

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

E.G.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2013040443

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 22, 2013, in Culver City.

E.G. (claimant) was not present; he was represented by his mother, F.T.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 August 22, 2013.

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 1-16; claimant's exhibits A-K.

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

Testimony: Lisa Basiri; Thompson Kelly, Ph.D.; F.T.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a three-year-old boy.
2. Claimant received funding for services from WRC under the Early Start Program.² As claimant was to transition out of that program, claimant's mother asked the Service Agency to determine claimant's eligibility for services under the Lanterman Act. By letter and by a Notice of Proposed Action dated March 5, 2013, the Service Agency notified claimant's mother that it had determined that claimant is no longer eligible for regional center services because he does not meet the eligibility criteria set forth in the Lanterman Act.
3. On April 1, 2013, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding eligibility so that claimant could continue to receive speech therapy and behavioral therapy, and begin to receive occupational therapy.
4. By letter dated April 16, 2013, WRC wrote that, after having reviewed information claimant's mother provided at a recent informal meeting, WRC was reaffirming its finding that claimant does not have a diagnosis that makes him eligible for regional center services under the Lanterman Act. The letter noted that claimant "is being served by the school district at age 3 because of his deficits in speech and language and his occupational therapy needs," and enclosed information regarding free behavior classes offered by WRC that would be available to claimant's mother.

Claimant's Background and Evaluations

5. Claimant lives at home with his mother and father.
6. Claimant currently receives special education services, including speech and language services and occupational therapy, at a preschool in the Beverly Hills Unified School District (BHUSD), in accordance with a Tri-Cities Special Education Local Plan Area Individualized Education Program (IEP) dated February 19, 2013.
7. A psychosocial assessment report dated May 21, 2012, when claimant was 27 months old, prepared by Andrea Danneker, M.A., the Early Start intake coordinator for the Service Agency, states that claimant reportedly sometimes used single words, though he used none at the assessment, he inconsistently followed directions, made eye contact, smiled socially, and reportedly enjoyed being with other people, got easily frustrated, had difficulty with transitions, and banged his head often, sometimes in frustration. Danneker

² The federal Early Intervention Program for Infants and Toddlers with Disabilities is known in California as the "Early Start Program;" the program is available to eligible infants and toddlers under the age of three. (See Cal. Code Regs., tit. 17, § 52100 et seq.)

recommended that the WRC Early Start Interdisciplinary Staffing Team determine whether claimant was eligible for regional center services. Pertinent evaluations were performed and claimant entered the Early Start Program.

8. Claimant's mother and WRC entered an Early Start Transition Agreement on October 12, 2012, providing that the Beverly Hills Unified School District would create an IEP for claimant and that WRC would conduct a psychological evaluation of claimant to determine eligibility for continued services under the Lanterman Act.

9. Lael Whiting Shannon, Ph.D., a licensed clinical psychologist, performed a psychological evaluation of claimant for the Service Agency. Dr. Shannon met with claimant and claimant's mother on October 31, 2012, when claimant was 32 months old. Dr. Shannon reported administering the following tests: Bayley Scales of Infant and Toddler Development-III (Bayley-III); Vineland Adaptive Behavior Scales II (Vineland II); and the Developmental Assessment of Young Children (DAYC) Social-Emotional subtest. (Ex. 5.) Dr. Shannon also interviewed claimant's mother and reviewed records.

10. Dr. Shannon wrote that claimant's early developmental milestones were within normal limits, and WRC was providing claimant with speech and occupational therapy and behavioral intervention. Claimant made good eye contact with Dr. Shannon; sometimes he focused well and sometimes he did not, but he listened to a story, spoke spontaneously, had a mostly positive emotional tone, and was receptive to praise. He displayed no atypical motor or attentional behaviors. He was only just beginning to make his wants known using more than single words, and sometimes just gestured. He had acquired some self-care skills, but was not yet toilet-trained. His mother reported that he was loving and affectionate with family members, sometimes greeting them with a hug; he mostly engaged in parallel play, but sometimes briefly played with other children individually and in small groups, and did not share toys or possessions. He would ask for assistance when having difficulty and show pride in accomplishments.

11. The Bayley III scores reflected an age equivalent of 28 months in cognitive and receptive language skills and 17 months in expressive language skills, as well as 32 months in fine motor skills and 21 months in gross motor skills. The DAYC Social-Emotional score reflected an age equivalent of 29 months.

12. Dr. Shannon diagnosed claimant with Expressive Language Disorder. He concluded in his report that:

[Claimant's] nonverbal cognitive skills are in the middle of the average range with an age equivalent of twenty-eight months. Language skills are in the borderline delayed range with receptive communication at twenty-eight months and expressive communication at seventeen months. Delays in language acquisition are not surprising as he is exposed to two languages [at home]. . . . Motor skills are in the middle of the average range [Claimant's] ability to function in the natural

environment is also assessed using the [Vineland-II] and based on mother[‘s] report.

