cerebral palsy with regular athetoid movement, but that the Mattress was ripped and the foam was compressed;
    - a letter from the Appellant's parents, dated October 15, 2019, which included photos of the Mattress, the enclosure bed, and the Appellant, and set out that:
        - the Appellant has cerebral palsy, is wheelchair bound, non-verbal, and suffers from cognitive impairments;
        - the Appellant's enclosure bed and the Mattress was funded 15 years ago;
        - hospital bed rails are not high enough to keep the Appellant from falling out of bed and potentially suffering injury;
        - the Appellant's parents are both in their 70s, have purchased many assistive devices for the Appellant, including, a van with custom built add-ons that is kept at the Appellant's residence and used by the Appellant's caregivers.

In the Reconsideration Decision, the Ministry reversed its earlier decision with respect to the replacement of the custom gate pad on the Appellant's enclosure bed and held that it was legislatively authorized to provide repairs to the enclosure bed, which included replacement of the upper pads inside the gate of the enclosure bed.

At the hearing of the appeal, the Appellant's parents both gave evidence on the Appellant's behalf. They described the extent to which they continue to care for the Appellant so that the Appellant can live somewhat independently. The Appellant currently resides in a townhome which was built, to an extent, to accommodate the Appellant's disabilities. The Appellant's parents described the Appellant as having been approved for the enclosure bed and the Mattress at around the same time that the Appellant

moved into the townhouse. The Appellant's parents also described experiencing health difficulties of their own and the difficulty that they and an organization they are part of have had in hiring staff to care for the Appellant. The Appellant's parents reiterated many of the concerns about the condition of the Mattress, noting that it is old and ripped and that it has occasionally been stained with urine and vomit, which obviously makes it particularly unhygienic. When asked how long the Mattress had been degrading, the Appellant's parents confirmed that it has been a process that has transpired over time and was not sudden. The Appellant's parents also confirmed that the Appellant's enclosure bed is not a hospital bed and that a hospital bed is not appropriate as a hospital bed generally does not have high enough railings to prevent the Appellant from falling on to the floor and potentially suffering an injury.

At the hearing of the Appeal, the Ministry representative confirmed that the Appellant's enclosure bed had been funded by the Ministry under a previous version of the EAPWDR which appears to have afforded the Ministry a greater degree of flexibility and discretion insofar as the approval of health supplements was concerned. This was confirmed by the Ministry representative who, at the hearing of the appeal, indicated that prior to changes being made to the EAPWDR in 2010, the EAPWDR did not itemize the medical supplies, equipment, and devices that were eligible for funding as health supplements, unlike sections 2 and 3 of Schedule C to the current version of the EAPWDR.

In the result, the Ministry representative stated that the Ministry was not authorized to provide funding for a replacement mattress because after the EAPWDR was amended in 2010, only hospital beds were itemized as an eligible health benefit and containment beds and automatic turning beds were expressly excluded from being eligible for funding as health supplements.

APPEAL NUMBER

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the Reconsideration decision, which denied the Appellant's request for a supplement in respect of a replacement custom mattress for the Appellant's enclosure bed because the request did not meet the requirements of sections 2 or 3 of Schedule C to the EAPWDR or sections 57 and 69 of the EAPWDR, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant.

The Legislation

Section 62 of the EAPWDR authorizes the Ministry to provide health supplements set out in sections 2 and 3 of Schedule C to the EAPWDR:

General health supplements

62 The minister may provide any health supplement set out in section 2 *[general health supplements]* or 3 *[medical equipment and devices]* of Schedule C to or for

(a) a family unit in receipt of disability assistance,

(b) a family unit in receipt of hardship assistance, if the health supplement is provided to or for a person in the family unit who is under 19 years of age, or

© a family unit, if the health supplement is provided to or for a person in the family unit who is a continued person.

Section 57 of the EAPWDR authorizes the Ministry to provide crisis supplements:

Crisis supplement

57 (1)The minister may provide a crisis supplement to or for a family unit that is eligible for disability assistance or hardship assistance if

(a) the family unit or a person in the family unit requires the supplement to meet an unexpected expense or obtain an item unexpectedly needed and is unable to meet the expense or obtain the item because there are no resources available to the family unit, and

(b) the minister considers that failure to meet the expense or obtain the item will result in

(i) imminent danger to the physical health of any person in the family unit

...

(3) A crisis supplement may not be provided for the purpose of obtaining

(a) a supplement described in Schedule C, or

(b) any other health care goods or services...

