

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KERRIA P.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2012050968

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 25, 2012, in Culver City.

Jeffrey A. Gottlieb, Attorney at Law, represented Claimant. Claimant's mother was present.¹

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

Oral and documentary evidence was received on October 25, 2012. The record was held open to allow the parties to file written closing briefs by November 16, 2012. The parties timely filed closing briefs. Claimant's brief was marked as Claimant's Exhibit 30. The Service Agency's brief was marked as Exhibit WRC25. The record was closed and the matter was submitted for decision on November 16, 2012.

ISSUE

Whether the Service Agency may terminate claimant's services pursuant to Welfare and Institutions Code section 4643.5, subdivision (b).

¹ Claimant and her mother are identified by titles or first name and initials to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits WRC1 - WRC25; claimant's exhibits 1-28 and 30.

Testimonial: Thompson Kelly, Ph.D., WRC chief psychologist; Erika Carpenter Rich, Ph.D., clinical psychologist and owner of Rich and Associates; Ilona Alfi, program supervisor, Beautiful Minds Center for Autism; Carmine Manicone, WRC service coordinator, and claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a nine-year-old girl who is currently a consumer of the Service Agency based her diagnosis of autistic disorder.
2. On February 22, 2012, the Service Agency sent claimant's mother a Notice of Proposed Action (NOPA), notifying her of the Service Agency's proposed action to close claimant's case effective June 1, 2012. The stated reason for the proposed action was that claimant is not substantially delayed by a regional center eligible diagnosis. The NOPA does not indicate the law, regulation, and/or policy in support of the action.
3. On March 16, 2012, the Service Agency sent claimant's mother a letter, signed by its chief psychologist, Thompson Kelly. The letter explained the Service Agency's proposed action to terminate claimant's case on the grounds that claimant does not have a qualifying developmental disability and she is not substantially delayed by a regional center eligible diagnosis.
4. On May 15, 2012, claimant's mother filed a fair hearing request, on claimant's behalf, to appeal the Service Agency's decision to close claimant's case effective June 1, 2012. In the fair hearing request, claimant's mother also indicated she was requesting an informal meeting.² Between May 18 and June 12, 2012, the Service Agency attempted, but was unable, to reach claimant's mother to schedule the informal meeting she requested. Eventually, the informal meeting was scheduled for July 10, 2012.

² Welfare and Institutions Code section 4710.7, subdivision (a), provides that, upon requesting a fair hearing, a claimant has the right to request a voluntary informal meeting with the service agency director or his or her designee. Under section 4710.6, subdivision (a), if an informal meeting is requested, the service agency and the claimant shall determine a mutually agreed upon time for the meeting.

5. On July 10, 2012, Mary Rollins of WRC held an informal meeting with claimant's mother. Following that meeting, Ms. Rollins sent claimant's mother a letter dated July 11, 2012, notifying her that she was upholding WRC's decision that claimant is not eligible for services. The letter states, in part: "The regional center concedes that [claimant] is on the Autism Spectrum but all report findings show that she is not substantially handicapped by that diagnosis. The Welfare and Institution[s] Code; Section 4512 defines regional center eligibility not only by diagnosis but that that diagnosis must constitute a substantial handicap. In reviewing all of [claimant's] assessments she demonstrates average to above average skills in all areas."

6. Subsequently, OAH scheduled the hearing in this matter for September 27, 2012. OAH granted claimant's request for a continuance, and the hearing date was continued to October 25, 2012.

Claimant's Background

7. Claimant lives with her mother, stepfather, and two brothers (ages 11 and 22). Her 11-year-old brother is diagnosed with autism and is also a WRC consumer.

8. Claimant is currently a fourth grader who receives special education services from her school district on the basis of autism. Claimant attends, and has attended, a regular education classroom with special education services and supports consisting of language and speech, counseling, occupational therapy, specialized academic instruction, and a one-to-one aide.

9. Prior to age three, claimant received services under the Early Start program based on her diagnosis of expressive language disorder. Under the Early Start program, claimant received speech therapy, occupational therapy, physical therapy, and behavior intervention.

10. In November 2005, when claimant was two years, seven months old, she was evaluated by licensed psychologist Martha Dedricks, Psy. D., who rendered a diagnosis of autistic disorder. Based on that diagnosis, the Service Agency has provided, and continues to provide, regional center services to claimant.

