

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BRANDON W.,

Claimant,

vs.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

OAH No. 2012030524

DECISION

This matter was heard before Administrative Law Judge Elaine H. Talley, Office of Administrative Hearings, State of California, in Sacramento, California, on August 23, 2012.

Claimant's grandmother, who is his guardian, represented claimant.

Robin Black, Legal Services Specialist, represented the service agency, Alta California Regional Center (ACRC).

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Was ACRC's original determination that claimant was eligible for regional center services due to a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals clearly erroneous pursuant to Welfare and Institutions Code section 4643.5, subdivision (b)?

If so, is claimant eligible for ACRC services because he is an individual with autism?

FACTUAL FINDINGS

1. Claimant is a seven-year-old boy who lives with his grandmother and siblings. He was found eligible for ACRC services at the age of three based on a diagnosis of Developmental Delay Not Otherwise Specified (DDNOS). Prior to this eligibility determination, claimant was found eligible for Early Start services due to a language delay at the age of 33 months. At the time claimant was found eligible for ACRC services, the eligibility team recommended reevaluating claimant's eligibility for services by July 2011.

2. On January 24, 2012, ACRC sent a letter informing claimant that the Interdisciplinary Eligibility Team had completed a comprehensive reassessment to determine claimant's ongoing eligibility for ACRC services. The team determined he did not have a developmental disability and therefore the original determination that he had a developmental disability was clearly erroneous. ACRC also sent a Notice of Proposed Action (NPA) to claimant informing him that ACRC would no longer be providing services to claimant 30 days from the date he received the NPA.

3. On March 6, 2012, claimant's grandmother filed a Fair Hearing Request, appealing ACRC's determination that claimant is not eligible for regional center services.

4. Under the Lanterman Act, ACRC accepts responsibility for providing services and supports for persons with developmental disabilities. A developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a)).

5. Claimant's grandmother believes claimant is eligible for regional center services under the fifth category and/or because he has autism. She does not contend that claimant is eligible for regional center services under any other category of disability. Claimant's grandmother testified that claimant "needs help." She stated that she is not sure how to help claimant and she would like ACRC's continued support. In the past, claimant received behavior support and parent training services from ACRC in order to help reduce claimant's tantrum behaviors and increase his social skills.

Psychological Assessments and Testimony Regarding the Fifth Category Eligibility

6. Cynthia Root, Ph.D., staff psychologist at ACRC, reviewed claimant's records, including a psychoeducational evaluation completed by Richard L. Pinnell, School Psychologist at Folsom Cordova Unified School District on November 9, 2011, and an Individualized Education Program (IEP) dated November 28, 2011. As part of his comprehensive assessment of claimant, Mr. Pinnell administered the Cognitive Assessment System (CAS), an individually administered test designed to measure intelligence as a group

of cognitive processes. The basic premise of the test is that human cognitive functioning includes planning, attention, simultaneous processing and successive processing. Dr. Root noted that the psychoeducational evaluation, using the CAS, determined claimant's IQ score to be 87, within the average range. In addition, Mr. Pinnell's report states:

Results from the Cognitive Assessment System should be interpreted with caution as [claimant] exhibited significant difficulty with understanding directions and sustained attention throughout the examination. Thus, these results might be an underrepresentation of his intellectual abilities.

Dr. Root noted that a person may score lower than his or her actual IQ on the CAS, due to an inability to attend to the test, but it is not possible to score higher than one's actual IQ. Dr. Root would expect a person who suffers from a condition similar to mental retardation or requiring treatment similar to that required by someone with mental retardation, to have a much lower IQ score than claimant's score of 87.

7. Mr. Pinnell's psychoeducational report documented concerning behaviors that may interfere with claimant's learning, such as constantly moving around and being highly distracted in the classroom. Claimant's teacher completed the Behavior Assessment System for Children, Second Edition (BASC-II). The BASC-II is an integrated system designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children, and to aid in the design of treatment plans. Mr. Pinnell noted that results of the teacher's BASC-II ratings may suggest that claimant suffers from hyperactivity and may have attention deficits. However, Mr. Pinnell cautioned that the results of this assessment are not sufficient to diagnose Attention Deficit Hyperactivity Disorder (ADHD), and that further assessment would be needed to diagnose the disorder.

