

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,¹

vs.

REDWOOD COAST REGIONAL CENTER,

Service Agency.

OAH Nos. 2015090635
2015100058²

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter via teleconference on December 18, 2015, from Oakland, California.

Lauren Gardner, Attorney at Law, represented Redwood Coast Regional Center, the service agency, and appeared from the Redwood Coast Regional Center office in Eureka, California.

Claimant represented himself and appeared from the Redwood Coast Regional Center office in Eureka, California.

¹ Claimant's name is not used in order to protect his privacy.

² On August 15, 2015, claimant filed a fair hearing request with the Office of Administrative Hearings (OAH No. 2015090635). On October 1, 2015, claimant filed another fair hearing request with the Office of Administrative Hearings (OAH No. 2015100058). On October 14, 2015, the two matters were consolidated for hearing and decision.

The record was left open for receipt of written closing argument from claimant. Claimant's closing argument was timely submitted, considered, marked for identification as Exhibits DD, EE, FF and GG, and received in evidence.

The matter was submitted for decision on January 4, 2016.

ISSUE

Must Redwood Coast Regional Center (RCRC) amend vendor applications and contracts to address claimant's request, as a reasonable accommodation, to record private conversations with vendor employees without the employees' knowledge or consent?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant is a 34-year-old consumer of RCRC. He is eligible for regional center services based upon a diagnosis of autism. RCRC provides services to claimant and other consumers through service providers or "vendors."

2. Claimant's cognitive ability and communication skills are diminished by his developmental disability. Because claimant has difficulty recalling conversations, he prefers to record conversations and meetings, allowing him to review the information discussed at a later time. Claimant has a recording device that he uses for this purpose.

3. The Americans with Disabilities Act (ADA)³ mandates the elimination of bias against individuals with disabilities and seeks to provide disabled individuals with accommodations to allow them to have equal access to services, programs, and activities offered by the government.

4. On August 20, 2015, claimant filed a fair hearing request, in which he stated:

I ask that I be allowed to record conversations involving any

³ The ADA is codified at 42 United States Code, section 12101 et seq.

agency receiving Lanterman Act dollars as a federal reasonable accommodation under the Americans with Disabilities Act (ADA) to benefit from [habilitation and rehabilitation services]. The ADA need is due to [cognitive] memory and needs relating to autism.

I have a recorder on me at all times for reasons of the [benefit] of [] fully participating from services purchased by Regional Center and the agency services it itself directly offers. That this [is] made part of my IPP. The agreement then is made upon purchase and is [consented to] without my having to remember.

5. On October 1, 2015, claimant filed a second fair hearing request, alleging that RCRC was not making a decision, or expressing in ways he could understand, his request to use an adaptive device to remedy his cognitive and autism disability.

6. Prior to the hearing in this matter, the parties clarified the issues to be determined. The issues claimant sought to resolve are:

Issue No. 1: May claimant record RCRC board meetings?

Issue No. 2: May claimant record his meetings with RCRC staff without announcing that he is doing so?

Issue No. 3: Will RCRC amend his Individual Program Plan (IPP) to indicate that he is permitted to record meetings with RCRC staff without announcing that he is doing so?

Issue No. 4: Must RCRC amend vendor contracts to state that any RCRC consumer is permitted to record a private conversation with an RCRC-funded vendor employee without announcing that he or she is doing so, in

order to meet claimant's request to record the meetings without being singled out?

7. On September 12, 2015, the Redwood Coast Developmental Services Corporation Board of Directors voted to digitally record its board meetings beginning in November 2015, to place the recordings on its website and to make those recordings available to individuals upon request. Claimant is satisfied with this action, and therefore, Issue No. 1 is moot.

8. On October 16, 2015, RCRC proposed an addendum to claimant's IPP stating:

As an accommodation, [claimant] may choose to make audio recording of his IPP meetings, and any other meeting with his RCRC Service Coordinator or other staff of the Regional Center. The Service Coordinator will inform any individual they are inviting to attend these meetings of [claimant's] possible choice to make an audio recording. [Claimant] will also inform individuals of his choice to record when he is meeting with RCRC vendored programs. At the time of these meetings, [claimant] and/or his Service Coordinator will remind participants of [claimant's] choice to make an audio recording of the meeting.