(Ex. 5.) Dr. Shannon found that claimant’s communication skills, daily living skills, and socialization and motor skills are in the borderline delayed range. He also found that claimant had a standard score of 96, for an age equivalent of 29 months, as measured using the DAYC Social-Emotional subtest. Dr. Shannon recommended that claimant be referred to the public schools for assessment and services and to receive developmental services, speech and language services, and individual and group therapy to address gross motor delays.

13. Thompson Kelly, Ph.D., Chief Psychologist and Director of Intake Services at WRC, served as a member of the interdisciplinary eligibility review committee that determined that claimant is not eligible for regional center services. Dr. Kelly testified that nothing in Dr. Shannon’s psychological evaluation report indicates a need for further assessment of claimant, whose primary delay was in expressive language and who was diagnosed with Expressive Language Disorder. Dr. Kelly testified that the diagnosis appeared reasonable, given claimant’s scores, and noted that Dr. Shannon made no Axis II diagnosis, which covers intellectual disabilities and personality disorders. Dr. Kelly testified that claimant’s IEP reflects that claimant’s primary disability is a speech and language impairment, with no secondary disability listed. Although the IEP reports some behavior concerns that could possibly indicate a child with autism, e.g., that claimant is easily frustrated, has difficulty communicating, and is sensory-seeking, those concerns could be related to a host of factors other than autism. For example, expressive language delays often result in significant behavioral effects such as not sharing and throwing tantrums, where the child uses behaviors to communicate. Dr. Thompson testified that there is no indication of an intellectual disability, and that there were no medical records for claimant showing seizures or Cerebral Palsy. Nor was there an indication of any developmental disability for purposes of the Lanterman Act. Claimant is able to engage with others in relational activities and demonstrate social and emotional reciprocity; he displayed no perseverative mannerism, and though he demonstrated some sensory-seeking behaviors, the entirety of his records do not suggest autistic disorder,³ or a substantial handicap other than in expressive language. Claimant performs well on standardized testing, including cognitive tests. His school district found claimant to be above average in pre-academic readiness. Although he displays willfulness about tasks he dislikes, he has an ability to initiate and sustain tasks.

14. A neurology consultation report was prepared by Yana J. Tavyev, M.D., on August 7, 2013, at claimant’s mother’s request, due to her concern about the possibility of autism in the context of claimant’s language delay. Dr. Tavyev conducted a physical examination of claimant and performed developmental testing using the Cognitive Adaptive Test/Clinical Linguistic Auditory Milestone Scale (CAT/CLAMS), a standardized test for children aged up to 36 months, designed to measure linguistic abilities and cognitive, adaptive, and fine motor skills. Dr. Tavyev concluded that claimant meets the DSM-IV-TR criteria for autism, showing a language delay, difficulty with play, perseveration with toy

³ Dr. Kelly testified that claimant would not qualify for a diagnosis of autism under either the DSM-IV-TR or the DSM-5.

trains, and social difficulties. Dr. Tavyev also recommended that claimant undergo genetic testing, including testing claimant for Fragile X Syndrome. Dr. Kelly testified that the CAT/CLAMS test, which measures general developmental delay in language and motor skills, is an inappropriate instrument for screening a child for autism, for which there are more specific standard instruments, such as Autism Diagnostic Observation Scale (ADOS) and the Gilliam Autism Rating Scale (GARS), and that Dr. Tavyev drew conclusions based only on a brief physical examination and an interview with claimant's mother. A BHUSD Special Services Department report prepared by psychologist Efua Paul, M.S., M.S.W., dated February 2013, states that the GARS-2 was applied and that the "[r]esults indicate that his probability of Autism is in the range of **unlikely**." (Ex. B; emphasis in original.)

15. Claimant's mother testified that claimant started banging his head on the floor and door at 18 months, that he tantrums, elopes, and laughs to himself, and that he is impulsive and sometimes aggressive, and has difficulty with appropriate play. She testified that the school district, when it evaluated claimant for services, could not obtain standardized scores because of claimant's disruptive behavior. She testified that claimant's teacher wrote a letter concerning claimant's need for behavior supports (see Ex. I), and that neither her family nor her husband's are available to help her address claimant's behavioral issues at home. She and her husband want her to go back to work and continue her career as a laboratory assistant, but she must stay home to help claimant. She complained that the speech therapy that claimant received while he was in the Early Start Program was unsatisfactory.

16. It was not established by a preponderance of the evidence that claimant has autism or mental retardation, or a disabling condition closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation, or epilepsy or Cerebral Palsy. Rather, the evidence shows that claimant has Expressive Language Disorder and attendant behavioral issues, and that he would likely benefit from the services being provided by his school district and by further behavioral intervention. Claimant may always submit to WRC additional evidence of developmental delay, such as a finding of Fragile X Syndrome, for WRC's consideration.

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. (Factual Findings 5-16.) A diagnosis of Expressive Language Disorder does not satisfy the eligibility requirement of a diagnosis of autism under section 4512, subdivision (a). Nor did claimant establish by a preponderance of the evidence that he qualifies for regional center services under the fifth category of eligibility, or any other category (Factual Findings 9-16.) It is not disputed that claimant will likely benefit from services tailored to mitigate the effects of his disability, including those services being provided by his school district. 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 E.G.’s appeal is denied.

DATE: September 13, 2013


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.