

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

In the Matter of:

Claimant,

v.

Tri Counties Regional Center

DDS No. CS0018383

OAH No. 2024060720

DECISION

Nana Chin, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on July 19, 2024, by videoconference.

Claimant's mother (Mother) represented Claimant. (Names are omitted and family titles are used to protect the privacy of Claimant and her family.).

Tri Counties Regional Center (TCRC or Service Agency) was represented by Vasti Mezquita, Services and Supports Manager for the Transition Team of TCRC.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on July 19, 2024.

ISSUE

Should the Service Agency be required to fund : (1) Else Organic Plant Based Formula; and (2) Probiotic Health Supplements?

EVIDENCE

Documentary:

TCRC's Exhibits 1, 2a-c, 3-8, 9a-b, 10-15; Claimant's Exhibits A-G

Testimonial: Sheila Watson TCRC Early Start Coordinator, Alexandria Bass, TCRC Early Start Services and Supports Manager, Anne E. Little, M.D., medical consultant; Fatima Lopez Martinez, Early Start Manager; Lani Jean Ashley, Ph.D., psychologist; and Mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a three-year old client of TCRC who lives with his parents and a minor sibling and is eligible for services under the Lanterman Developmental Disabilities Services Act (the Lanterman Act, Welf. & Inst. Code, § 4500 et seq.) because he has Down Syndrome, a disabling condition found to be closely related to intellectual disability (ID) or requires treatment similar to that required for individuals with ID (5th Category).

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2. In a Notice of Action dated May 21, 2024, TCRC notified Parents that their request that TCRC fund Else Plant Based Formula (Else Formula) and Probiotic Health Supplements was denied. The reason TCRC offered for denying funding for the Else Formula was the formula was not related to Claimant's qualifying diagnosis of ID; and the reason TCRC was denying funding for the Probiotic Health Supplements (probiotics\\- were that regional centers are prohibited from purchasing experimental treatments that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. In addition, TCRC asserted that meeting Claimant's nutritional needs is considered a parental responsibility.

3. Mother appealed the denial and this hearing ensued.

Early Start Services

4. Claimant was born on June 5, 2021, with Down Syndrome and began receiving Early Start services from TCRC when he was one month and 21 days. During the initial assessment, Claimant was observed to have global developmental delays but no significant neurological deficits other than low muscle tone and strength, all of which are typical for children of his age with Down Syndrome. (Exh. 3.)

5. Claimant was provided with an array of services which included: (1) physical therapy (PT) to address his delays with gross motor development, strength and muscle tone; (2) speech therapy (ST); (3) occupational therapy (OT) to address his delays with fine motor and adaptive skills development, as well as to monitor feeding skills; and (4) early interventionist services to address global developmental skills acquisition.

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6. Shortly before Claimant turned three years old, Claimant's occupational therapist prepared a Closing Developmental Report. The report noted Claimant's progress in several areas but found that due to the oral-motor delays caused by Claimant's Down Syndrome, he had developed an aversion to eating anything other than formula.

Eligibility Determination

7. To be eligible for regional center services, an individual needs to have a qualifying developmental disability, which includes intellectual disability (ID), cerebral palsy, epilepsy, autism or a disabling condition found to be closely related to ID or requires treatment similar to that required for individuals with ID (commonly referred to as 5th Category).

8. On December 6, 2023, TCRC made an early determination that Claimant qualified for regional center services based on his mild intellectual disability (ID).

9. Once Mother became aware of TCRC's determination, she contacted TCRC Service Manager Fatima Lopez Martinez. Mother expressed that she did not feel that Claimant's qualifying diagnosis was ID. The issue was eventually referred back to the eligibility team.

10. Lani Jean Ashley, Ph.D., a staff psychologist at TCRC, and a member of the eligibility team, explained that under Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), ID is a diagnosis that is reserved for individuals over the age of five; children under the age of five are diagnosed with global developmental delay. (The DSM-5, published by the American Psychiatric Association, is a widely manual, was utilized by the Service Agency in making its eligibility determination.)

