

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2015040545

DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California (OAH), heard this matter in Napa, California, on June 1, and July 7, 2015.

Claimant's mother represented claimant, who was not present at the state-level fair hearing.

Attorney at Law Kristin N. Casey represented North Bay Regional Center (service agency).

On July 7, 2015, the parties submitted the matter for decision, and the record closed.

ISSUE

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

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 12, 2015, service agency notified claimant that he was not eligible for regional center services.
2. On March 31, 2015, claimant's mother filed a fair hearing request appealing that decision and this hearing ensued.

Diagnostic Criteria for Autism Spectrum Disorder

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5), identified criteria for the diagnosis of Autism Spectrum Disorder. The diagnostic criteria include persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of Autism Spectrum Disorder to qualify for regional center services under the category of autism.

Evidence Presented At Hearing

4. Claimant is a 14-year-old male. Claimant contends he is eligible for regional center services based upon a diagnosis of Autism Spectrum Disorder.

SERVICE AGENCY'S EVIDENCE

5. In reaching its determination, service agency reasonably relied, in part, on findings and opinions of mental health professional, Todd Payne, Psy.D. In consultation with service agency's three-person Eligibility Team, Dr. Payne reviewed all available records pertaining to claimant in order to formulate his objective current opinions.

Dr. Payne has worked for service agency for 13 years. Of the years of his employment tenure with service agency, he has been the regional center's staff psychologist tasked with intake and eligibility determinations for persons seeking supports and services through service agency.

6. In this matter, which focuses upon claimant, Dr. Payne offered credible, persuasive and compelling testimonial evidence at the hearing of this matter. His objective analysis and considered opinions are integral to the determinations made in this matter.

7. During his reliable testimony at the hearing, Dr. Payne provided detailed reviews of the following documentary evidence.

a. On February 22, 2010, when claimant was nine years, nine months old, the M.I.N.D.¹ Institute administered testing for claimant. Tests and assessments of claimant showed that he had an array of difficulties (low average working memory; below average processing speed; borderline for letter-word identification; borderline reading fluency; extremely low passage comprehension; extremely low math fluency; at risk cognitive/inattention; problems with inhibiting his actions; problems with fluidly shifting from one activity or situation to the next; problems with regulating and maintaining his emotions; impairment with holding and manipulating information in his memory; problems with organizing materials; and difficulty monitoring his behavior and the impact of his behavior on others). But, in February 2010, the M.I.N.D. Institute did not determine claimant to be impacted by either intellectual developmental disability (mental retardation) or autism. Rather, the clinical psychologist determined claimant to be impaired by “Generalized Anxiety Disorder, and also [that he] experience[d] auditory hallucinations.”

b. In a Psychoeducational Evaluation report, dated October 18, 2010, a school psychologist, for California Virtual Academies of Simi Valley, California, did not find claimant was impaired by autism or intellectual developmental disability. But, claimant demonstrated that he had significant deficits in his attention, visual-motor integration skills, visual-perceptual skills, visual memory, and visual-sequential memory. Claimant’s reading, math and writing skills were “all far below average compared to other students his age,” that is 10 years, five months old. The evaluating psychologist noted that claimant had taken medications to treat Attention Deficit Hyperactive Disorder (ADHD) and anxiety. Due to his history of significant behavior and emotional issues, the school psychologist determined in October 2010 that claimant was eligible for Special Education services because claimant was “learning disabled.”

c. Kaiser Permanent Medical Group has followed claimant over a course of years. In November 2012, a health care provider within the Kaiser system noted claimant to be impaired by ADD (attention deficit disorder) or ADHD.

On September 26, 2013, Robert Broadhurst, M.D. of Kaiser found claimant’s primary encounter diagnosis to be “ADHD, Combined.”

d. On December 12, 2012, Fawzia S. Ashar, M.D., FAACAP, a diplomate with the American Board of Psychiatry and Neurology, as well as the Director of the Kaiser Permanente (Rancho Cordova) facility’s Autism Spectrum Disorders Center, sent a letter to

¹ M.I.N.D. means Medical Investigation of Neurodevelopmental Disorders, which is a part of the University of California Davis Health System, located on 50th Street in Sacramento, California.

claimant's mother. The letter set out that claimant "does *not* have signs and symptoms or early developmental history of Autism Spectrum Disorders." (emphasis added.) Dr. Ashar noted, however, that claimant "has significant learning delays along with delays in non-verbal intellectual capacity needing significant attention." And, the board-certified psychiatrist pointed out that claimant "is also diagnosed with Anxiety disorder"

e. On February 27, 2014, the Solano County SELPA issued an Individualized Education Program report (IEP). The IEP report, which noted claimant to be 13 years old, determined him eligible for Special Education services by reason of a primary condition of "Emotional Disturbance," and a secondary condition of "Specific Learning Disability."

f. A report, dated May 20, 2014, by the Solano County SELPA alluded to claimant having a disorder characterized as a "Sensory Processing diagnosis." The report, however, does not suggest that claimant was impacted by autism or developmental intellectual disability.

g. On July 7, 2014, Ken Colenzo, LCSW of the Department of Psychiatry of the Kaiser Permanente Medical Group in Vacaville, California, wrote a report regarding claimant. The report determined claimant to have "been diagnosed with Anxiety Disorder and ADHD combined type." Claimant was enrolled in an Anxiety Group with other teenagers and he was retained on "medication management" for the anxiety disorder.

h. On November 7, 2014, Sean McGreevey, a school psychologist for the Dixon Unified School District Office of Student Services, issued a psychological report for claimant. In the report's opening paragraph, the matter was raised as to "some question about whether [claimant] might fall under the Autism Spectrum." Four detailed tests (Wechsler Abbreviated Scale of Intelligence, Second Edition (WASI-II); NEPSY-II; Delis-Kaplan Executive Functioning System (D-KEFS); and, Conner's Third Edition) were administered to claimant. Claimant had a full scale IQ of "borderline 79." The report concluded that claimant met "the eligibility criteria for Emotional Disturbance and Specific Learning Disability." Further, claimant met "the criteria for Other Health Impairment based on his ADHD." And, the report determined an extraordinary level of anxiety impacted claimant.

i. On January 5, 2015, Kaiser Permanent Medical Group performed a Brain MRI for claimant. The MRI study revealed an abnormality "consistent with cerebellar malformation mega cisterna magna (MCM), which is most commonly associated with ventriculomegaly." And, the condition "can be associated with corpus callosum abnormalities." The medical report conveys information including the fact that one-third of children having MCM develop the spectrum of disorders including "cognitive and language delays as well as delayed motor development and neurological abnormalities" This medical opinion supports an inference that claimant's malady is related to an organic brain condition, as opposed to autism.

CLAIMANT'S EVIDENCE

8. Claimant's mother offered poignant and heart-felt testimony regarding her experiences over the years with claimant.

9. Claimant, through his mother, offered two reports that suggest claimant is impacted by autism.

a. Erika Frieze, Psy.D., a licensed clinical psychologist, with the M.I.N.D. Institute Clinic issued a report, based on an evaluation, dated December 18, 2014. Dr. Frieze found that claimant does not meet "diagnostic criteria for an intellectual disability." But, the report opined that claimant's "long-standing history of poor social skills, peer relationship deficits, a literal thinking style, perseverative interests, and sensory deficits" suggest the prospect of his impairment being grounded in an Autism Spectrum Disorder. Dr. Frieze's report concluded that as a result of the Social Communication Questionnaire and the ADOS-2 assessment indicated "*concerns consistent with autism spectrum*" for claimant. (Emphasis added.) The report pointed out, however, that claimant did "not appear like an individual with a classic Autism Spectrum Disorder." Claimant appeared "extremely charismatic and social." But, the report noted peculiar behaviors on claimant's part that suggested an Autism Spectrum Disorder malady.

