

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER,

Service Agency

OAH No. 2021070227

DECISION

Jami A. Teagle-Burgos, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter virtually on September 30, 2021, using the Microsoft Teams application.

Kerri Neal, Fair Hearings Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother represented claimant with the assistance of a court-certified Spanish language interpreter.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on September 30, 2021.

ISSUE

Should IRC provide American Sign Language (ASL) classes to claimant and claimant's mother?

FACTUAL FINDINGS

Background

1. Claimant is a six-year-old girl who qualifies for regional center services based on a diagnosis of autism spectrum disorder. Claimant lives at home with her mother, father, and siblings. IRC provides funding for claimant to receive 30 hours per month of preferred provider respite and an additional temporary 45 hours per month of preferred provider respite due to the COVID-19 pandemic. Claimant is a recipient of Supplemental Security Income (SSI) and Medi-Cal benefits. Claimant receives 33 hours a month of In-Home Support Services (IHSS) and claimant's mother is her IHSS provider.

2. On June 24, 2021, IRC served claimant with a Notice of Proposed Action denying her request to provide ASL classes to claimant and claimant's mother.

3. On July 2, 2021, claimant's mother filed a Fair Hearing Request appealing IRC's denial. This hearing followed.

Evidence Presented by IRC

4. An Individualized Education Program (IEP) by claimant's school district, dated October 2, 2018, indicated that claimant, who was four years old at that time, was evaluated by Marsha Athan, M.A., a speech/language pathologist, and Henriette

W. Langdon, Ed.D., F-CCC-SLP, BCS-CL, a bilingual speech/language pathologist, who determined that she had "significant delays in her receptive, expressive, and social communications skills."

5. On December 2, 2019, when claimant was five years old, Abby M. Rozenberg, M.S., CCC-SLP, completed a speech and language evaluation of claimant. Claimant presented with "significant deficits in expressive and receptive language skills" and it did "not appear that she ha[d] a reliable functional communication system." Claimant combined "vocalizations, gestures and some signs to signal her basic needs and preferences and gain control over her environment." Ms. Rozenberg recommended that claimant participate in speech and language therapy for 20-minute sessions, three times a week, and 30-minute small group sessions each week.

6. On December 9, 2019, claimant underwent an Independent Educational Evaluation that was conducted by Priscilla Hsieh, Psy.D., a licensed clinical psychologist at Gunn Psychological Services, Inc. Claimant had significant and pervasive behavioral difficulties, so only a few subtests were administered. Claimant was five years old and in kindergarten. She possessed "no functional (verbal) language ability" and she was unable to complete "picture naming" that assesses one's expressive language. Claimant was diagnosed with autism spectrum disorder, level 3 "requiring very substantial support" with accompanying language impairment and deferred intellectual impairment; language disorder; intellectual disability, severe (provisional); and attention deficit hyperactivity disorder.

7. An IEP by claimant's school district, dated May 20, 2020, indicated that in the area of expressive language, claimant "inconsistently gestures/signs . . . [and] she is able to match an object to a picture from a choice of two pictures with an average of 30% accuracy." It was also found that she "demonstrates 10% accuracy identifying

objects when labels, from a field of two objects” . . . and [claimant] produces vocalizations to indicate pleasure of frustration. She has not been observed to imitate sounds or words.”

8. An Individual Program Plan (IPP) by IRC, dated December 8, 2020, indicated that claimant’s IRC Consumer Services Coordinator (CSC) was Alberta Soqui, and two planning meetings were held on November 10, 2020, and November 19, 2020. It was determined that claimant would receive 30 hours a month of routine respite and 45 hours month of temporary routine respite due to the COVID-19 pandemic.

