

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2014120900

DECISION

Christopher Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on March 20, 2015.

Claimant's mother represented claimant, who was present at the hearing.

Lisa Basiri, Fair Hearings and Legal Affairs, represented the Westside Regional Center (WRC).

The matter was submitted on March 20, 2015. On July 13, 2015, the parties convened by telephonic status conference with Presiding Administrative Law Judge Nancy Beezy-Micon. The parties had previously been advised in a July 7, 2015, telephonic status conference, that ALJ Ruiz was on extended leave and was unable to render a proposed decision in this matter. The parties entered into a stipulated agreement to permit another Administrative Law Judge to issue a proposed decision based on an examination of the exhibits and on the audio recording of the administrative hearing.

Based on the review of the administrative record, the undersigned Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder?

Jurisdictional Matters

1. Claimant is a five-year-old girl who lives with her mother. She attends transitional kindergarten at an elementary school. She received some special educational services prior to kindergarten but has been terminated from special educational services because she functioned above the required level for that program. Claimant also had been receiving regional center services under the Early Start program, but this service ended when she reached three years of age.

2. On September 30, 2014, claimant's mother requested that WRC provide services to claimant on the basis that claimant suffers from Autism Spectrum Disorder. As part of that request, claimant provided various documents to WRC, including medical and psychological records, to support claimant's request for services.

3. On February 19, 2015, WRC notified claimant that she is ineligible for regional center services based on the evaluation conducted by WRC and a review of her records because she did not have a disability that qualified her to receive WRC services.

4. On December 18, 2014, claimant's mother filed a fair hearing request appealing WRC's decision.

Records of Claimant's Previous Evaluations Provided to WRC

SEPTEMBER 6, 2009, PSYCHOLOGICAL ASSESSMENT BY CAROL KELLY, ED. D.

5. Dr. Kelly, a licensed clinical psychologist, evaluated claimant on September 6, 2009. Dr. Kelly conducted her evaluation of claimant using the Wechsler Preschool and Primary Scale of Intelligence (Third Edition) and the Vineland Adaptive Behavior Scales (Second Edition). Dr. Kelly also conducted parental interviews, observed claimant at play, and reviewed claimant's records from the WRC Early Start program.

Dr. Kelly noted that, in prior testing by an occupational therapist on March 8, 2012, claimant's scores on cognition tests fell within an average range. In language skills, claimant scored in the lower average range. Claimant also was rated as having poor adaptive skills and as having social skills in the lower average range.

Following her assessment of claimant, Dr. Kelly summarized her findings as follows:

[Claimant] is a 2.10-year-old girl who has been followed by the regional center because of concerns regarding speech and language delays. Current testing . . . finds that her Verbal IQ, Performance IQ, and Full Scale IQ fall within the average range of intelligence. Her adaptive skills . . . indicate ability in the low average range in the area of communication, and the borderline range in regard to motor skills. [Claimant] is

beginning to speak but her words are unclear and difficult to understand.

6. Dr. Kelly diagnosed claimant with Phonological Disorder and recommended further testing through the local school district to assess whether claimant is eligible for speech and language services, and to rule out hearing impairment.

OCTOBER 2013 PSYCHOLOGICAL ASSESSMENT BY WON-FONG LAU, PH. D.

7. Dr. Lau conducted a psychological assessment of claimant on October 11, 16, and 18, 2013. Claimant had been referred to the Los Angeles County Department of Mental Health Services due to concerns of aggression, tantrums, and attention difficulties. In his assessment, Dr. Lau used the Neuropsychological Scale for Children; the Wechsler Preschool and Primary Scale of Intelligence (Fourth Edition), and Sensory Profile test. Dr. Lau also reviewed medical records and observed claimant.

Dr. Lau diagnosed claimant with Pervasive Developmental Disorder. He noted her language delays prior to age three, and pointed out that, although she had been recommended to attend speech and language therapy, her attendance in therapy at various agencies was inconsistent. Thus, her progress in speech and language continued to be negatively impacted.

Dr. Lau observed:

It is likely that her symptoms of anxiety preclude her from learning and approaching novel task demands, which in turn impacts her ability to retain new information and apply her cognitive skills to un-related and ambiguous stimuli that are unfamiliar to her. Her developmental history also indicates that her verbal skills are especially impacted in social situations, thus it is likely her symptoms of anxiety interfere with her ability to have meaningful interactions with others . . .

8. Based on the foregoing, Dr. Lau also diagnosed claimant with Anxiety Disorder NOS. Dr. Lau explained that, although claimant did not meet the full criteria for any specific anxiety disorder in the DSM-IV-TR, she did exhibit some symptoms of frequent, persistent worry and anxiety. Dr. Lau recommended claimant be assessed by her local school district so that she could obtain special education services, if warranted. He also recommended behavioral therapy and weekly dyadic therapy with her mother.

OTHER RECORDS PROVIDED TO WRC

9. Also included in the records provided to WRC were a March 8, 2012, behavioral assessment by occupational therapist Candace Robinson and a September 26, 2014, occupational assessment by occupational therapist Janet Gunter. Both concluded that claimant was in need of speech and language services.

WRC's Evaluation of Claimant

10. WRC performed a comprehensive clinical evaluation of claimant to determine eligibility for WRC services. The multi-disciplinary team of evaluators was comprised of a physician, a psychologist, and counselors. After review of claimant's previous medical and psychological records, and following the evaluations conducted by WRC, the WRC Eligibility Review Committee determined that, although claimant presents with mild Autism Spectrum Disorder, she does not have a significant functional limitation in three or more areas of major life activity. Thus, she is not eligible to receive regional center services.

OCTOBER 24, 2014, EVALUATION BY JANET WOLF, PH. D.

12. Dr. Wolf conducted a psychological assessment of claimant on October 20, 24, and 30, 2014, using the Wechsler Preschool and Primary Scale of Intelligence (Fourth Edition); the Vineland Adaptive Behavior Scales; and the Autism Diagnostic Observation Schedules. Dr. Wolf also conducted parental interviews, observed claimant at play, observed claimant in a school setting, and reviewed the records claimant provided to WRC.

Dr. Wolf concluded that claimant's performance in cognitive evaluations fell in the average range. Her verbal comprehension skills were in the low average range, and her visual spatial skills fell in the high average range. Her working memory and processing speed fell in the average range, although her responses to some tasks were not appropriate. Claimant responded well to structured tasks.

In Dr. Wolf's report, she further described her observations of claimant relative to the diagnostic criteria for Autism Spectrum Disorder as set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5 TR.) With respect to cognition, Dr. Wolf determined that claimant demonstrated strengths of well-developed cognitive skills in a structured situation, although she had some challenges in social affect. She did not display aggressive behavior. However, she modulated between loud and soft speaking in a school setting which caused disruption. Claimant could be loud, highly active, and overpowering. Claimant displayed normal communicative behaviors used for social interaction, and consistently sought the attention of others. Her vocabulary was extensive, although sometimes she used words out of context. Claimant addressed individuals by looking at them directly and by verbally referencing them specifically. Her reciprocity was limited because she had limited responsiveness to the social effect of others. Dr. Wolf did observe claimant to briefly manifest restricted, repetitive behaviors. Dr. Wolf described claimant's behavior as over-active, over-stimulated, and very loud.

13. Based on her observations, Dr. Wolf concluded that claimant exhibited some autism spectrum-related symptoms and diagnosed her with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. Dr. Wolf recommended that claimant's mother have claimant assessed by a pediatric psychiatrist or behavioral pediatrician due to her level of hyperactivity, impulsivity, and distractibility, as well as her frequent euphoria. Dr. Wolf

did not conclude in her report that claimant displayed significant functional limitations, per the DSM-5 TR, in three or more major life activities.

JANUARY 28, 2015, EVALUATION BY KAELY SHILAKES, D. PSY.

14. Dr. Shilakes conducted a psychological assessment of claimant on January 28, 2015. Dr. Shilakes also reviewed the prior evaluations.

Dr. Shilakes reported that claimant presented as an attractive young girl who was dressed appropriately and well-groomed. Claimant appeared interested in the available toys and engaged in pretend play. Claimant did not engage in repetitive behaviors and was able to interact appropriately with Dr. Shilakes throughout the evaluation.

Dr. Shilakes further observed that claimant spoke in complete sentences with some minor articulation errors. Claimant also utilized appropriate gestures such as shrugging her shoulders, pointing toward objects she wanted, nodding her head to indicate “yes,” and holding out her hand to reach for objects. Claimant’s eye contact was also appropriate and she displayed a wide range of facial expressions.

Claimant was able to follow Dr. Shilakes’s instructions and suggestions, and she was self-directed at times. Claimant did not follow instructions to read a book. However, she was able to initiate finding a toy for her brother to play with. During the observation, claimant was always in motion and appeared restless. She was unable to remain seated for any length of time.

15. Based on her observations, Dr. Shilakes concluded that claimant’s behaviors were not consistent with Autism Spectrum Disorder and were more possibly attributable to claimant’s Attention Deficit Hyperactivity Disorder. She also concluded that due to the claimant’s inconsistent use of complete sentences, an evaluation by a speech pathologist would be helpful to rule out a language disorder. Dr. Shilakes did not report that claimant had significant functional limitations in three or more areas of a major life activity.

Testimony of Thompson Kelly, Ph. D.

16. Thompson Kelly, Ph.D., is the Chief Psychologist for WRC. Dr. Kelly has significant experience in the diagnosis of individuals who are suspected to have autism. Dr. Kelly testified at the hearing.

17. Dr. Kelly reviewed claimant’s records. With respect to the report by Dr. Carol Kelly, Dr. Thompson Kelly noted that claimant was diagnosed with Phonological Disorder. He explained that this disorder is a disorder of articulation. While a person may understand words and sentences, he or she may not be able to articulate them. From his review of this report, Dr. Kelly did not see any symptoms that would typically be consistent with a diagnosis of autism.

18. Dr. Kelly also reviewed the report by Dr. Lau. He noted that the diagnosis of Pervasive Development Disorder under the DSM-IV TR meant the examiner observed challenges in communication and socialization. However, Dr. Thompson explained that, prior to claimant's evaluation by WRC in 2014, the DSM-IV TR changed to the DSM-5 TR. This change incorporated many disorders, including Pervasive Development Disorder, into Autism Spectrum Disorder by utilizing a broader diagnostic criteria. Consequently, someone now can be diagnosed with autism, but the autism is classified by a range of impairment. There is no dispute, based on Dr. Kelly's review of claimant's history and the evaluation completed by WRC, that claimant now has a diagnosis of Autism Spectrum Disorder.

19. Dr. Kelly reviewed the WRC evaluation completed by Dr. Wolf. He agreed that claimant was not observed to present with repetitive behaviors; was adequate with self-care issues; did well in school; and experienced issues primarily with social interaction and an inability to initiate and sustain focus on tasks. He pointed out that all of claimant's evaluations show that claimant's social interaction and attention problems are mild.

20. Dr. Kelly was present during the multidisciplinary evaluation on January 28, 2015. Although he was observing another child he did have the opportunity to briefly observe claimant because claimant interacted with the child that Dr. Kelly was observing. Dr. Kelly reviewed the WRC Multidisciplinary Evaluation report that Dr. Shilakes completed. He concurred with Dr. Shilakes that claimant was very easily engaged, initiated interactions, responded to interactions, engaged in a variety of play activities, demonstrated symbolic pretend play, and was able to use language appropriately. Claimant had some articulation problems, but she was able to communicate in complete sentences, articulate her needs, and express her desires.

21. Dr. Kelly concurred with the assessment of the multidisciplinary team that, although claimant was diagnosed with Autism Spectrum Disorder, she did not have substantial impairment in three or more major life activities.

Dr. Kelly explained how this determination was made. He explained that the team looks at a child's chronological age. Clinically, they think about how an average five year old should be functioning in the areas of receptive and expressive language; learning; self-care; mobility; and self-direction.¹ In his opinion, claimant's deficits are in the areas of language, self-care, and self-direction. However, she functions at the level of a three and one-half year old or four year old. Consequently, her impairment is mild.

Evidence Presented By Claimant

22. Claimant's mother produced a collection of documents. The first document was Janis Gutner's November 6, 2014, evaluation of claimant. Ms. Gutner is an Occupational Therapist. According to the report, Ms. Gutner utilized the Miller Function and Participation Scale (completed by claimant's mother), and sensory processing measures

¹ The other two categories, capacity for independent living and economic self-sufficiency, do not apply to a five-year old.

completed by claimant's school and mother. Ms. Gutner also interviewed claimant's mother and claimant, and observed claimant in a structured and unstructured clinical setting. Ms. Gutner concluded that claimant displayed "deficits" in "functional participation" at home, school and in the community, in social interaction, self-regulation, motor coordination and functional use of language. Ms. Gutner noted that claimant's difficulties appear to be due in part to the inefficient processing of vestibular and proprioceptive sensory information. Claimant also had a moderate delay in motor skills. Ms. Gutner concluded that the motor delays and sensory processing difficulties are most likely contributing to claimant's difficulties with participation at home, school, and in social situations. Ms. Gutner's report did not contain a conclusion that claimant displayed significant functional limitations in three or more major life activities.

23. Claimant's mother provided a July 30, 2013, Child's Functional Equivalence Questionnaire (CFEQ), regarding claimant's functioning in the following areas: acquiring and using information; moving and manipulation of objects; self-care; and health and physical well-being. In response to that questionnaire, claimant's mother reported that claimant was functioning from moderately below average to severely below average in every category.

The CFEQ, however, is of limited value. When it was completed, claimant was several years younger than she was at the time of the WRC evaluation, and it was completed by claimant's mother and not a medical or psychological professional whose purpose was to diagnose claimant for WRC eligibility under the Lanterman Act criteria. Given claimant's history of phonological disorder, pervasive development disorder, and attention deficit hyperactivity disorder at the time her mother completed the CFEQ, it is also impossible to ascertain whether claimant's alleged limitations were attributable to autism. The CFEQ did not contain any conclusion that claimant displayed significant functional limitations in three or more major life activities.

24. Claimant's mother provided a March 8, 2012, evaluation conducted by Candace Robinson, an occupational therapist. This evaluation occurred almost three years prior to the evaluation conducted by Dr. Shilakes at WRC. Claimant was only two and one half years old at the time of Ms. Robinson's evaluation.

Ms. Robinson utilized the Bayley Scales of Infant and Toddler Development Third Edition and the Developmental Assessment for Young Children. Ms. Robinson also conducted interviews with claimant's mother and observed claimant in a clinical setting. Ms. Robinson concluded that claimant displayed "scattered" developmental abilities. Claimant had below average play skills and problem solving abilities. Claimant had average grasp and comprehension skills. Claimant's language ability was below average, and she also exhibited global immaturity in social development. Claimant was also noted to have some sensory processing deficits. Based on her observations, Ms. Robinson recommended that claimant be evaluated further for sensory processing and that she attend speech therapy. Ms. Robinson's report did not contain a conclusion that claimant displayed significant functional limitations in three or more major life activities.

25. Claimant's mother provided two letters from herself to Wendy Ostensen, the principal at claimant's elementary school. Claimant's mother requested in her letters that claimant had trouble following directions, processing information, focusing and attending to a task, and keeping her hands to herself. The letters appeared to have been written in order to obtain special education services for claimant. The letters did not contain any conclusions or evidence that claimant displayed significant functional limitations in three or more major life activities.

26. Claimant's mother testified. Claimant's mother believes that, based on the evidence presented, claimant qualifies for WRC services based on a diagnosis of Autism Spectrum Disorder, and because claimant has significant functional limitations in receptive and expressive language; learning; self-care; mobility; and self-direction. However, claimant's mother did not elaborate on these categories to establish how claimant is significantly limited.

27. Claimant's mother added that claimant receives therapy once a week at her school in order to help her with speech and emotional problems. Claimant also has an occupational therapist who comes to her school on Fridays. Claimant's mother hopes to obtain speech therapy through the school in the future, but at the present time, the school has indicated that claimant's speech impairments, if any, are not impacting her academically. Academically, claimant does not meet the criteria for special education services.

28. No testimony was provided by a psychologist, doctor, or other medical professional concluding that claimant is substantially impaired in three or more major life activities.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

Applicable Law

2. Under the Lanterman Developmental Disabilities Services Act (the Act). (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a

remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subds. (a) & (b); Cal. Code Regs., tit. 17, § 54000, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512; Cal. Code Regs., tit. 17, § 54000, subd. (b).))

4. Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

5. California code of regulations, title 17, Section 54001, subdivision (a), defines “substantial disability” as:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; (G) Economic self-sufficiency.

6. A regional center is required to perform initial intake and assessment services for “any person believed to have a developmental disability.” (Welf. & Inst. Code, § 4642.) “Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs” (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, “the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources.” (Welf. & Inst. Code, § 4643, subd. (b).)

7. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

Evaluation

8. It is undisputed that claimant has Autism Spectrum Disorder. However, in order to qualify for WRC services, claimant must have significant functional limitations in three or more major life activities: receptive and expressive language; learning; self-care; mobility; and self-direction. The evidence established that claimant has some difficulties in the areas of language and self-direction; however, claimant's deficits in those areas are not substantial. The most recent evaluation of claimant was completed by Dr. Shilakes. As Dr. Shilakes's evaluation demonstrated, claimant was easily engaged, initiated interaction and responded to stimuli, engaged in a variety of play activities, and used language appropriately. Although claimant clearly had articulation problems, she was able to communicate in complete sentences, articulate her needs, and express her desires.

Academically, claimant no longer receives special education services because she is performing above the level that would qualify her for the special education program. Previous evaluations of claimant in the areas of cognitive functioning and adaptive functioning ranged from low average to average but remained within the average range for her age group. No evidence was presented to demonstrate that claimant's deficits are causing her to be substantially impaired in her ability to learn.

While it was undisputed by almost every evaluator that claimant experiences deficits in the area of self-direction, it appears that the deficits tend to be related to her attention deficit hyperactivity disorder rather than autism, and the deficits were mild.

The only evidence of mobility issues came from the report by Ms. Gutner, who observed that claimant displayed moderate delays in her fine motor skills. However, Ms. Gutner's evaluation noted that further testing was required to assess the impact of the motor delays on claimant's development. No evidence in Ms. Gutner's report established that claimant suffered from significant impairment of her motor functioning.

Finally, although claimant's mother reported deficiencies in self-care in areas such as claimant's brushing her teeth and getting dressed, insufficient evidence established that claimant's deficit in the area of self-care was substantial.

Claimant's mother clearly wants the best for her daughter. It is also clear that claimant suffers from some limitations in learning, self-care, and self-direction. However, the burden was on claimant to establish her eligibility for regional center services. Insufficient evidence was presented to demonstrate that claimant has significant functional limitations in three or more areas of a major life activity as would be required to qualify her for regional center services under the autism category.

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