11. In Claimant's case, the eligibility team originally found Claimant to be eligible under ID because Down Syndrome is a condition generally associated with ID. According to Dr. Ashley, the benefit of an ID classification is that it is a classification that is easier for school districts to understand. After discussion with Mother, Dr. Ashley agreed with Mother's concern about the TCRC determination that Claimant had mild ID because Claimant has not been formally assessed and the early diagnosis essentially "skips" two years of Claimant's life. Dr. Ashley discussed the issue with the eligibility team and the team members were in agreement. Dr. Ashley noted that though it was "a little unusual," the decision to change Claimant's diagnosis to 5th Category "was very legitimate."

Request for Funding

12. On May 15, 2024, an individual program plan (IPP) meeting was conducted at Claimant's home. One of Claimant's health goals was "wellness." Though Claimant was generally healthy, Parents expressed their concern that Claimant was not eating solid foods and was only drinking formula.

13. A request was made to TCRC to fund: (1) the purchase of Else Formula; and (2) probiotics, dietary fiber products and a magnesium supplement. TCRC requested Anne E. Little, M.D., a medical consultant, review the funding requests.

ELSE FORMULA

14. As part her review of Claimant's request for Else Formula, Dr. Little reviewed: (1) a letter of medical necessity for nutritional supplement and diapers from Claimant's pediatrician, Melissa Ruiz, MD, which stated Claimant has been unable to take any solid food by mouth due to his oral-motor delays and the only formula Claimant has been able to tolerate is Else Formula, (2) the prescription for Else Formula

from Dr. Ruiz; (3) Claimant's medical primary care records from Vance Woodward, DO; (4) the closing OT assessment from Claimant's occupational therapist, Rachel Price; and (4) a letter describing Claimant's oral-motor and feeding deficits from OT Price.

15. Dr. Little noted "[t]he necessity for [Else Formula] as a medical need for health and safety [was] established" and Claimant was at risk for malnutrition and dehydration, but recommended funding be denied because TCRC had not been provided with documentation that Parents had requested funding from their insurance and that the request had been denied.

16. At hearing, Dr. Little acknowledged Claimant's oral-motor delays were a product of his Down Syndrome, as children with Down Syndrome have global delays, but asserted that Down Syndrome was not a qualifying developmental disability. Dr. Little also opined that the more appropriate solution to address Claimant's feeding issues would be a consultation with a psychologist who could look at Claimant's behaviors surrounding feeding, a functional behavior assessment, applied behavior analysis (ABA), continued feeding therapy and a consultation with a registered dietitian.

PROBIOTICS, DIETARY FIBER PRODUCTS

17. As part her review of Claimant's request for probiotics, dietary fiber products, Dr. Little reviewed: (1) Claimant's medical records from Van Woodward, D.O.; and (2) communication with Brent Caplan, D.C. recommending nutritional formulas, probiotics, and other supplements.

18. Dr. Little found that the records did not support the clinical necessity for these products. Dr. Woodward described Claimant as "a healthy child with Down syndrome who was in good general health and was working with an Occupational

Therapist on feeding issues.” (Exh. 9b, p. A42.) Dr. Caplan’s communication did not indicate he had ever examined Claimant and simply listed a series of recommendations that would “hopefully” be “supportive for him.” (Exh. 13, p. A52.)

19. Dr. Little noted there was no documentation Claimant had any medical or clinical need for these products. Dr. Little noted that the Lanterman Act prohibited the “funding of treatments that are not evidence-based or established as clinically effective or safe, including the use nutritional therapy when not through a general physician practice” and that Dr. Caplan was a chiropractor and not a physician and was not providing health care through a general physician practice. (Exh. 9b, p. A43.)

Mother’s Testimony

20. When Claimant was six months old, Mother suffered three strokes and is now permanently disabled. The family is now financially supported solely by Father who works full-time and attends classes at the North Valley Occupational Center (NVOC).

ELSE FORMULA

21. The family receives Women, Infants, and Children (WIC) and CalFRESH benefits which are used to feed their family. Mother asserted she understood the mandate TCRC consider parental responsibility, but asserted Claimant’s nutritional needs are not typical of other three-year-old children. Had Claimant’s needs been similar to others his own age, he would be eating solid food like the rest of the family.