If any vendor of RCRC denies [claimant's] request to record a meeting, the Service Coordinator will assist [claimant] in advocating for the accommodation.

RCRC's proposal satisfied Issues No. 2 and 3, but because it did not address Issue No. 4, claimant did not sign the proposed IPP addendum. Nevertheless, RCRC has agreed

to allow claimant to record meetings with RCRC staff without announcing that he is doing so. RCRC is also willing to include language to this effect in claimant's IPP. Thus, Issue Nos. 2 and 3 are also moot.

VENDOR CONTRACTS

9. The only issue remaining concerns claimant's request to record conversations with vendors providing services funded by RCRC, without announcing that he is doing so. Claimant fears that if he tells service providers that he is recording their conversations, they may discriminate against him, and may refuse to provide services to him. Claimant therefore requests that RCRC add language to all vendor contracts, on behalf of all consumers, permitting unannounced recording of private conversations, so that he is not singled out.

10. The ADA provides for accommodations to be made upon request to aid the disabled. Claimant does not feel he should have to request this accommodation, pointing out that individuals with wheelchairs do not have to announce that they need ramps to enter public buildings.⁴ Claimant also points out that he is permitted to record classes he takes at his community college without seeking the consent of the teacher; these classes, however, are not private conversations.

11. RCRC refuses to require that vendors allow RCRC consumers to record private conversations with vendor employees without the employee's knowledge or consent on grounds that: 1) individuals have a right under the Penal Code to be advised if a private conversation is being recorded; 2) most vendors do not sign a contract, and are vendorized by completing a form developed by the Department of Developmental Services; 3) the contract language that is used with certain vendors is standardized and

⁴ The ADA requires certain structural improvements to facilities open to the public in order allow access by disabled individuals.

regulated; 4) most consumers do not require this accommodation; and 5) it has policies in place to protect claimant from discrimination.

Penal Code Sections 630 and 631

12. RCRC cites Penal Code sections 630 and 631 in support of its position. Penal Code sections 630 and 631 prohibit the recording of private conversations without the consent of the other parties to the conversation. RCRC has consented to claimant's request to record conversations with its staff; however, it asserts that it is not authorized to consent to the recording of private conversations between claimant and service providers.

RCRC'S Agreements with Vendors

13. Claimant argues that his right to a reasonable accommodation under the ADA trumps Penal Code sections 630 and 631. He requests that RCRC insert language in each contractual agreement with service providers requiring that they consent, on behalf of their employees, to allow consumers to record conversations with vendor representatives without that employee's knowledge or consent.

14. RCRC has agreements with, or "vendorizes," many service providers on behalf of many consumers. Some vendors are not used at all, some are used very occasionally (e.g., hotels) and others provide services very regularly. California Code of Regulations, title 17, section 54310, requires that all service providers complete a vendor application form developed by the Department of Developmental Services (Form DS 1890). Regional centers do not have authority to substitute their own forms in place of Form DS 1890, or to add the language proposed by claimant.

15. Supported living service providers and transportation providers must sign a contract in addition to the vendorization application. (See, Cal. Code Regs., tit. 17, §§ 50607, 58543, 58671.) The language of the contract is standardized and regulated, and RCRC is not authorized to add the language proposed by claimant to these contracts.

16. Moreover, services are tailored to the needs of the particular consumer and

most RCRC consumers do not request or require this accommodation. It would be unreasonable to add the proposed language to its vendor agreements on behalf of all consumers, assuming claimant had standing to request this accommodation on behalf of all consumers.

Protection Against Discrimination

17. RCRC protects its consumers from discrimination or retaliation by its service providers. California Code of Regulations, title 7, section 54326, subdivision (a)(7), prohibits vendors from discriminating in the provision of services to consumers on the basis of disability. In addition, RCRC has adopted a zero tolerance policy for client abuse or neglect, which requires service providers to be considerate, respectful and to focus on the consumer's security and dignity. The zero tolerance policy language is inserted into all vendor contractual agreements. Finally, RCRC adopted a whistleblower policy that protects RCRC consumers who report improper service provider activity, including discriminatory conduct.

