

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

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2019100164

DECISION

Nana Chin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this consolidated matter¹ on November 21, 2019, in Bishop, California.

¹ Due to the similarity of issues and circumstances, this matter was consolidated for hearing purposes with OAH case number 2019100163.

Claimant² 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 wood pellets (three tons) 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.

² 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. ³ 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-Determination⁴ pilot program. As part of Claimant's 2019 plan, the Service Agency agreed to provide funding for wood pellets 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 wood pellets.

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

5. All jurisdictional requirements have been met.

³ Undesignated statutory references are to the Welfare and Institutions Code.

⁴ 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.

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 on making 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,⁵ which results in a number of physical and intellectual challenges.

11. For the past seven years, Claimant's SDP's budget included, among other items, an allowance for propane as well as three tons of wood pellets. (Exhibit 15.) This allowance was included due to Claimant's "disability related condition" which requires him "to be in a consistently heated/cooled environment to remain at the necessary 70-75 degrees." (*Sic*) (Exhibit E, p. 19.)

12. 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).

13. 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 "[i]t is medically necessary that [Claimant's] home environment remains [at] a safe temperature by maintaining a temperature between 70-75 degrees Fahrenheit." (Exhibit D, p. 61.)

14. During the IPP meeting, the Service Agency notified Claimant's parents that they could potentially obtain assistance from Inyo Mono Advocates for Community Action, Inc. (IMACA), a local generic resource, for propane assistance and Southern California Edison's California Alternate Rates for Energy (CARE), program that

⁵ 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.

provides consumers with a reduced electricity rate. Claimant's parents agreed to apply for assistance on Claimant's behalf but requested that both the propane⁶ and the wood pellets that been approved as part of Claimant's 2019 Self-Determination pilot plan, be kept in place pending any approval.

Service Agency's Contentions

15. 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.

16. The Service Agency admitted that it had previously authorized funding, pursuant to Claimant's IPP, for wood pellets 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 preventing 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

⁶ The request for continued propane assistance, which was the subject of OAH Case Number 2019100165, was withdrawn prior to the hearing.

prohibits the continued funding.⁷ The Service Agency further failed to establish any evidence that the wood pellets constitute “utilities” for purposes of the SDP.

Claimant’s Contentions

17. According to Claimant’s parents, funding for wood pellets and propane had been part of Claimant’s SD pilot plan for the past seven years. Funding had been most recently reauthorized from June 1, 2019, through May 31, 2020. Due to Claimant’s condition, Claimant needs to keep the ambient home temperature at a steady level. Though they have withdrawn their request for propane, they request that funding for wood pellets continue until Claimant’s next scheduled IPP is prepared in 2020.

18. Claimant’s parents accepted that, going forward, Claimant’s SDP budget will no longer include funding for his wood pellets. They contended, however, that they need additional time to absorb the additional cost of the wood pellets into their household budget in order to continue to care for Claimant and to keep Claimant in the home.

⁷ 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.

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 wood pellets. Jurisdiction in this case is established. (Factual Findings 1 through 5.)

Standard of Proof

2. A regional center seeking to terminate or reduce ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency is seeking to terminate funding for Claimant's wood pellets and bears the burden of proving, by a preponderance of the evidence, that its decision is correct.

Applicable Law

3. 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.)

4. 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.)

5. Regional centers are required to ensure adherence with federal and state law 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, subd. (a).)

6. 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).)

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 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 Wood Pellets

8. In this instance, it was determined during the IPP process that provision of wood pellets to keep his home a safe temperature is necessary due to his disability. Therefore, the evidence established that the wood pellets were determined through the IPP process to be a service necessary to meet Claimant's individual needs.

9. 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 wood pellets was in violation of KRC's purchase of service policies or did not otherwise adhere with federal and state laws or regulations.

ORDER

Claimant's appeal is granted. KRC shall provide Claimant funding for wood pellets 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.