22. Mother requested both WIC and MediCal (through Gold Coast Health Plan) fund the Else Formula. WIC denied her request in January 2023. Mother requested that MediCal fund the items, but was repeatedly told that it was “not a

request that could be reviewed.” Mother finally was able to get a denial letter from MediCal, which she provided to TCRC.

23. Mother asserted that she is appealing MediCal’s denial and agrees to the therapies recommended by TCRC to address Claimant’s feeding issues, but that Claimant has immediate ongoing nutritional needs that cannot wait.

PROBIOTICS

24. Mother explained the request for probiotics originated from Claimant’s pediatrician, Dr. Ruiz, who verbally suggested to her that fiber and magnesium be introduced into Claimant’s diet. Dr. Ruiz recommended Mother look up each of the supplements individually, which prompted her to contact Dr. Caplan for a list of recommendations. Mother asserts the request was not for “experimental” treatment.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) (All undesignated statutory references are to the Welfare and Institutions Code.) Claimant timely requested a hearing following the Service Agency’s denial of funding, and therefore, jurisdiction for this appeal was established.

2. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Where a change in services is sought, the party seeking the

change bears the burden of proving that a change in services is necessary. (See Evid. Code, § 500.) The standard of proof in this case is a preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, § 115.)

3. In seeking funding for Else Formula and probiotics, Claimant bears the burden of proving by a preponderance of the evidence that the Lanterman Act requires TCRC to deliver the services and supports he requests. Claimant has met his burden of proving he is entitled to funding of the Else Formula but did not meet his burden of proving he is entitled to funding of the probiotics.

Relevant Legal Provisions

4. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) The Lanterman Act gives regional centers a critical role in the coordination and delivery of services and supports for persons with developmental disabilities. (§ 4620, et seq.)

5. The “services and supports” provided to a consumer include “specialized services and supports . . . directed toward the alleviation of a developmental disability . . . or toward the achievement and maintenance of independent, productive, and normal lives . . .” (§ 4512, subd. (b).) The services and supports necessary for each consumer are determined through the IPP process. (§§ 4512, subd. (b), 4646.)

6. Regional centers are required to ensure adherence with federal and state laws and regulations and ensure that the purchase of services and supports for a consumer: (1) conforms with the regional center’s approved purchase of service

policies; (2) utilizes generic services and supports when appropriate; and (3) utilizes other services and sources of funding (§ 4646.4, subd. (a).)

7. If a generic agency fails or refuses to provide a regional center consumer with those supports and services which are needed to maximize the consumer's potential for integration into the community, the Lanterman Act requires the regional centers to fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390).)

Analysis

REQUEST FOR ELSE FORMULA

8. TCRC does not dispute that Else Formula is medically necessary for Claimant's health and safety. Dr. Little's suggestion that Claimant's qualifying developmental disability is not the reason for Claimant's inability to eat solid food was rejected. The evidence established Claimant is eligible for services under the 5th Category based on global delays caused by his Down Syndrome. The delays include oral-motor delays which currently prevent Claimant from eating solid foods and are therefore related to his qualifying developmental disability.

9. TCRC's suggestion that funding for Else Formula: (1) is more appropriately funded through another generic resource; and (2) is a parental responsibility is rejected. Claimant's need for Else Formula is not a need typical of a child who does not have a developmental disability. In addition, there is a current and immediate need for Else Formula. While Parents appeal, TCRC is required to fill the gap (i.e. fund the service) by providing funding for Else Formula in order to meet Claimant's

goal IPP goal of “wellness.” (In addition, there is no evidence such an appeal would be successful.)

REQUEST FOR PROBIOTICS

10. Claimant did not present any evidence that would suggest that funding probiotics meets any need relating to Claimant’s developmental disability. There was no medical report from any examining physician who found probiotics necessary to support Claimant.

ORDER

1. Claimant’s appeal from TCRC’s NOPA dated May 21, 2024, is granted in part and denied in part.

2. TCRC shall provide funding for Else Organic Plant Based Formula until such time as it is no longer medically necessary for Claimant or a generic resource provides funding for the formula.

3. TCRC is not required to providing funding for Probiotic Health Supplements.

DATE:

NANA CHIN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.