

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DIEGO A.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2011110726

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 1, 2012, in Culver City.

Diego A. (claimant) was not present; he was represented by his mother, Tatiana V.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 1, 2012.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-12.

Testimony: Thompson Kelly, Ph.D.; Tatiana V.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a ten-year-old boy.
2. Claimant's mother asked the Service Agency to determine claimant's eligibility for services under the Lanterman Act. By letter dated August 31, 2011, and by a Notice of Proposed Action dated September 8, 2011, the Service Agency notified claimant's mother that it had determined that claimant is not eligible for regional center services because he does not meet the eligibility criteria set forth in the Lanterman Act.
3. Claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding eligibility, requesting that claimant "get funding for social skills therapy or classes." (Ex. 2.²)

Claimant's Background and Evaluations

4. Claimant lives at home with his mother and grandmother.
5. Claimant currently receives special education services, including occupational therapy, at Westwood Charter Elementary School.
6. A psychosocial assessment report dated July 26, 2011, prepared by Rafael Garcia, M.A., an intake counselor for the Service Agency, states that claimant's mother was concerned about claimant's social skills, self-direction, and auditory processing. Claimant's mother also reported that claimant had been "diagnosed with Asperger's by his school." She further reported that claimant does most self-care tasks on his own, that he can make simple change and make simple purchases, that he can order food in restaurants and make simple cold snacks for himself, and that he refuses to clean up after himself, even with prompting. She reported that claimant engages in simple conversation, displays echolalia, makes eye contact, shows affection, does not engage with peer or initiate social contact, and is very bossy; that he has difficulty with transitions; that he does not engage in self-injurious behaviors and does not elope; and that he reads at grade level, cannot remember multistep instructions, and is easily distracted. In his assessment report, Mr. Garcia recommended obtaining claimant's medical records and coordinating a psychological assessment. (Ex. 6.)
7. Janet Wolf, Ph.D., a licensed clinical psychologist, performed a psychological evaluation of claimant for the Service Agency. Dr. Wolf met with claimant and claimant's mother on August 23, 2011. Dr. Wolf reported administering the following tests: Wechsler Intelligence Scale for Children—4th Edition (WISC-IV); Autism Diagnostic Observational Schedule, Module 3 (ADOS); Vineland Adaptive Behavior Scales. (Ex. 5.) She also conducted a clinical interview and reviewed records.

² The date of the fair hearing request is not established by the evidence.

8. Dr. Wolf wrote that claimant’s mother reported that claimant had language delays after his first year, and that he had received early intervention services including preschool, speech therapy, and in-home behavior intervention. Dr. Wolf reviewed a psychological evaluation of claimant performed in 2003 by Lael Shannon, Ph.D., noting that Dr. Shannon had diagnosed claimant with mild receptive/expressive language delays and with a phonological disorder. Dr. Wolf reviewed a 2003 speech and language evaluation by Barbara Vasser, M.S., noting that Ms. Vasser found that claimant demonstrated mild to moderate receptive delays and moderate to severe expressive delays and articulation challenges. Dr. Wolf also reviewed an August 8, 2010, letter from Derek A. Ott, M.D., noting that he wrote that claimant has Asperger’s syndrome, Attention Deficit Hyperactivity Disorder (ADHD), and Depression, Not Otherwise Specified.

9. Dr. Wolf obtained the following ADOS results for claimant:

Communication Total	3
Reciprocal Social Interaction Total	10
Total	13
<i>Communication autism cut-off:</i>	3
<i>Reciprocal Social Interaction Autism Cut-off</i>	6
<i>Communication + Reciprocal Social Interaction Cut-off</i>	10

Dr. Wolf noted “Autism Spectrum Cut-offs” of 2 for communication, 6 for reciprocal social interaction, and 7 for communication plus reciprocal social interaction. She describes the “autism spectrum range” as being the range of Pervasive Developmental Disorder. (Ex. 5.) Administering the WISC-IV, Dr. Wolf found that claimant’s verbal comprehension index score was 75, his working memory index was 94, his perceptual reasoning index was 96, his processing speed index was 78, and his full scale IQ was 88.

10. Dr. Wolf diagnosed claimant with Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS). She concluded in her report that claimant:

Fell in the borderline range for verbal activities and in the average range for perceptual reasoning activities. He demonstrated characteristics of atypical relatedness and atypical communication that are consistent with diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified.

(Ex. 5.) Dr. Wolf recommended that claimant participate in an appropriate social skills group.

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11. On January 30, 2012, Mayra Mendez, Ph.D., L.M.F.T., C.G.P., observed claimant at school on behalf of the Service Agency,

due to concerns regarding Autistic Disorder. During this observation, [claimant] presented with significant behavioral challenges Based on interviews with [teachers] and [claimant's] one-to-one aide, [claimant] appears to function in the average range of intelligence based on ability to engage academics at grade level and placement in mainstream classroom. . . . Everyone interviewed described [claimant] as presenting with significant challenges in social-emotional regulation. They stated that he does not have friends as he alienates peers with abrasive, critical, negative and demeaning commentary.

(Ex. 3.) Dr. Mendez concluded that claimant's overall profile "is one suggestive of a diagnosis of Asperger's Disorder," based on criteria described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). (*Id.*) She recommended continued school counseling to address claimant's social and emotional challenges in the school setting, and continued mental health services.

12. Thompson Kelly, Ph.D., chief psychologist and director of intake services at WRC, served as a member of the eligibility review committee that determined that claimant is not eligible for regional center services. The committee examined claimant's psychological and medical records, school records, and private assessments in which claimant was observed in multiple settings. Dr. Kelly consulted with individuals who have or have had direct contact with claimant, including claimant's one-on-one aid at school, Dr. Mendez (Ex. 3), and Dr. Wolf. Dr. Kelly testified that Dr. Wolf found that claimant does not meet the autistic disorder criteria, an eligible diagnosis under the Lanterman Act, but may meet the criteria for Asperger's Disorder or PDD NOS. Dr. Kelly testified that Dr. Mendez, who observed claimant, found that he had substantial socialization deficits but no substantial delay in communication and language; this would not support a diagnosis of autistic disorder, although it might indicate an autistic spectrum disorder, ADHD, or a mood disorder. Dr. Kelly testified that Dr. Ott's diagnostic impressions of claimant are consistent with Dr. Wolf's and Dr. Mendez's; he found that claimant's oppositionality and inattention suggest autistic spectrum and mental health characteristics, possibly supporting diagnoses of ADHD and depression. Dr. Kelly testified that claimant's academic and daily living skills and his adaptive functioning in general are not consistent with an individual with mental retardation. With respect to the fifth category of eligibility for regional center services, to treat an individual with mental retardation, everything must be broken down into small, concrete steps. Claimant, however, has a great deal of abstract ability, and does not need similar treatment. Drs. Wolf, Shannon, and Mendez did not find that claimant is on the same intellectual plane as an individual with mental retardation. His one-to-one aide at school is there to encourage him to comply with classroom standards; claimant is rigid, but he is able to do the tasks assigned in class. Based on these findings, the eligibility review committee

ruled out fifth category as a basis for claimant's eligibility under the Lanterman Act. Claimant's problems involve socialization, not cognition. Dr. Kelly noted that it is not uncommon for someone with Asperger's disorder to have comorbid psychological diagnosis, because the disorder will have an emotional impact resulting in psychological symptoms such as depression and anxiety. Dr. Kelly opined that claimant would definitely benefit from intervention.

13. Claimant's mother testified that claimant has had problems at school, and that they are related to social skills. He has been removed from his fifth grade classroom because his teacher felt he had used up his peers' patience and tolerance. Claimant does not understand that his oppositionality and rigidity, and his willingness to discuss only subjects of interest to him, have an effect on his relationship with his peers and his teachers. Claimant's mother is not currently working, so she cannot afford to get help for claimant, who needs consistent social instruction until he becomes an adult. She believes that claimant's social deficits will have an increasingly greater effect on claimant's well-being, and she is concerned that his lack of social success could cause depression. She testified that claimant is a bright child who requires help to learn how to socially interact with his peers.

14. A preponderance of the evidence establishes that claimant does not have autistic disorder or mental retardation, and that he does not have a disabling condition closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation. Rather, the evidence shows that he may have PDD NOS or Asperger's Disorder and psychological comorbidities, and that he would likely benefit from services designed to enhance his social skills.

LEGAL CONCLUSIONS

1. Cause does not exist to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 14, and Legal Conclusions 2 through 4.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (See Evid. Code, § 115.)

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that he suffers from a developmental disability that "originate[d] before [he] attain[ed] 18 years old, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a).) "Developmental disability" is defined to include mental retardation, cerebral palsy, epilepsy, autism, and "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (*Id.*)

4. Claimant did not establish by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act based on a diagnosis of autism. A diagnosis of Asperger's Disorder or PDD-NOS does not satisfy the eligibility requirement of a diagnosis of autism under section 4512, subdivision (a); rather, an individual must be diagnosed with autistic disorder, as that condition is defined in the DSM-IV-TR. Nor did claimant establish by a preponderance of the evidence that he qualifies for regional center services under the fifth category of eligibility. (Factual Findings 4 through 14.) It is not disputed that claimant would likely benefit from services tailored to mitigate the social and psychological effects of his disabilities. But WRC is not required to provide those services to claimant, as his disabilities have not been diagnosed as being any of the five qualifying diagnoses for regional center services.

ORDER

Claimant Diego A.'s appeal is denied.

DATE: March 14, 2012

HOWARD W. COHEN
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.