

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**KERN REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2019100163**

**DECISION**

Nana Chin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter<sup>1</sup> on November 21, 2019, in Bishop, California.

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<sup>1</sup> Due to the similarity of issues and facts, this matter was consolidated for hearing purposes only with OAH case number 2019100164.

Claimant<sup>2</sup> was present throughout the proceedings and represented by his parents.

Kern Regional Center (KRC or Service Agency) was represented by Kristine Khuu, Assistant Director of Client Services.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on November 21, 2019.

## **ISSUE**

Whether the Service Agency must continue funding for nutritional supplements until Claimant's next Individual Program Plan (IPP).

## **EVIDENCE**

Documentary: KRC's Exhibits A through F

Testimonial: Kristine Khuu, Assistant Director of Client Services; Claimant's parents

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<sup>2</sup> Names are omitted and family titles are used throughout this Decision to protect the privacy of Claimant and his family.

## FACTUAL FINDINGS

### Parties and Jurisdiction

1. Claimant is a KRC consumer who is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act; Welf. & Inst. <sup>3</sup> Code, § 4500 et seq.) based upon qualifying diagnoses of mild intellectual disability (ID) and cerebral palsy.

2. For approximately 20 years, Claimant has been a participant in KRC's Self-Determination<sup>4</sup> pilot program. As part of Claimant's 2019 plan, the Service Agency agreed to provide funding for nutritional supplements from June 1, 2019, until May 31, 2020.

3. On August 22, 2019, the Service Agency issued a Notice of Proposed Action (NOPA), informing Claimant that they were terminating funding for Claimant's nutritional supplements.

4. Claimant filed a fair hearing request to appeal the Service Agency's decision.

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<sup>3</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>4</sup> Self-Determination is a voluntary alternative to the traditional way regional centers provide services and supports. It is designed to offer consumers and their families more freedom and control in choosing their services and supports. In addition to the increased flexibility and control, many consumers are able to receive services that regional centers are not ordinarily allowed to fund due to changes in state law.

5. All jurisdictional requirements have been met.

## **Self-Determination**

6. Self-Determination began as a pilot program approximately 20 years ago with five regional centers. Because KRC serves consumers in two very rural areas where traditional service providers are difficult to find, KRC was one of the regional centers chosen to participate in the pilot program.

7. In 2013, the Legislature enacted Code section 4685.8, requiring the Department of Developmental Services (DDS) to establish and implement a state Self-Determination Program (SDP) that would be available in every regional center catchment area. Implementation of SDP, however, was contingent upon approval of federal funding.

8. On June 7, 2018, DDS announced that the application for federal funding, or "Waiver", of SDP was approved by the Centers for Medicare and Medicaid Services (CMS). SDP is currently available to a limited number of participants. DDS intends to make SDP available to all eligible consumers after June 7, 2021. (Self-Determination Program-Frequently Asked Questions, <https://www.dds.ca.gov/SDP/faq.cfm> [as of Dec. 1, 2019.]

9. Following CMS approval, certain services and supports previously authorized under the pilot program could no longer be funded with the SDP budget.

## **Background**

10. Claimant is a 23-year old non-conserved male who resides in a mobile home with both of his parents. In addition to his qualifying diagnoses, Claimant has a

diagnosis of Pierre Robin sequence,<sup>5</sup> which results in a number of physical and intellectual challenges.

11. Due to his condition, Claimant suffers from a number of chronic craniofacial issues and is at risk of choking when he eats food with different textures. As a result, Claimant requires a specialized diet to meet his nutritional needs.

12. In order to meet his needs, Claimant's Self-Determination pilot budget has, for the past seven years, included a monthly grocery stipend. (Exhibit 15.) The stipend is used to purchase nutritional supplements such as meal replacement drinks for Claimant.

13. On August 9, 2019, a planning meeting was held during which both a Self-Determination Person Centered Plan and an Individual Program Plan (2019 IPP) were generated. The meeting was attended by Claimant; his parents; Russel Rankin, the Self Determination Pilot Service Broker; Cameron Matthewson, KRC Service Coordinator; and Dustlyne Beavers, Independent Facilitator (IF).

14. Claimant's 2019 IPP notes that the supports and services Claimant has received through his Self-Determination pilot plan have made it possible for Claimant to remain in the family home. It further notes that Claimant's condition makes specialized equipment and supplies, including a special diet, necessary for his ongoing health and safety in order to remain in the least restrictive environment.

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<sup>5</sup> Pierre Robin sequence is a condition characterized by a small lower jaw, displacement of the tongue toward the back of the oral cavity and cleft palate.