8. The IEP team found claimant to be eligible for special education under the eligibility category Specific Learning Disability (SLD). Dr. Root noted that the IEP did not find him eligible under the categories of mental retardation or autistic-like behavior. Claimant's November 28, 2011 IEP noted that he is at grade level in all academic areas and is receiving instruction in regular education except for 40 minutes per week of small group instruction. His education program is not similar to what would likely be provided to a person who suffers from a condition similar to mental retardation.

Question of Eligibility under Diagnosis of Autism

9. Dr. Root testified that there was no evidence in claimant's records that he suffers from autism. Autism is a disorder described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fourth Edition Text Revised (DSM-IV TR).

10. To have an autistic disorder, an individual must have: (1) qualitative impairments in social interaction; (2) at least one qualitative impairment in communication; and (3) and at least one restricted repetitive and stereotyped pattern of behavior, interest, or

activity. There must be a total of at least six of these items. The impairments in social interaction and communication must be marked and sustained. An individual must also have delays or abnormal functioning, with an onset prior to three years, in social interaction, language as used in social communication, or symbolic or imaginative play. The three broad criteria are:

(1) Section 299.00 of the DSM-IV TR requires that, to be diagnosed with autism, an individual must have a qualitative impairment in social interaction as manifested by at least two of the following items:

- (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction.
- (b) failure to develop peer relationships appropriate to developmental level
- (c) lack of spontaneous seeking to share enjoyment, interests, or achievements with other people...
- (d) lack of social or emotional reciprocity.

(2) Section 299.00 of the DSM-IV TR requires that to be diagnosed with autism, an individual must have a qualitative impairment in communication as manifested by at least one of the following items:

- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
- (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
- (c) stereotyped and repetitive use of language or idiosyncratic language
- (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to the developmental level.

(3) Section 299.00 of the DSM-IV TR requires that to be diagnosed with autism, an individual must have restricted repetitive and stereotyped patterns of behavior, interests, and activities as manifested by at least one of the following items:

- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

- (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
- (c) stereotyped and repetitive motor mannerisms...
- (d) persistent preoccupation with parts of objects.

11. Dr. Root noted that nothing in claimant's records indicates that those who have assessed him and who work with him have any suspicion that he suffers from autism. Claimant's November 28, 2011 IEP states that he:

...plays with other children well. He has friends. Some time outs for impulsive actions. Less time-outs lately.

It appears claimant is able to develop peer relationships that are appropriate for his developmental level.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for providing services and supports for persons with developmental disabilities and an obligation to help them, which it must discharge. (Welf. & Inst. Code, § 4501.) As defined in the act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, and that constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a)).

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, § 54001, subd. (c).)

2. "Substantial handicap" is defined by regulations to mean "a condition which results in major impairment of cognitive and/or social functioning." (Cal. Code Regs., tit 17, § 54001, subd. (a).) Because an individual's cognitive and/or social functioning is multifaceted, regulations provide that the existence of a major impairment shall be determined through an assessment that addresses 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; and (7) economic self-sufficiency. (Cal. Code Regs., tit. 17, § 540001, subd. (b).).

3. Evidence provided at hearing supports ACRC's finding that its original determination that claimant suffers from a condition closely related to mental retardation

or requiring treatment similar to that required by people with mental retardation was clearly erroneous.

4. Although claimant's grandmother testified that claimant may have autism, none of the evidence provided at hearing, which included several assessments of claimant, documents a diagnosis, or a suspected diagnosis, of autism. No evidence was offered that claimant suffers from mental retardation, cerebral palsy, or epilepsy.

ORDER

Claimant's appeal from ACRC's decision that claimant is no longer eligible for regional center supports and services under the Lanterman Act is DENIED.

DATED: September 11, 2012

ELAINE H. TALLEY
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd.(a).)