9. An Occupational Therapy Evaluation for Educational Purposes and in School Setting was conducted on March 22, 2021, by Susanne Smith Roley, PT, OTR/L, FAOTA. Claimant was found to have “significant delays in development including adaptive skills, communication, fine and gross motor skills, perceptual motor and praxis abilities, and social skills.” On the Adaptive Behavior Assessment System – Third Edition (ABAS-3), her parents and teacher reported concerns in all areas except for “relative strengths in home living and self-direction.” On the Behavioral Rating Inventory of Executive Function – 2 (BRIEF-2), claimant’s parents reported typical behavior and emotion regulation, and “significant concerns with cognitive regulation with relative strengths in planning/organizing and organization of materials.” Her teacher reported significant concerns in behavior regulation, emotion regulation, and cognitive regulation.” On the Sensory Processing Measure (SPM), claimant had “definite dysfunction” in vision, touch, and balance and motion.

10. On May 15, 2021, Christy Himstreet, M.S., CCC-SLP, prepared a Speech and Language Independent Educational Evaluation Report, upon claimant being referred by her parents to determine if it is appropriate to continue using ASL to help claimant communicate and what training/support can be implemented at school to aid

staff in helping claimant. Ms. Himstreet made the following assessments: [Bold in original.]

[Claimant] has not had access to a speech generating device (SGD) for alternative and augmentative communication (AAC), ever. She is primarily communicating using sign expressively and reportedly understands sign, Spanish, and English equally. [Claimant] is now at a difficult juncture in her communication development. If she is to continue to only learn to sign, which is her primary communication currently and reported by school staff as her communication strength, it denies her access to many peers, teachers, extended family and community members who do not sign. While sign is absolutely a necessary part of her immediate communication needs given the circumstances, an MC device, implemented with fidelity by experienced team members, will allow [Claimant] expression within a variety of contexts with varying communication partners for long-term benefit. It is the use of our language which allows it to grow outside of what we're able to provide in therapy offices and classroom settings.

[¶] . . . [¶]

5. An **Assistive Technology (AT) evaluation** is crucial and of monumental importance for [Claimant] as she has a massive discrepancy between her receptive and expressive functioning and no current way to express herself with

available communication partners. Current technology allows even our most early communicators access to expression via AAC. [Claimant] deserves access to her curriculum by way of a communication system that will afford her the opportunity to share her wants and needs beyond rudimentary means. [Claimant] currently is using signs, pantomiming, pointing, gesturing and guiding others to get her wants and needs met. She understands some English, some Spanish and some signing. The staff at her school know minimal signs and instruction is in English, her parents know many signs and her home language is Spanish and there are no other students in her class who sign for which she could interact. An AT evaluation with special considerations given to possible visual impairment, should happen asap.

[¶] . . . [¶]

10. **Continue ASL support** as [Claimant] will be learning yet a 4th way to communicate, via AAC. Although sign has proved to be successful for [Claimant] in the short term, AAC use will serve her needs for increased access to communication for her education and community involvement. Sign is [Claimant]'s best mode of communication currently and as such should be honored and supported while learning to use an AAC device. . . .

11. In an IPP addendum completed by IRC, dated June 10, 2021, indicated the following. Claimant needed a lot of assistance with her personal care and she was not able to use the restroom independently. She soon would no longer receive services at Milestone Speech and Language Therapy. She continued to learn ASL and responded to questions by signing "yes" with her hands. Claimant's mother was searching for a sign language tutor or class to assist claimant and claimant's mother with ASL, and "mother understands and agrees that she will be funding for the tutor and/or classes."

12. An Informal Meeting with IRC was held on July 19, 2021, where claimant's mother and an IRC representative were present. A letter by IRC, dated July 26, 2021, memorializing the meeting stated that claimant's most recent IEP was completed on March 26, 2021, and her next IEP was to be held when school resumed in the fall. In summer school this summer, claimant participated in Zoom ASL classes provided by her school district pursuant to an agreement with the school district through the IEP process. Claimant's health insurance is Inland Empire Health Plan (IEHP) through Medi-Cal. IEHP has provided speech/language services, once a week, for 45 minutes, through Milestones Speech Language Therapy since 2017. Claimant's mother had requested that IEHP provide ASL classes for claimant and herself, but there was no indication that this request was denied. Claimant's brother participated in an ASL club in high school and he helped teach claimant and the family ASL. Claimant's mother and father are utilizing YouTube to further their knowledge of ASL. IRC informed claimant's mother that ASL classes were not considered a specialized service or support in alleviating claimant's developmental disability of autism; and generic resources must be exhausted as IRC is the payor of last resort, and generic resources are available through claimant's school district and medical insurance.