b. Donna Marie Costello, Ph.D., ABSNP, a licensed educational psychologist, issued an Independent Educational Evaluation, dated February 25, 2015, for claimant. The 34-page report provides a comprehensive study of various assessment instruments and procedures used by Dr. Costello reaching her opinions regarding claimant. Of striking note is the opening line of Dr. Costello's report that claimant was "an affable young man who presented as friendly, talkative, and cooperative throughout testing." At the time of Dr. Costello's report, claimant was 14 years old and an eighth-grade student. The report set out that claimant had "a complex presentation of cognitive strengths and deficits as well as non-cognitive factors." Dr. Costello rendered an opinion that claimant met "the special education eligibility [criteria] as a student with autism," as well as "other characteristics often associated with autism," based on the California Education Code. Dr. Costello gained support by the recent M.I.N.D. Institute report. But, her report set out, "[h]owever, the clinical diagnosis of autism is *insufficient* for eligibility for special education based on education code." (Emphasis added.)

SERVICE AGENCY'S REFUTATION OF DETERMINATIONS OF AUTISM

10. On behalf of service agency's position, Dr. Payne offered persuasive testimony refuting the validity of the assessments and the opinions expressed in the December 2014 report by the psychologist with the M.I.N.D. Institute and the February 2015 report by Dr. Costello. Dr. Payne credibly proclaimed that the diagnoses in those reports for claimant as being impacted by an Autism Spectrum Disorder were erroneous. Moreover, Dr.

Payne was very clear in showing that claimant has neither an intellectual developmental disability nor a condition similar (Fifth Category) to intellectual developmental disability.

Ultimate Finding

11. The weight of the evidence at the hearing of this matter established that claimant is not impaired by a diagnosis of an Autism Spectrum Disorder so as to meet the criteria for eligibility for supports and services through a regional center.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Authority

2. The Lanterman Act is set forth in Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 outlines California's responsibility for persons with developmental disabilities, and the State's obligation to provide services and supports to them.

4. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as one that "originates before an individual attains age 18; continues, or can be expected to continue indefinitely; and constitutes a substantial disability for that individual." A developmental disability "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."

5. California Code of Regulations, title 17, section 54000, defines developmental disability as one "attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." The developmental disability must originate before age 18, be likely to continue indefinitely, and constitute a substantial disability. The developmental disability shall not include handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature.

6. California Code of Regulations, title 17, section 54001, defines substantial disability, and requires that the assessment for it be made by the regional center.

Ultimate Determinations

7. Claimant's mother is a strong advocate for her son. She is concerned about his development. After living with difficulties over the years in attending to her son's extraordinary behaviors and researching autism, it seemed to claimant's mother that claimant exhibited autistic features. But, she is not an expert in assessing and rendering a diagnosis that supports a determination of autism. Claimant's mother's concerns and actions are very understandable, and claimant's mother is to be commended for exploring every avenue of assistance for her son. But, service agency has expended the time, knowledge and experience of a three-person Eligibility Team, which could not find that claimant meets the criteria for eligibility to be received into regional center's supports and service due to autism. The regional center system was not designed to and legally cannot assist everyone who could benefit from assistance except where there is an unequivocal determination, by the weight of evidence, that the claimant is impacted by a specific developmental disability.

Claimant does not suffer from an Autism Spectrum Disorder and it was not established that he has a global impairment similar to an intellectual developmental disorder and/or one that requires similar services. And, claimant does not function in the community like a developmental intellectual disabled person. Rather, he is a person with low-average cognitive abilities and anxiety/behavior issues. He has been determined to be affected by the Generalized Anxiety Disorder.

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 must be denied.

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. None of the documents introduced or the testimony offered demonstrated that claimant had a diagnosis of Autism Spectrum Disorder. The burden was on claimant to establish eligibility for regional center services. As claimant introduced insufficient evidence to establish he was eligible to receive regional center services on the basis of autism, his appeal of service agency's determination that he is ineligible to receive services must be denied.

ORDER

Claimant's appeal from the North Bay Regional Center's determination that claimant is not eligible for regional center services and supports is denied.

Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

DATED: July 21, 2015

_____/s/_____
PERRY O. JOHNSON
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 ninety days.