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Section 69 of the EAPWDR authorizes the Ministry to provide health supplements in cases where persons may be facing a direct and imminent life threatening need:

Health supplement for persons facing direct and imminent life threatening health need

69 The minister may provide to a family unit any health supplement set out in sections 2 (1) (a) and (f) *[general health supplements]* and 3 *[medical equipment and devices]* of Schedule C, if the health supplement is provided to or for a person in the family unit who is otherwise not eligible for the health supplement under this regulation, and if the minister is satisfied that

(a) the person faces a direct and imminent life threatening need and there are no resources available to the person's family unit with which to meet that need,

(b) the health supplement is necessary to meet that need,

(c) a person in the family unit is eligible to receive premium assistance under the *Medicare Protection Act*, and

(d) the requirements specified in the following provisions of Schedule C, as applicable, are met:

(i) paragraph (a) or (f) of section (2) (1);

(ii) sections 3 to 3.12, other than paragraph (a) of section 3 (1).

The health supplements which the Ministry is authorized to provide under section 62 are set out in sections 2 and 3 of Schedule C to the EAPWDR:

General health supplements

2 (1) The following are the health supplements that may be paid for by the minister if provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation:

(a) medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required for one of the following purposes:

(A) wound care;

(B) ongoing bowel care required due to loss of muscle function;

(C) catheterization;

(D) incontinence;

(E) skin parasite care;

(F) limb circulation care;

(ii) the supplies are

(A) prescribed by a medical practitioner or nurse practitioner,

(B) the least expensive supplies appropriate for the purpose, and

(C) necessary to avoid an imminent and substantial danger to health;

(iii) there are no resources available to the family unit to pay the cost of or obtain the supplies;

(a.1) the following medical or surgical supplies that are, at the minister's discretion, either disposable or reusable, if the minister is satisfied that all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies:

(i) lancets;

(ii) needles and syringes;

(iii) ventilator supplies required for the essential operation or sterilization of a ventilator;

(iv) tracheostomy supplies;

(a.2) consumable medical supplies, if the minister is satisfied that all of the following requirements are met:

(i) the supplies are required to thicken food;

(ii) all the requirements described in paragraph (a) (ii) and (iii) are met in relation to the supplies;

...

Medical equipment and devices

3 (1) Subject to subsections (2) to (5) of this section, the medical equipment and devices described in sections 3.1 to 3.12 of this Schedule are the health supplements that may be provided by the minister if

(a) the supplements are provided to a family unit that is eligible under section 62 *[general health supplements]* of this regulation, and

(b) all of the following requirements are met:

(i) the family unit has received the pre-authorization of the minister for the medical equipment or device requested;

(ii) there are no resources available to the family unit to pay the cost of or obtain the medical equipment or device;

(iii) the medical equipment or device is the least expensive appropriate medical equipment or device.

(2) For medical equipment or devices referred to in sections 3.1 to 3.8 or section 3.12, in addition to the requirements in those sections and subsection (1) of this section, the family unit must provide to the minister one or both of the following, as requested by the minister:

(a) a prescription of a medical practitioner or nurse practitioner for the medical equipment or device;

(b) an assessment by an occupational therapist or physical therapist confirming the medical need for the medical equipment or device.

...

(3) Subject to subsection (6), the minister may provide as a health supplement a replacement of medical equipment or a medical device, previously provided by the minister under this section, that is damaged, worn out or not functioning if

(a) it is more economical to replace than to repair the medical equipment or device previously provided by the minister, and

(b) the period of time, if any, set out in sections 3.1 to 3.12 of this Schedule, as applicable, for the purposes of this paragraph, has passed.

(4) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was previously provided by the minister if it is more economical to repair the medical equipment or device than to replace it.

(5) Subject to subsection (6), the minister may provide as a health supplement repairs of medical equipment or a medical device that was not previously provided by the minister if

(a) at the time of the repairs the requirements in this section and sections 3.1 to 3.12 of this Schedule, as applicable, are met in respect of the medical equipment or device being repaired, and

(b) it is more economical to repair the medical equipment or device than to replace it.

(6) The minister may not provide a replacement of medical equipment or a medical device under subsection (3) or repairs of medical equipment or a medical device under subsection (4) or (5) if the minister considers that the medical equipment or device was damaged through misuse.

...

Medical equipment and devices — hospital bed

3.6 (1) Subject to subsection (3) of this section, the following items are health supplements for the purposes of section 3 of this Schedule if the minister is satisfied that the item is medically essential to facilitate transfers of a person to and from bed or to adjust or maintain a person's positioning in bed:

(a) a hospital bed;

(b) an upgraded component of a hospital bed;

(c) an accessory attached to a hospital bed;

(d) a positioning item on a hospital bed.