13. A prescription, dated July 22, 2021, by Vivien Pacold, M.D., claimant's primary care physician, was written for her to "continue sign language education."

14. Claimant received services from Jyll Chandler, M.A., CCC-SLP/OMT, at Milestones Speech and Language Therapy, from May 11, 2018, through August 17, 2021. Claimant was non-verbal, and she was diagnosed with autistic disorder and apraxia. Picture Communication Exchange System (PECS) was utilized earlier in her therapy. A progress note on August 17, 2021, indicated that claimant was receiving therapeutic services for the use of a "speech generating device" and she "used two signs together to comment, request, or label in 80% of opportunities."

15. An AAC Report Structure for Funding of Speech Generating Devices, dated September 21, 2021, by Ms. Chandler determined the following: [Bold in original.]

A. General Statements. [Claimant] is a 7-year-old female with a diagnosis of Autism. [Claimant] was diagnosed at birth after a normal pregnancy and delivery with no complications. [Claimant's] primary means of communication is via simple gestures/sign language. [Claimant] has made minimal progress with verbal speech, and she cannot use speech as her primary communication method. [Claimant] can inconsistently produce bilabial sounds in isolation, but she requires verbal, visual, and tactile cues. The child has difficulty communicating wants and needs to her family and friends as well as medical personnel. At times, [claimant] points to items and will verbalize the same sounds for many objects using the same

verbalization due to inability to accurately produce speech sounds. [Claimant] can respond to yes/no questions with sign approximations, and head nods, but this is not an effective means of communication and therefore the assessment for the need of a speech generating device was completed. [Claimant's] condition is chronic and stable, and independent communication is expected to remain stable at the present level. Therefore, it is anticipated that her natural speech will not be sufficient to meet her most simple and daily communication needs.

[¶] . . . [¶]

Sign language – Sign language is not a viable option for communication due to the physical limitations of [claimant] and the inability of most communication partners to understand this method of communication. [Claimant] communicates with some signs but often needs a model to imitate to use this form of communication. In addition, [claimant's] delay in fine motor movements cause her to often use approximations of signs rather than the exact sign even when provided a model. This is not an adequate form of communication for [claimant] as she is limited in her acquisition of signs, and most people in her everyday environment are not competent in sign language. This limits her communication partners and renders him unable to meet her daily communication needs.

[¶] . . . [¶]

Section 5: Rationale for Device Selection. This individual requires a speech generating device with speech output, symbols or images, a speech bar, a carrying case, ability to easily and quickly switch from English to Spanish, and dedicated device without internet to meet the person's functional communication goals related to needs/wants, ADLs, and personal safety.

TESTIMONY BY LEIGH-ANN PIERCE

16. Leigh-Ann Pierce, an IRC Program Manager, testified and the following is a summary of her testimony. She has been a Program Manager for four years and she manages 14 staff members. She listens to families' requests for services; manages staff in their daily routines; attends meetings; drafts Notices of Proposed Action if services are denied; and attends IPP meetings when parents request her to attend. She is familiar with claimant because she has had direct contact with claimant's mother through email and she has attended claimant's IPP meetings. Claimant qualifies for IRC services due to her condition of autism spectrum disorder. Claimant is requesting that IRC fund an ASL tutor to assist her and her mother with learning ASL. IRC is the "payer of last resort." An ASL tutor would be funded through a "general resource" and not IRC. Claimant was receiving speech services at Milestones through her Medi-Cal insurance as administered by IEHP, and her school district was also providing speech services as shown by her IEP. Medi-Cal insurance and school districts are considered "general resources." Ms. Pierce reported claimant's evaluations showed that ASL is not an adequate form of communication because she was limited in her acquisition of signs, and it was recommended that she use an SGD to communicate such as a "Super

Talker”, “GoTalk”, or “Tobii Dynavox.” However, Ms. Pierce also reported that claimant’s evaluations indicated that ASL should be continued but she should learn another way to communicate with others through an AAC/SGD especially at school.

Claimant’s Evidence

TESTIMONY BY CLAIMANT’S MOTHER

17. Claimant’s mother testified and her testimony is summarized as follows: Claimant started receiving services through IRC in 2015. In 2016, a therapist noted that claimant was “imitating everything that was being done” and recommended ASL for claimant because she was not making any sounds. Claimant’s brother who was in high school, at the time, learned some ASL at a school club and helped teach claimant and her family some words in ASL. The family mainly learns ASL from YouTube. ASL is how claimant mainly communicated with her family as the PECS was not successful with claimant. The school district then told claimant’s mother that ASL is not used at school, so claimant needs to learn how to learn to speak or communicate in a different way. Claimant’s mother listened to the school district and stopped using ASL at home and “let them [the school district] do what they had to do.”

18. Two years passed and an emergency occurred with claimant – and since claimant could not speak – claimant began using ASL to ask for help. Since that time, claimant’s family has used ASL to communicate with claimant. Claimant’s mother reported that she “looked everywhere for help” and stated, “I just want you to know that us as parents we have done everything possible so they can cover all of those areas.” The school district did not provide claimant an AAC/SGD and her medical insurance also did not provide claimant with any device. Claimant’s mother would see it being “tested” at Milestones during sessions when a therapist would show her what

was being done during sessions, but no device has ever been given to claimant for school or home. Claimant's mother and father even hired counsel to assist them with claimant's IPP but claimant only received six sessions of ASL and claimant has yet to receive an AAC/SGD from any resource. Claimant's mother stated that a "GoTalk" device was approved and is "in process" for approval through claimant's school district, but the specialist recommended a "Tobii Dynavox" device and the district instead approved a "GoTalk" device, and since the school district and the specialist did not agree, the school district is now saying that claimant needs yet another assessment. Claimant was first evaluated for an AAC/SGD by her medical insurance in 2019, and she has yet to receive any device.

19. During claimant's mother's testimony, claimant could be seen on the video screen approaching her mother for assistance and/or affection, and it was apparent that claimant does not speak and relies on gestures to communicate with her mother.

20. Claimant's mother stated, in part: "So time goes by, but we communicate with my daughter with ASL. That's what we use."

21. In response to the recommendation for an AAC/SGD by the school district and medical insurance, claimant's mother credibly stated:

That's what they say is recommended [an AAC/SGD], but they only recommend it, but that's it. Nothing is written that they are going to do it. . . . We have been navigating with all the things you have recommended to us. The only thing that has been consistent is the ASL. The only thing I can say

as a mom, is I cannot leave her blind as she goes out into the world.

SUPPORTING DOCUMENTS SUBMITTED BY CLAIMANT

22. Claimant submitted some of the same supporting documents that were submitted by IRC, including the Milestones Speech and Language Therapy treatment records; the Speech and Language Independent Educational Evaluation Report, dated May 16, 2021, by Ms. Himstreet; the Occupational Therapy Evaluation for Education Purposes and In School Settings, dated March 22, 2021, by Ms. Roley; and the IEP, dated May 7, 2020.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine whether a regional center should fund certain services, the burden of proof is on claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, §§ 115; 500.)

Relevant Law

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from

family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

4. Welfare and Institutions Code section 4512, subdivision (b), defines "services and supports" as:

[S]pecialized 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis

of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . .

Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4644, subdivision (a), states, in part, ". . . In no case, shall regional center funds be used to supplant funds budgeted by any agency which has a responsibility to provide prevention services to the general public."

7. Welfare and Institutions Code section 4646 requires that the IPP and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

8. Welfare and Institutions Code section 4646.4, subdivision (a), requires regional centers to establish an internal process that ensures adherence with federal

and state law and regulation, and when purchasing services and supports, ensures conformance with the regional center's purchase of service policies, and shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate. . . .

(3) Utilization of other services and sources of funding as contained in Section 4659.

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.

