

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No: 2017101189

DECISION

Administrative Law Judge Kirk E. Miller, Office of Administrative Hearings, State of California, heard this matter on February 22, 2018, in Napa, California. The proceedings were interpreted from English into American Sign Language by Kay Feuerborn, Kris Halmer, Jeanie Witkins and Nanette Dadzie.

Claimant was present and represented by her father.

Jack Bengé, Attorney at Law, represented North Bay Regional Center (NRBC), the service agency.

The matter was submitted on February 22, 2016.

ISSUE

Is NBRC required to provide Claimant with fluent American Sign Language (ASL) interpreters at her day program?

FACTUAL FINDINGS

1. Claimant is a 33-year-old woman and a consumer of NBRC who is eligible for regional center services based on her diagnoses of cerebral palsy, epilepsy and intellectual disability. Claimant is profoundly deaf, she uses an electric wheelchair to ambulate, she has limited use of her left hand, and she requires assistance with all activities of daily living. She lives with her parents and attends a day program called Dungarvin, five days a week, for six hours a day.

2. NBRC presently provides Claimant with two hours of ASL services, five days each week, while she attends the Dungarvin day program. The service is provided by certified ASL interpreters. On October 13, 2017, NBRC issued a Notice of Proposed Action (NOPA) to Claimant stating that it would stop funding ASL services effective November 30, 2017.¹ The reason for the action, as stated in the NOPA, is "NBRC has provided alternative day program [*sic*] and requested family to explore communication device replacement."

3. Claimant's mother began teaching her to communicate using ASL at age 18 months, and it is the principal method by which language is communicated to her. Claimant also has some ability to respond using ASL, but this is compromised by her ability to effectively sign using her left hand. Claimant's mother is a certified ASL interpreter and provides interpretation services at a school.

4. Approximately 10 years ago, Claimant received an electronic Augmentative Communication Device (ACD), which permitted her to communicate her thoughts and wishes to others. The ACD is no longer functional; the software cannot be updated and it has not been used for several years. However, her health insurance provider, Kaiser Permanente (Kaiser) has agreed to provide a new ACD to Claimant, and as of the

¹ NBRC has continued to fund the ASL services during the appeal process.

hearing date, she expected to receive the new device imminently. Kaiser is a generic resource. The ACD will attach to Claimant's wheelchair and it is anticipated that it will permit her to respond more effectively to others, including those who are communicating to her using ASL.

5. Claimant has participated in the Dungarvin day program since 2006 and first began receiving ASL services there in 2011. Initially, she received the service on Mondays, Wednesdays and Fridays, for two hours a day. In an Addendum to Claimant's Individual Program Plan-Person Centered Objective (IPP) dated March 26, 2014, the service was increased to two hours a day, five days each week. The IPP states "The ID Team met and agrees that [Claimant] will benefit from additional services from Interpreting & Consulting to allow [Claimant] the opportunity for full inclusion during her day program. Client requests interpreting hours continue 2 hours per day. Monday through Friday, up to 46 hours per month." NBRC approved the additional hours.

6. When Claimant's April 5, 2017 IPP was prepared, Claimant requested to increase her ASL hours in the day program from two to six hours per day. The IPP also notes that Claimant's use of ASL was limited, and that the limitation "may be due to her limited motor skills." The request for an increase in ASL hours was not approved. An IPP Addendum dated April 18, 2017, states that Claimant's family was asked to investigate the day program at Chadbourne, because Claimant's NBRC case manager understood the Chadbourne staff "used ASL more frequently" than the Dungarvin staff. The family was also requested to contact Claimant's health insurance carrier regarding a replacement for her ACD.

7. On October 3, 2017, Claimant's mother visited the Chadbourne day program. Following the visit, she advised Claimant's case manager that there were two Chadbourne staff members with basic ASL skills working at the program, and neither of them was fluent in ASL. Claimant's mother did not believe Claimant would benefit from

being placed there. Claimant's mother also contacted Kaiser about providing a new ACD which was ultimately approved by Kaiser. Nonetheless, the October 13, 2017 IPP Addendum stated that NBRC would not provide ASL services after November 30, 2017.

8. NBRC's IPP team decided to terminate ASL services because it determined: (1) Claimant's use of the service was compromised because of the limitations on her own ability to sign; (2) the Chadbourne day program would offer staff better trained in the use of ASL as compared with the Dungarvin staff; (3) use of the ACD was a generic resource that would permit Claimant to communicate without additional ASL services; (4) Claimant was often in the community rather at the day program location; and, (5) based on input from the Dungarvin program, the IPP team understood staff members were able to communicate satisfactorily with Claimant even when ASL interpreters were not present. This final point was based on an Annual Review provided by Dungarvin dated April 5, 2017. The Annual Review contains a chart which seems to show that Claimant scored "100 per cent" on "expressive communication."

9. Claimant's father and sister credibly testified that Claimant has a good understanding of the information she receives from those who use ASL to communicate with her. ASL is used in the home and it is the medium through which Claimant is able to understand what is happening around her. This is also the case in her day program. Her mother is fluent in ASL and the other family members, while not certified, routinely use ASL to communicate with her. Claimant is well satisfied and happy at the Dungarvin program. The staff at Chadbourne is only able to use "basic" ASL and the director is "semi-fluent." It is anticipated that the new ACD will permit Claimant to respond more easily and completely in conversation, but it will not be used by others to communicate with her. The ACD will help Claimant to compensate for the limited use of her left hand when responding, but does not take the place of the need for others to communicate to her using ASL. It is not a substitute for ASL.

10. The evidence did not establish a basis for NBRC to terminate the ASL services Claimant receives. While Claimant's ability to respond to others using ASL is limited, this shortcoming should be addressed by her use of the ACD. The evidence did not establish that a change in Claimant's day program to Chadbourne would reduce the need for contracted ASL services: although the staff at Chadbourne possess "basic" skills and the director is "semi-fluent," the evidence did not establish the meaning of the terms "basic" or "semi-fluent," or if staff with basic ASL skills would be adequate to meet Claimant's communication needs.

The ACD Claimant will receive is funded by a generic resource. Although Claimant is often in the community, the evidence did not establish that ASL interpreters are unnecessary on field trips. Finally, the communication chart prepared by the Dungarvin staff and contained in the Annual Report is not a reliable indicator of Claimant's ability to understand or use ASL. This is because: (1) it evaluated Claimant's "expressive communication," that is, her ability to communicate with others, not her ability to understand ASL; (2) it did not explain the context in which Claimant's communication was assessed; (3) it did not describe the nature of the communications that were the subject of the evaluation; and (4) it provided no information about the methodology upon which the chart was developed.

LEGAL CONCLUSIONS

1. The standard of proof in this case is the preponderance of evidence. A regional center seeking to terminate ongoing funding provided to a consumer has the burden of demonstrating its decision is correct. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [the party asserting a claim or making changes generally has the burden of proof in administrative hearings].)

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act

(Act). (Welf. & Inst. Code, § 4500, et seq.)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.” (§ 4501.) The Act also provides the right for covered persons to “make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community the way they spend their time, including education, employment, and leisure ... and program planning and implementation. ” (§4502, subd. (b)(10).)

3. Services and supports for persons with developmental disabilities means “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (§ 4512, subd. (b).) ASL is a specialized service as contemplated by the Act.

4. The Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) An IPP describes the consumer’s goals and objectives and delineates the services and supports needed by the consumer to implement her goals and objectives. (§§ 4646, 4646.5, 4512, subd. (b).) Each consumer is assigned a service coordinator, who is charged with the task of implementing and monitoring each IPP. (§ 4647.) Until Claimant’s October 13, 2017 IPP Addendum was developed, Claimant received ASL services as part of her IPP. Claimant believes the ASL services are necessary and required under the Act, and has challenged

² All references are to the Welfare and Institutions Code unless otherwise indicated.

NBRC's proposed termination of ASL services, as contemplated by the October 13, 2017 IPP Addendum.

5. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of an IPP, they are also directed by the Legislature to provide services cost-effectively and to consider innovative methods of achieving the objectives contained in a consumer's IPP. (§§ 4646, subd. (a), 4648, subd. (a)(11), and 4651, subd. (a).) Accordingly, regional centers are directed to utilize generic funding resources for the provision of services and supports when appropriate. (§ 4646.4, subd. (a)(2).) Here, generic resources have been used to obtain the ACD. NBRC argues the staff at Chadbourne will satisfy Claimant's need for ASL services, which would be more economical than contracting separately for ASL services. However, the evidence did not establish that either the Chadbourne staff, or use of the ACD without fully trained ASL staff, could satisfy Claimant's communication needs. (Finding 10.) No other generic or more cost effective substitute service was established by the evidence.

6. In the hearing request, Claimant requested an increase in the number of hours per day that ASL interpreters are provided, from two hours to six hours. The evidence established that Claimant presently has a need for ASL interpreters, but it did not address or establish the number of hours per day the interpreters are required to meet Claimant's communication needs. No determination is made regarding Claimant's request to increase the number of hours of ASL interpretation she receives, because insufficient evidence was presented on this issue. That issue must be determined between NBRC and Claimant as part of the IPP process. (§ 4646.4, 4648, subd. (a)(7).)

ORDER

North Bay Regional Center shall continue to provide Claimant with ASL services two hours per day, five days a week.

DATED: February 27, 2018

KIRK E. MILLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.