LEGAL CONCLUSIONS

1. In the Lanterman Developmental Disabilities Services Act, the State of California accepts responsibilities for persons with developmental disabilities. (Welf. & Inst. Code, § 4500 et seq.⁵) The Lanterman Act and the regulations adopted to implement the act govern this matter. A state level fair hearing is available to service agency consumers to determine the rights and obligations of the parties.

2. 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."

⁵ All subsequent statutory references are to the Welfare and Institutions Code.

(§ 4501.) The purpose of the scheme is twofold: (1) to prevent or minimize the institutionalization of persons with developmental disabilities and their dislocation from family and community and (2) to enable persons with developmental disabilities to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives. (§§ 4501 & 4685; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

3. The Department of Developmental Services is the state agency charged with implementing the Lanterman Act. It contracts with regional centers that are charged with the responsibility of providing developmentally disabled individuals with access to services and supports best suited for them. (§ 4620, subd. (a).) To determine how a consumer is to be served, regional centers conduct a planning process that results in the development of an IPP. (§ 4646.) The IPP is developed by an interdisciplinary team with the participation by the consumer and/or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provision for the acquisition of services, and reflect the individual consumer's desires and preferences. (§§ 4646, 4646.5.)

4. Claimant is requesting that RCRC add language to the vendor applications, and its contracts, on behalf of all consumers, requiring service providers to consent to any consumer recording private conversations with a vendor representative without announcing that he or she is doing so.

5. In Penal Code section 630, the Legislature declared that in light of the development of new technological devices and techniques, it intends to protect the right of privacy of the people of this state. Penal Code section 632 provides that every person who records a private conversation without the consent of all parties to the conversation is guilty of a misdemeanor. Penal Code section 637.2 provides that anyone whose privacy has been invaded by the recording of a private conversation without that individual's knowledge gives rise to a civil cause of action. RCRC is justifiably reluctant to require vendors to waive their employees' rights under these Penal Code sections.

Moreover, the vendor application, Form DS 1890, is developed by the Department of Developmental Services and RCRC does not have authority to add the language specified by claimant. The content of its transportation and supported living services contracts is likewise regulated and standardized.

In addition, a regional center consumer's IPP and services are tailored to his or her needs. Few consumers request to record meetings with vendor representatives, and therefore adding this language to all vendor applications and contracts is unreasonable.

Finally, claimant argues that he should not need to request this accommodation because the request might expose him to discrimination. Public and private entities must ensure effective communication with individuals with disabilities. When necessary to ensure that communication with individuals with hearing, vision or speech impairments, for example, the agency must provide appropriate aids, such as interpreters, assistive listening devices, readers, and large print texts. (See, e.g., 28 C.F.R. §§ 35.104, 35.160, 36.104, 36.303.) However, ADA accommodations are triggered by a request. The request need not be in particular language or on a particular form, but it must be made. One of the purposes of the ADA is to eliminate paternalism and biased assumptions about what people with disabilities can and cannot accomplish. Public agencies, employers and businesses are not required to presume the need for an accommodation; rather, the burden to request an accommodation rests on the individual. RCRC has not rejected claimant's request for an accommodation; to the contrary, it supports claimant's request by allowing him to record conversations with RCRC staff at any time, and agreeing to advocate for him if a vendor refuses to allow this accommodation.

RCRC has a policy prohibiting its service providers from discriminating against its consumers based on disability, and it has a whistleblower policy to protect consumers who lodge a complaint concerning a vendor's actions. Claimant has not established he has been discriminated against as a result of having requested to record conversations with vendor representatives. However, if he does encounter such discrimination, he can safely

report any such discrimination to RCRC for action.

For all of these reasons, RCRC is not obligated to amend vendor applications and contracts to address claimant's request, as a reasonable accommodation, to record private conversations with vendor employees without the employees' knowledge or consent.

ORDER

Claimant's appeals are denied.

DATED: January 19, 2016

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Jill Schlichtmann
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JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings