

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LEONARDO S.,

Claimant,

OAH No. 2012090745

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on October 17, 2012 in Salinas, California.

Claimant's mother represented Claimant Leonardo S.

Jacques Maitre, Director's Designee for Fair Hearings, represented Service Agency San Andreas Regional Center.

The record closed on October 17, 2012.

ISSUES

1. Is Claimant eligible to receive regional center services and supports by reason of a diagnosis of autism?
2. If Claimant is not eligible for regional center services under the category of autism, is he eligible under the "fifth category" because he has a condition closely related to mental retardation, or that requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

1. Claimant, born November 20, 1995, is nearly 17 years of age. He resides with his mother and brother in Monterey, and his mother applied for regional center services on

his behalf. San Andreas Regional Center (SARC) found him not eligible, he appealed, and this hearing followed.

2. Claimant's mother reports that nurses and others have asked her whether Claimant is autistic. These comments led her to look up autism on the internet, and she believes that Claimant exhibits many of the characteristics of the disorder. For example, Claimant washes his hands, with a lot of water, 20 or more times per day. When he hears a sound, he asks her about it and if she does not respond with yes or no, but instead says something like "um hum," Claimant will repeat "um hum" many times. Claimant stays in the shower a very long time. He does not like to be called a name that is like his, but not exactly, and will become very frustrated when his classmates call him this other name. Claimant will not touch food with his hands; he must always use a fork or spoon. Claimant has a small yellow bird object that "he takes everywhere," and he has had problems in school as a result. Claimant engages in many repetitive types of behaviors, and also comes to his mother with many problems.

3. Claimant's mother acknowledges that Claimant does well in math and enjoys it. But he becomes very frustrated with subjects that involve critical thinking and reasoning. He has Individual Education Plan (IEP), and receives help at school, but Claimant's mother would like to have more help for Claimant.

4. Claimant attends Monterey High School and is on track to graduate. He receives special education services pursuant to an IEP and is eligible for the services because of a "speech language impairment." The areas of need are identified as receptive language and expressive language. His most recent IEP report (October 2012) states that he receives 860 minutes per month of small group tutorial support and 120 minutes per month of speech and language resource specialist assistance in a small group setting.

At the annual IEP meeting, Claimant's English teacher reported his grade as a "C" with test results a "C" or a "D." Complex questions are very difficult, and he becomes frustrated with these, but participates easily in class activities. Claimant's annual speech and language report states that Claimant "is a very serious student who is able to stay organized and focused on a task. He is a motivated learner." It was noted that he needs "support in reading the nonverbal cues of this listener."

5. Claimant is seen for counseling at Seaside Family Health Center, Monterey County Mental Health Department. He was first assessed for services on March 14, 2012, with the reason for visit described as "behavior problem." Gerard Fernandez, M.D., evaluated Claimant, who presented with complaints of stress and anxiety, as well as headaches before tests at school and talking to himself. Dr. Fernandez listed "anxiety and unspecified psychosis" as possible diagnoses. Subsequent records of visits on May 9 and June 20, 2012, identify the diagnosis as anxiety. Claimant was seen on those occasions by Luz Venegas, LCSW, who discussed coping strategies with Claimant. At a visit on September 5, 2012 with Venegas the diagnosis of pervasive developmental disorder is noted,

with no explanation for the change. Venegas instructed Claimant in deep breathing exercises at that visit.

6. On July 16, 2012, Ubaldo F. Sanchez, Ph.D., evaluated Claimant pursuant to his SARC application. SARC contracted with Dr. Sanchez so that Claimant would have the choice to employ either Spanish or English during the evaluation process. Dr. Sanchez reviewed Claimant's history, and employed the following testing instruments: Structured Diagnostic Interview for Autistic Disorder; Autism Diagnostic Observation Scale (ADOS), Module 4; Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV); and Adaptive Behavior Assessment System – Second Edition (ABAS-II). Per Claimant's preference, the evaluation was conducted in English.

7. In a written report, Dr. Sanchez concluded as follows:

While [Claimant's] overall ADOS algorithm total scores fall within the autism spectrum cut-off, he does not meet the DSM-IV TR criteria for Autistic Disorder based on his presentation during the evaluation. He was moving a lot and presented as awkward. His eye contact was fair. He did not display any speech abnormalities typically associated with autism, i.e., echolalia or the stereotyped/idiosyncratic use of words or phrases. He did not display any hand, finger, or other complex mannerisms. He was able to use gestures to regulate social interaction. He was not self-absorbed and was able to respond to all requests. Records indicate that he has a good sense of humor and is friendly to all the students. He has a positive attitude about learning and works diligently on his assignments.

His ABAS-II results, based on his mother's input, indicate significant impairment in his self-direction and social skills. His communication, community use, functional academic, home living, and leisure skills fall within the borderline range. Based on his presentation during the evaluation, these results are deemed to be a slight underestimate of his functional abilities.

[Claimant] scored in the lower limits of the low average range of measured intelligence on the WAIS-IV. The scores should be viewed with caution given the cultural bias of the test.

He should continue with his counseling.

[Claimant] needs to remain in special education for the foreseeable future. I recommend that he be reevaluated periodically by the school district to determine his progress.

8. Nancy Krogseng-Adams, Psy.D., is a licensed clinical psychologist and SARC employee. She reviewed the documents submitted by Claimant to determine his eligibility for regional center services. These included school records, a psycho-educational assessment conducted at age 11, and the report of the evaluation conducted by Dr. Sanchez.

Dr. Adams concluded as follows:

[Claimant] appears to meet criteria for Pervasive Developmental Disorder, Not Otherwise Specified, with co-morbid language disorder. Evidence is clear over time that [Claimant] struggles to express himself. He does not demonstrate a cognitive profile consistent with Mental Retardation. [Claimant] does, however, show some autistic like qualities that have appeared to have kept him from being as social as expected for his age. On the other hand, he is more interactive than is typical for those with Autistic Disorder, and lacks some features that would place him in the Autistic Disorder category diagnostically. It is my best professional opinion with all available information that [Claimant] does not meet qualification criteria for SARC.

9. At hearing, Dr. Adams also opined whether Claimant meets the criteria commonly referred to as the “fifth category” for eligibility. Dr. Adams explained that fifth category eligibility requires “some kind of severe cognitive disability that looks like Mental Retardation.” Claimant is precluded from this category of eligibility by the results of his intelligence testing and academic testing, where he scored in the average to low-average range.

LEGAL CONCLUSIONS

1. The governing law is found in Welfare and Institutions Code section 4500 et seq., commonly known as the Lanterman Act. At section 4501 the Legislature declares the State of California’s responsibility for persons with developmental disabilities. The Supreme Court has stated that the purpose of the Act:

Is two-fold: 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.”

Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384.

2. The Act does not apply to every citizen who suffers a physical or mental handicap and is in need of assistance. Rather, a person must meet specific criteria as described in section 4512(a):

(a) ‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

3. Claimant has applied for eligibility under the category of autism. A diagnosis of autism requires:¹

A. Significantly sub average intellectual functioning, defined by an IQ of about 70 or below obtained by assessment with a standardized testing instrument, and

B. Significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional intellectual skills, work, leisure, health and safety, and

C. Onset before age 18.

4. The evidence did not demonstrate that Claimant has autism; rather, both experts opined that he suffers from Pervasive Development Disorder, a much less serious condition.

5. A developmental disability not resulting from one of the four listed conditions is commonly called the “fifth category.” Claimant was also assessed pursuant to this category, which provides eligibility despite normally disqualifying IQ scores where it can be

¹ Diagnostic criteria are taken from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV).

shown that an individual is in fact functioning at an adaptive and cognitive level as if he or she were mentally retarded, and/or that the services he or she requires are consistent with those needed by a mentally retarded individual. It is not necessary that a claimant present as if mentally retarded in every aspect. If that were the case, there would have been no need to specify additional criteria for acceptance. However, the condition must be substantially disabling, that is, one that causes a major impairment, and it must have originated prior to age 18.

6. Further guidance in assessing eligibility is found in title 17, California Code of Regulations, section 54001:

(a) 'Substantial Handicap' means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.

(b) Since an individual's cognitive and/or social functioning are many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

- (1) Communication skills;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self-sufficiency.

7. These seven areas are examined to assist in the determination of whether the applicant might be a person suffering from a condition similar to or requiring services similar to mental retardation. Although intelligence testing is an important part of the analysis, it contributes only a portion of the picture. Evidence from all domains relevant to actual ability to function in society must be examined. The successful applicant would then qualify for services under the "other" or "fifth" category.

8. Additional information regarding eligibility is found in title 17, California Code of Regulations, section 54000(c). It provides that where the handicapping condition is solely physical in nature and not associated with neurological impairment, is solely due to a psychiatric disorder, or consists solely of learning disabilities, it is not a developmental disability for the purposes of the Lanterman Act.

Analysis

9. Claimant's mother is a strong advocate for her son. She is concerned about his development, and followed up when a nurse and others asked her if he was autistic. After researching autism, it seemed to her that he exhibited autistic features. These concerns and actions are very understandable, and Claimant's mother is to be commended for exploring every avenue of assistance for her son. The regional center system, however, was not designed to and legally cannot assist everyone who could benefit from assistance.

Claimant does not suffer from autistic disorder and it was not established that he has a global impairment similar to mental retardation and/or one that requires similar services. He does not function in the community like a mentally retarded person. Rather, he is a person with low-average to average cognitive abilities and speech and language issues. Claimant has difficulties, but he also has noteworthy strengths. It is not possible, given the evidence presented, to conclude that Claimant qualifies for regional center services pursuant to the Lanterman Act. Claimant is not eligible for regional center services due to autism or pursuant to the "fifth category." Accordingly, Claimant's appeal will be denied.

ORDER

Claimant Leonardo S's appeal is denied. He is not eligible for regional center services.

DATED: _____

MARY-MARGARET ANDERSON
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.