9. Welfare and Institutions Code section 4648, subdivision (a)(1), requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

10. Welfare and Institutions Code section 4648, subdivision (a), provides:

[¶] . . . [¶]

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, if appropriate. The consumer's family.

11. Welfare and Institutions Code section 4648.5 states:

(a) Notwithstanding any other law or regulations to the contrary, effective July 1, 2009, and ending on June 30, 2021, a regional center's authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

[¶] . . . [¶]

(3) Educational services for children three to 17, inclusive, years of age.

[¶] . . . [¶]

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in their home and no alternative service is available to meet the consumer's needs.

12. A regional center is required to identify and pursue all possible sources of funding for consumers receiving regional center services, including governmental entities such as school districts. (Welf. and Inst. Code, § 4659, subd. (a).)

13. A regional center is prohibited from purchasing services available from generic resources, including Medi-Cal, . . . "private insurance, or a health care service plan when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage. . . ." (Welf. and Inst. Code, § 4659, subd. (c).)

14. Welfare and Institutions Code section 4659, subdivision (d), provides:

(1) Effective July 1, 2009, notwithstanding any other law or regulation, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not

have merit. If, on July 1, 2009, a regional center is purchasing the service as part of a consumer's IPP, this provision shall take effect on August 1, 2009. Regional centers may pay for medical or dental services during the following periods.

(A) While coverage is being pursued, but before a denial is made.

(B) Pending a final administrative decision on the administrative appeal if the family has provided to the regional center a verification that an administrative appeal is being pursued.

(C) Until the commencement of services by Medi-Cal, private insurance, or a health care service plan.

(2) When necessary, the consumer or family may receive assistance from the regional center, the Clients' Rights Advocate funded by the department, or the state council in pursuing these appeals. . . .

Evaluation

15. Claimant did not establish by a preponderance of evidence that IRC should provide ASL classes to her and her mother.

16. Claimant's mother credibly testified about how frustrating it has been for claimant and her parents to navigate the process for claimant to obtain an AAC/SGD, which would provide her a way to communicate with everyone – including her family,

classmates and staff at school, and others in her community. Claimant has been attempting to obtain an AAC/SGD since 2018 through her medical insurance of Medi-Cal/IEHP, which provided speech and language therapy through Milestones. Claimant has also been attempting to obtain an AAC/SGD through her IEP at her school district for at least the last two years. It has been a disappointing process for claimant's parents who simply wish for claimant to be able to communicate, and the only form of communication that has been consistent for claimant has been ASL. In fact, IRC introduced claimant and her family to ASL because she is non-verbal. Claimant's presentation at the hearing via video, as she came and went on the screen beside her mother, demonstrated that she does not speak and relies heavily on communicating with her mother through non-verbal means or gestures. The evaluators agree that claimant deserves to be able to communicate effectively with school peers and staff, and others in the community, and because ASL is not used at her school or by others, they recommended that she communicate with an AAC/SGD. The same evaluators concede it is important for claimant to continue to have the support she needs to communicate with her family in ASL, as ASL is currently her primary way of communicating until she receives an AAC/SGD.

17. However, the evidence does not demonstrate that claimant requested ASL classes for her and/or her mother through claimant's medical insurance of Medi-Cal/IEHP and/or claimant's school district/IEP. Claimant submitted a prescription for ASL classes from her primary care physician, but there is no indication that IEHP has received a request to provide claimant with ASL classes or that such a request was denied. There is also no indication that a request for ASL classes was submitted to claimant's school district/IEP or that any such request was denied. The only ASL support that claimant has received has been through a previous IPP through IRC, which resulted in claimant receiving six sessions of ASL classes. As such, based on the

above, even though claimant continues to wait for an AAC/SGD device and it has been recommended that she continue to receive ASL support, she must first exhaust the generic resources of IEP/school district and Medi-Cal/Milestones before IRC can provide ASL classes because IRC is the payer of last resort.

ORDER

Claimant's appeal from Inland Regional Center's determination that it will not fund American Sign Language classes to claimant and claimant's mother is denied.

DATE: October 12, 2021

JAMI A. TEAGLE-BURGOS
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.