(2) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (1) of this section is 5 years from the date on which the minister provided the item being replaced.

(3) The following items are not health supplements for the purposes of section 3 of this Schedule:

(a) an automatic turning bed;

(b) a containment type bed.

Medical equipment and devices — pressure relief mattresses

3.7 (1) A pressure relief mattress is a health supplement for the purposes of section 3 of this Schedule if the minister is satisfied that the pressure relief mattress is medically essential to prevent skin breakdown and maintain skin integrity.

(2) The period of time referred to in section 3 (3) (b) of this Schedule with respect to replacement of an item described in subsection (1) of this section is 5 years from the date on which the minister provided the item being replaced.

Panel Decision

Section 57

A crisis supplement can be provided for in respect of items that are not provided for under Schedule C and are not health care goods or services. On that basis alone, it would appear that section 57 is inapplicable to the Appellant's request for a replacement custom mattress, given that the recommendation for same came from the Appellant's doctor and the OT.

However, even if a replacement mattress could be characterized as something other than a health care good or service, in order to be eligible for funding as a crisis supplement, the request must also be the result of an unexpected expense. Alternatively, the need for a replacement mattress must have been unexpected. There also have to be no other resources available to the Appellant to cover the cost of the replacement mattress and the Ministry must be satisfied that failure to meet the expense of a replacement mattress will result in imminent danger to the Appellant's physical health. The Appellant's parents specifically confirmed, however, that the Mattress had degraded over time and that it was not unexpected that it would do so. At the same time, while there was evidence about the extent to which continued use of the Mattress was unhygienic, the evidence did not go so far as to indicate that the Appellant faced an imminent physical health danger. In the result, the panel finds that the Ministry was reasonable in its determination that the request for a replacement mattress did not meet the criteria for funding as a crisis supplement.

Section 69

Section 69 of the EAPWDR authorizes the Ministry to provide a health supplement for persons facing a direct and imminent life threatening health need. However, a health supplement under this section is limited to a person or family unit who is not otherwise eligible for a health supplement under this regulation. In addition to the lack of evidence about the imminent life threatening need for a new mattress, the Appellant *is* eligible for health supplements under the EAPWDR and, in the result, the

panel finds that the Ministry was reasonable in its determination that the request for a new mattress did not meet the requirements for an emergency health supplement under section 69 of the EAPWDR.

Sections 2 and 3, Schedule C

Sections 2 and 3 of Schedule C to the EAPWDR itemize a number of types of medical equipment and surgical supplies that are eligible for funding as health supplements to recipients of assistance who meet the requirements for health supplements under section 62 of the EAPWDR.

Section 2(1) of Schedule C to the EAPWDR provides for a number of medical and surgical supplies which are eligible for funding as health supplements. These supplies are lancets, needles and syringes, ventilator supplies, tracheotomy supplies, and consumable medical supplies. In order to be eligible for a health supplement for one of these items a recipient of assistance must demonstrate that there are no other resources available to pay for the cost of the supply, that it is necessary to prevent imminent and substantial danger to health, and that it is necessary for one of the purposes set out in section 2(1)(a)(i) of Schedule C. Namely, it must be required for wound care, ongoing bowel care, catheterization, incontinence, skin parasite care, limb circulation care. In addition to the lack of evidence that the replacement mattress was required for any of the purposes set out in section 2(1)(a)(i) of Schedule C to the EAPWDR, the evidence before the Ministry also did not indicate any imminent or life threatening need for a replacement custom mattress. As a replacement custom mattress is also not among the medical or surgical supplies itemized under section 2(1)(a.1) and 2(1)(a.2) of Schedule C to the EAPWDR, the panel finds that the Ministry's determination that the Appellant's request for a new mattress did not meet the requirements for a general health supplement under section 2 of Schedule C was also reasonable.

Section 3 of Schedule C to the EAPWDR itemizes the medical equipment and devices that are eligible for funding as health supplements. The general requirements for the equipment itemized in sections 3.1 through 3.12 of Schedule C are set out in section 3(1) of Schedule C and section 3(2) of schedule C for items specifically referred to in sections 3.1 through 3.8 and 3.12 of Schedule C.

As the request for a replacement mattress could potentially fall under sections 3.6 or 3.7 of Schedule C, the Appellant would need to provide a prescription of a medical practitioner or nurse practitioner and an assessment by an occupational therapist, both of which were provided by the Appellant with the request for a replacement custom mattress.

Section 3.6 of Schedule C to the EAPWDR authorizes the provision of a supplement in respect of a hospital bed, an upgraded component of hospital bed, an accessory attached to a hospital bed, a positioning item on a hospital bed, or the replacement of any of those items. However, section 3.6(3) of Schedule C expressly excludes an "automatic turning bed" and a "containment type bed" from eligibility for health supplements under section 3.6 of Schedule C. The evidence before the Ministry and the panel is that the Appellant's bed is *not* a hospital bed and, in the result, the panel finds that the Ministry's denial of the Appellant's request for a replacement custom mattress for the Appellant's *enclosure* bed was reasonable, having regard to section 3.6 of Schedule C.

In order to be eligible for a health supplement in respect of a pressure relief mattress or the replacement of same, which is provided for under section 3.7, the Ministry must be satisfied that the mattress is medically essential to "prevent skin breakdown and maintain skin integrity." In the case of the Appellant, outside of a reference in the October 22, 2019 from the OT to "pressure redistribution", the type of mattress being requested by the Appellant does not appear to be a pressure relief mattress. In addition, the evidence before the Ministry did not indicate that the mattress being requested by the Appellant was required to prevent skin breakdown and maintain skin integrity. The panel finds that the Ministry was

reasonable in its determination that the Appellant did not meet the requirements for a health supplement under section 3.7.

In addition to being authorized to provide supplements for the equipment and devices described in sections 3.1 through 3.12 of Schedule C, section 3(3) of Schedule C to the EAPWDR authorizes the replacement of medical equipment or a medical device that had previously been provided by the Ministry *under section 3* if it was damaged, worn out, or not functioning where it was more economical to replace the item than to repair it. This provision contrasts with section 3(4) of Schedule C to the EAPWDR which authorizes the Ministry to repair medical equipment or a medical device that was previously provided by the Ministry irrespective of whether it had been provided under section 3 of the EAPWDR.

Consequently, the legislative changes to the EAPWDR in 2010 produces the incongruous result that the Ministry held, in the Reconsideration Decision, that it is authorized to *repair* the Appellant's enclosure bed, as the bed itself is medical equipment or a medical device previously provided by the Ministry, but that it is not authorized to *replace* the Appellant's enclosure bed or the Mattress because the Mattress is medical equipment or a medical device that had previously been provided by the Ministry but *not under section 3 of Schedule C* to the EAPWDR. In addition, the current version of the EAPWDR expressly sets out that a containment type bed is not an eligible item under section 3 of Schedule C. In effect, the legislation, in its current form, authorizes the Ministry to repair the Appellant's enclosure bed under section 3(4) of Schedule C but renders it seemingly useless because replacing the Mattress with the type of custom mattress that is required by the Appellant for use in the enclosure bed is not authorized under section 3(3) of Schedule C. Underscoring the irony of this is the possibility that the Appellant *might* meet the criteria for a health supplement in respect of a hospital bed and upgraded components to a hospital bed were such a supplement to be requested. However, such a bed could well be more expensive than the replacement of the Mattress and would result in the Appellant having a bed that did not provide as effective protection against falls.

This Panel is limited in its jurisdiction to determine if the Ministry acted in accordance with the provisions of the applicable legislation. Because Section 3.6(3)(b) of Schedule C to the EAPWDR specifically prohibits funding for a containment type bed and because section 3(3) of Schedule C to the EAPWDR precludes the replacement by the Ministry of items that were not previously approved under section 3 of Schedule C to the EAPWDR, the panel finds that the Ministry is simply not legislatively authorized to approve replacement of the Mattress as a health supplement, even where the panel may find the result unfair and illogical in these circumstances. Despite the foregoing, the panel is nevertheless bound to confirm the Ministry's decision.

While the Panel does not have any jurisdiction over decisions made by the provincial government outside of the legislation as set out in the Employment and Assistance for Persons with Disabilities Act (EAPWDA) and the EAPWDR, given the Appellant's need for a replacement of the Mattress and the history summarized above, the panel supports any decision that might be made by the Ministry that would allow it to continue to fund the costs relating to the acquisition and maintenance of a containment type bed for use by the Appellant.

APPEAL NUMBER

PART G – ORDER

THE PANEL DECISION IS: (Check one) ☒ **UNANIMOUS** ☐ **BY MAJORITY**

THE PANEL ☒ **CONFIRMS THE MINISTRY DECISION** ☐ **RESCINDS THE MINISTRY DECISION**

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? ☐ Yes ☐ No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☒ or Section 24(1)(b) ☒

and

Section 24(2)(a) ☒ or Section 24(2)(b) ☐

PART H – SIGNATURES

PRINT NAME Adam Shee	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/12/17

PRINT NAME Simon Clews	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/12/17
PRINT NAME David Handelman	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/12/17