11. The Service Agency currently funds for claimant to attend social skills training with Erika Carpenter Rich and 21 hours per month of in-home respite services. Pursuant to claimant's individual program plan (IPP) dated April 28, 2011, the Service Agency funded 21 hours per month of respite, 15 hours per week of behavior intervention services provided by Beautiful Minds, and one session per week of social skills training provided by Pam Sirota. Pursuant to claimant's IPP dated April 30, 2010, the Service Agency funded 21 hours per month of in-home respite, one session per week of social skills training with Kid Scouts, and behavior

intervention provided by Beautiful Minds of 15 hours per week direct service, 2 hours per month of clinic, and 8 hours per month of supervision.

Evaluation by Dr. Dedricks

12. In November 2005, Martha Dedricks, Psy.D., completed a psychological evaluation of claimant and diagnosed her with autistic disorder. At the time of the evaluation, claimant was two years, seven months old (or 31 months old). Dr. Dedricks administered the Bayley Scales of Infant Development and the Vineland Adaptive Behavior Scales, made behavioral observations of claimant during testing and at her preschool program, and interviewed claimant's teacher.

13. Dr. Dedricks found claimant's overall level of cognitive functioning fell within the range of mild delays, with her non-verbal cognitive skills at 26 months, her verbal skills at 30 months, and her receptive language to be relatively stronger than her expressive language. Dr. Dedricks also found claimant's motor skills were within the range of mild delays at 26 months.

14. Based on her evaluation of claimant, Dr. Dedricks concluded that claimant met the diagnostic criteria for autistic disorder. In her written report, she explained:

Based on the results of this evaluation, [claimant] meets criteria for autistic disorder. [Claimant] demonstrates language delay as well as reduced use of language in social situations. She uses speech to communicate her wants and needs at home, but uses less speech for the purposes of establishing joint attention. In regards to social interaction, [claimant] does not show an interest in playing with or interacting with other children. She does not talk" [sic] at her preschool program, and during the observation, her affect was flat and solemn. In addition, she does not respond to attempts by her teacher to engage her in play with other children. Thirdly, [claimant] evidences repetitive play, such as pouring sand in and out of containers and turning light switches on and off. During the evaluation session, she showed little interest in toys, but wandered around and played with the blinds, or "rode" on her mother's leg like a "horsie." She also wanders around at preschool, and sometimes looks as if she does not know what she should be doing during routines or transitions. It should be noted that [claimant] displays significant strengths, such as a positive response to structure, and an ability to interact with adults in one-on-one situations. During the evaluation session, she was cooperative with the assessment process, and evidenced appropriate eye contact. [Claimant] should continue to receive Regional Center services that target her social communication skills, and be re-assessed within the next two years, in order to help her reach her true potential.

15. The Service Agency determined claimant to be eligible for regional center services, and has provided her with services, based on the diagnosis of autistic disorder made by Dr. Dedricks.

Evaluation by Dr. Arizpe

16. On December 9, 2011, Melissa Bailey Arizpe, Ph.D., completed a psychological evaluation of claimant. At the time of this evaluation, claimant was eight years, eight months old. Dr. Arizpe's evaluation was based on her review of available records, clinical interview, behavioral observations, and claimant's scores on the Wechsler Intelligence Scale for Children--Fourth Edition (WISC) and Vineland Adaptive Behavior Scales--Second Edition (Vineland).

17. Based on her evaluation of claimant, Dr. Arizpe concluded that claimant no longer met the full criteria for autistic disorder and she better met the diagnostic criteria for pervasive developmental disorder, not otherwise specified (PDD-NOS). In her written report, Dr. Arizpe explained:

Cognitively, the examiner gave [claimant] the WISC. Based on her answer, [sic] she is functioning in the average to high average range on all subtests with the exception of her processing speed which is on the cusp of the borderline and low average range. She shows a specific strength in her ability to recognize abstract concepts. It does appear she has some difficulty with hand-eye coordination as was noted on coding and symbol search. Adaptively, the Vineland was used to determine these skills based on her mother's responses. She is functioning in the low average range on also [sic] subtests. She would be expected to read at or above grade levels. She is able to understand words not meant to be taken literally such as "button your lip." She is able to care for most of her own hygiene issues. She does still need assistance with bathing. She was able to state the value of most coins. She does have some difficulty. [sic] She would not be expected to accept helpful suggestions from others without having some emotional response. She would not be expected to keep secrets or confidences longer than one day. Socially and emotionally, the examiner observed [claimant] during the session. She was noted to make sustained eye contact. She was able to carry on a back and forth conversation. She was aware of the conversation that was happening between the examiner and her mother and made frequent comments. In addition, [claimant] offered information and initiated conversation. No stereotypical or repetitive behaviors were noted. It does appear that [claimant] has made significant improvements since her initial testing with [Dr. Dedricks] at two years seven months. As a result, it is the opinion of this examiner that she no longer meets the full criteria for autistic disorder. Based on

her continued emotional difficulties and past history of a slight speech delay, the examiner feels that she better meets the criteria of Pervasive Developmental Disorder.

Service Agency's Position

18. Following the evaluation of claimant by Dr. Arizpe in December 2011, WRC's eligibility team reviewed claimant's case regarding her on-going eligibility for regional center services. Thompson Kelly, Ph.D., is WRC's chief psychologist and was a member of the eligibility team that reviewed claimant's case. The eligibility team reviewed the available records and information in claimant's WRC file, including the evaluation reports by Drs. Dedricks and Arizpe, school records, and progress reports from claimant's service providers. The team also considered information provided by claimant's service coordinator, Carmine Manicone.

19. The Service Agency contends that Dr. Dedricks' diagnosis of autistic disorder was erroneous. Dr. Dedricks, in making the diagnosis, did not administer any autism-specific testing. Although it appeared to the eligibility team that the doctor suspected claimant might be autistic, Dr. Dedricks did not use an autism rating scale, such as the ADOS or GARS, to rule out an autism diagnosis.³

20. Further, the WRC eligibility team felt that Dr. Dedricks' evaluation "lacked substantial evidence to support a diagnosis of autistic disorder." Dr. Dedricks' observations of claimant were not consistent with a profile of autistic disorder. The behavior that Dr. Dedricks characterized as repetitive play -- i.e., pouring sand in a bowl, playing with window blinds, and turning light switches on and off -- was not unusual or atypical for a child of claimant's age. Claimant demonstrated symbolic play when she rode her mother's leg like a horse. She used physical gestures (i.e., nodding) and facial expressions (i.e., smiling) in response to Dr. Dedricks' questions. She demonstrated joint attention and imitative play when she joined Dr. Dedricks at the testing table and imitated the doctor by stacking blocks on the table. Dr. Dedricks noted that claimant did not show an interest in toys and sat anxiously on her mother's lap when she first arrived at the doctor's office for the evaluation. Since the evaluation was claimant's first visit to Dr. Dedricks' office and her first time meeting the doctor, claimant's behavior was not unusual, in that any child might become anxious when visiting a new place or meeting a person for the first time.

21. The Service Agency contends that claimant is no longer substantially handicapped by a qualifying disability. Claimant was recently diagnosed by Dr. Arizpe with PDD-NOS, which is not a qualifying disability for regional center services. Further, she is not substantially handicapped in three or more of the seven

³ ADOS stands for Autism Diagnostic Observation Schedule. GARS stands for Gilliam Autism Rating Scale.

areas of major life activity (as age appropriate to claimant) defined by the Lanterman Act and regulations. Assessments and testing by the school district measured her cognitive and academic abilities in the average to high average range. Dr. Arizpe's evaluation did not find social or behavioral issues rising to the level of supporting a diagnosis of autistic disorder.

22. Claimant's service coordinator, Carmine Manicone, observed claimant during a speech therapy session and at a Girl Scout meeting. Mr. Manicone is not a psychologist. Mr. Manicone's basic impressions of claimant are that she is a charming young lady and appears fairly typical of her peer group. She engages with adults and has good eye contact. When Mr. Manicone questioned claimant, she answered his questions and stayed on topic. At the Girl Scout meeting, Mr. Manicone observed claimant seemed more shy than her peers but by outward appearance did not look different from her peers. She did not readily initiate social contact, but was receptive when contacted by the other girls. As the meeting went on, claimant started to engage more with the other girls.

Claimant's Position

23. Claimant's mother contends that claimant's regional center services should not be terminated. She contends that her daughter was correctly diagnosed with autistic disorder. She contends the diagnosis of PDD-NOS by Dr. Arizpe is not valid. Dr. Arizpe did not do a thorough and proper evaluation. Dr. Arizpe did not administer a rating scale or testing specific to autism. Claimant's mother notes that Dr. Arizpe did not interview her as part of the evaluation, despite her repeated requests to Dr. Arizpe to do so. Dr. Arizpe's written report appears to be a "cut-and-paste" job, in that the report, in two places, identifies "Dr. Doi" as the psychologist who evaluated claimant at age two years, seven months when, in fact, the evaluation was done by Dr. Dedricks.

24. Claimant's mother testified that claimant continues to have social and behavioral challenges due to autistic disorder. Claimant's mother disagreed with service coordinator Manicone's observations of claimant. According to mother, although claimant may be in the same space as other children and may appear to be playing with them, in actuality claimant is in her own world and not interacting with the other children. Mother testified, at school, claimant lines up with the other children but she is in her own world and does not realize the other children have left and she is standing alone. Claimant's mother testified that claimant cannot advocate for herself. She is often the victim of bullying by other children but will not tell the teacher or other authority figure. Claimant does not understand sarcasm or irony. She does not initiate or maintain conversations with others beyond saying, "Hi." Claimant cannot follow the flow of a conversation and says things that are off-topic or inappropriate. Claimant has tantrums, which require time to get her to calm down. Claimant needs prompting to complete self-care tasks such as brushing her teeth or changing into her pajamas at bedtime. In the past two years, claimant has been

obsessive about drawing horses. The problem, according to mother, is that claimant draws the horse naturally but with its penis showing. Claimant has safety issues when crossing streets or in parking lots, which her mother described as "aimless walking," in that she will notice that stop lights change from red to green but she will not pay attention to the cars driving.

25. Erika Rich, Ph.D. is a clinical psychologist and owner of Rich and Associates. Dr. Rich testified at the hearing. She assessed claimant for social skills training in July 2012 and has been working with claimant in a social skills group for three months. Dr. Rich has found that claimant has significant delays in the social area. She is immature and has difficulty engaging with peers. Dr. Rich's social skills group is a structured, therapeutic setting. Claimant is often on the sidelines and needs prompts to engage with the other children in the group, even when the children invite her to join them. Claimant has difficulty advocating for herself. She does not realize when she is being teased. Dr. Rich finds that claimant's conversational skills are "significantly impoverished," and she has difficulty reading social cues.

26. Ilona Alfi was employed with Beautiful Minds from 2006 to 2010. Ms. Alfi testified at the hearing. She was claimant's in-home behavior therapist from 2006 to 2008, and then a program supervisor from 2008 to 2010. She last saw claimant in March 2010. Claimant was under three years old when Ms. Alfi first began working with her. She worked with claimant to address deficits in communication skills, social skills, interaction with peers, self-help, safety skills, and sensory issues. Ms. Alfi testified that when she stopped working with claimant, claimant still had significant deficits in social skills, communication with peers, attention to task, task completion, and following multiple-step tasks. Ms. Alfi observed claimant in school and observed claimant had difficulty sitting down, and she would climb on chairs and tables. Claimant would not accept the classroom routine and needed a lot of verbal prompts and a schedule.

LEGAL CONCLUSIONS

1. For the reasons set forth below, the Service Agency may not terminate claimant's on-going eligibility for regional center services. Claimant's appeal shall be granted.

The Lanterman Act

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., and the implementing regulations, California Code of Regulations, title 17, section 54000 et seq., govern this case.

3. Under the Lanterman Act, a person is eligible for regional center services who establishes that he or she has a "developmental disability," as defined in Welfare and Institutions Code section 4512, subdivision (a). That statute defines "developmental disability" as "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." Further, the statute requires that the disability must be attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the "fifth category" (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (*Id.*)

4. The term "substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by the regional center, and as appropriate to the age of the person: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001.)

5. Under Welfare and Institutions Code section 4643.5, subdivision (b), "[a]n individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous."

6. Where a change in the status quo is sought, the party seeking the change has the burden of proving, by a preponderance of the evidence, that a change is necessary. (Evid. Code, §§ 115 and 500.) In this case, the Service Agency is seeking to change the status quo by its decision to terminate claimant's on-going eligibility for services under the Lanterman Act. As such, the Service Agency has the burden to prove by a preponderance of the evidence that this change is necessary.

Adequate Notice

7. Claimant has raised a procedural issue that must be addressed before addressing the substantive issue in this case. Claimant contends the Service Agency failed to provide "appropriate notice" of its proposed action to terminate claimant's on-going eligibility. A regional center is required to send "adequate notice" to a consumer and his or her authorized representative, if any, when it makes a decision "to reduce, terminate, or change services set forth in an individual program plan." (Welf. & Inst. Code, § 4710, subd. (a).) The term "adequate notice" is defined in section 4701 to mean a written notice informing the consumer of certain information specified in the statute, including, but not limited to, the action the regional center proposes to take, the reasons for the action, the effective date of the action, and the specific law, regulation or policy supporting the action. (Welf. & Inst. Code, § 4701, subs. (a)-(d).) Adequate notice of a regional center's proposed decision or action is

an essential element of the right to a fair hearing because it informs the consumer of the reasons for the decision or action, thereby permitting the consumer to present evidence at a fair hearing that contests the decision or action.

8. The Service Agency notified claimant's mother of its proposed action to close claimant's case by sending her the NOPA dated February February 22, 2012. The NOPA fails to meet the requirements for "adequate notice" because it does not specify the law, regulation or policy supporting the proposed action. (Welf. & Inst. Code, § 4701, subd. (d).) The appropriate remedy for the Service Agency's failure to provide "adequate notice" is determined by a consideration of whether claimant was prejudiced at the hearing. The ALJ concludes that claimant was not prejudiced at the hearing by the Service Agency's failure to provide adequate notice.

Discussion

9. In this case, the Service Agency did not meet its burden of proving by a preponderance of the evidence that claimant's original diagnosis of autistic disorder was clearly erroneous. The Service Agency's contention that Dr. Dedricks' evaluation was not supported by substantial information was not persuasive. On the basis of Dr. Dedricks' evaluation and diagnosis, the Service Agency found claimant eligible for regional center services and has provided her with services based on that diagnosis. No evidence was presented that, at the time of Dr. Dedricks diagnosis, the Service Agency found the evaluation deficient. No evidence was presented that the Service Agency requested further testing or evaluation, which it was entitled to do. Under the Lanterman Act, an assessment for determining regional center eligibility may include, among other things, "provision or procurement of necessary tests and evaluations." (Welf. & Inst. Code, § 4643, subd. (a).)

10. Further, the PDD-NOS diagnosis by Dr. Arizpe tends to confirm Dr. Dedricks' diagnosis, as both doctors evaluated claimant and found she met criteria for diagnoses that are within the autism spectrum. Under the DSM-IV-TR⁴, autistic disorder and PDD-NOS are both included in the category of "pervasive developmental disorders." (DSM-IV-TR, p. 69.) The diagnosis of PDD-NOS is used "when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotyped behavior, interests, and activities, but the criteria are not met for a specific Pervasive Developmental Disorder." (DSM-IV-TR, p. 84.) Dr. Arizpe found that claimant had "made significant improvements" since her testing at age two years seven months such that "she no longer meets the full criteria for autistic disorder." Dr. Arizpe's diagnosis of

⁴ The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders.

PDD-NOS does not prove that Dr. Dedricks' diagnosis was erroneous. At most, Dr. Arizpe's findings tend to prove that claimant's condition has been improved by the interventions she has received from the regional center and/or her school. Claimant's progress from the time of Dr. Dedricks' evaluation to the time of Dr. Arizpe's evaluation is not a basis to terminate her eligibility for regional center services, but it does provide a basis for the Service Agency to review and modify her IPP accordingly. Under Welfare and Institutions Code section 4646.5, subdivision (b), a regional center is authorized to review and modify a consumer's IPP "in response to the person's achievement or changing needs."

11. The parties made arguments regarding whether claimant meets the definition of "substantial disability" under California Code of Regulations, title 17, section 54001. A finding on whether claimant meets that definition is not necessary to resolve the ultimate issue of whether the Service Agency may terminate claimant's on-going eligibility pursuant to Welfare and Institutions Code section 4643.5, subdivision (b), since the determinative issue under that statute is whether the original diagnosis of autistic disorder was clearly erroneous.

12. Based on the foregoing, claimant's appeal must be granted. The Service Agency may not terminate her eligibility for regional center services.

ORDER

Claimant's appeal is granted. The Service Agency may not terminate claimant's on-going eligibility for regional center services.

DATED: December 10, 2012



ERLINDA G. SHRENGER
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.