15. The Service Agency notified Claimant's parents during the August 2019 IPP meeting that, due to recent changes in its eligibility requirements, Claimant was potentially eligible to participate in the CalFresh program, an entitlement program that provides monthly benefits to assist low-income households in purchasing the food they need to maintain adequate nutritional levels. Claimant's parents agreed to apply for CalFresh benefits on Claimant's behalf but requested that the nutritional supplements, which had been approved as part of Claimant's 2019 Self-Determination pilot plan, be kept in place pending approval.

### **Service Agency's Contentions**

16. Other than stating that KRC's pilot Self-Determination program had been extremely flexible and permitted the Service Agency to provide supports and services which would otherwise not be available to consumers, no information was provided at the hearing about the program.

17. The Service Agency admitted that it had previously authorized funding, pursuant to Claimant's IPP, for nutritional supplements under its pilot program. The Service Agency argued, however, since implementation of SDP by DDS, the Service Agency's ability to fund supports and services was subject to a number of restrictions. Included among the restrictions is a restriction that prohibits individuals from using their SDP budget to fund for food or utilities as "[t]here are regulations and law in place that disallow [KRC] to fund for food and utilities, services that were paid through the Pilot program for the past 7 years." (Exhibit D.) At the hearing, the Service Agency did not cite or produce copies of the "regulations and law" that the Service Agency

contends prohibits the continued funding for food.<sup>6</sup> The Service Agency also failed to present evidence that Claimant's nutritional supplements constitute "food"<sup>7</sup> for purposes of SDP.

18. The Service Agency further argued that as there are other generic resources, including CalFresh, which could potentially provide funding for Claimant's nutritional supplements, the Service Agency could not fund for those services.

### **Claimant's Contentions**

19. According to Claimant's parents, nutritional supplements have been part of Claimant's Self-Determination pilot plan for the past seven years. Funding had been most recently reauthorized from June 1, 2019, through May 31, 2020.

20. Claimant's parents submitted an application for benefits on Claimant's behalf shortly after the August 2019 IPP. As of the date of the hearing, however, they

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<sup>6</sup> The only evidence to support the Service Agency's contention that food and utilities could not be funded with a consumer's SDP budget is a DDS website printout of "Frequently Asked Questions" which was admitted into evidence as Exhibit C. There is no information on Exhibit C or the DDS website as to the statutory or regulatory authority for that prohibition.

<sup>7</sup> The Food and Drug Administration (FDA), the federal agency responsible for the ensuring the safety of food, dietary supplements and medications, regulates "supplements" under a different set of regulations than those covering conventional foods and drug products.

have not been notified if any determination has been made by CalFresh regarding Claimant's eligibility for the program.

21. Claimant's parents explained that a large portion of the family budget goes towards Claimant's care and that the sudden loss of regional center funding to meet Claimant's nutritional needs would severely impact the family's finances.

22. Claimant's parents accepted that going forward Claimant's SDP budget will no longer include funding for his nutritional supplements. They contended, however, that they need additional time to attempt to get funding for Claimant's nutritional supplements through other generic resources in order to continue to provide Claimant care for Claimant in the home.

## **LEGAL CONCLUSIONS**

### **Jurisdiction**

1. Pursuant to section 4710.5, subdivision (a), "Any . . . authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interests, shall . . . be afforded an opportunity for a fair hearing." Claimant requested a hearing to appeal the Service Agency's decision to terminate funding for nutritional supplements. Jurisdiction in this case is established. (Factual Findings 1 through 5.)

### **Applicable Law**

2. 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.)

3. 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.)

4. Regional centers are required to ensure adherence with federal and state laws and regulations and ensure that the purchase of services and supports for an adult 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).)

5. Services and supports funded by SDP may only be funded if CMS determines that the services and supports are deemed eligible for federal financial participation. (§4685.8, subd. (c)(6).)

6. 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).

## **Request for Nutritional Supplements**

7. In this instance, it was determined during the IPP process that, due to Claimant's disability, he requires a special diet and that the extra cost for his diet is "disability related, medically necessary and exceeds what [Claimant's Supplemental Security Income] covers." (Exhibit F, p. 60.) Therefore, the evidence established that the nutritional supplements were determined through the IPP process to be a service necessary to meet Claimant's individual needs. The Service Agency failed to establish grounds for termination of the service. The Service Agency has failed to present any competent evidence that provision of nutritional supplements was in violation of KRC's purchase of service policies or did not otherwise adhere to federal and state laws or regulations.

8. Finally, the Service Agency argued that the provision of nutritional supplements is a service more appropriately funded through another source, specifically pointing to CalFresh as another funding source. This argument is somewhat disingenuous as the Service Agency has acknowledged that there was no assurance that Claimant will be found eligible by CalFresh, specifically noting that "this assistance may not be an option." (Exhibit D, p. 16.)

## **ORDER**

Claimant's appeal is granted. KRC shall continue to provide Claimant funding for nutritional supplements pursuant to his 2019 IPP until such time as changed circumstances or a new IPP warrants otherwise.

DATE:

NANA CHIN

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.