

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2017060936

DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter at Alhambra, California on October 31, 2017.

Claimant's mother represented Claimant, who was not present. The names of Claimant and his mother are omitted to protect their privacy.

Jacob Romero, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (ELARC).

The matter was submitted on October 31, 2017.

ISSUE

Whether ELARC must reassess Claimant for eligibility for services under the Lanterman Developmental Disabilities Services Act, after ELARC's assessment determined he was ineligible.

EVIDENCE RELIED UPON

Documents: ELARC exhibits 1 through 17; Claimant's exhibit A. Testimony: Randi Bienstock, Psy.D.; Claimant's mother.

FACTUAL FINDINGS

1. ELARC determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)¹

2. Claimant is a seven-year-old boy. In late 2016 or early 2017, his school program referred him to ELARC for assessment for autism spectrum disorder.

3. ELARC assessed Claimant and determined he was not eligible for services under the Lanterman Act, because he did not have a developmental disability as defined in the Act. (See § 4512, subd. (a).) ELARC sent his mother a letter dated May 11, 2017, stating he was ineligible.

4. Claimant's mother submitted a Fair Hearing Request on his behalf, dated June 9, 2017, stating her disagreement with ELARC's determination, and requesting that ELARC reassess him. She later waived the 50-day time limit for holding the hearing, and the 80-day time limit for a final administrative decision. (§§ 4712, subd. (a), 4712.5, subd. (a).)

BACKGROUND

5. Claimant was born in May 2010. He was delivered without complication at full term gestation, and discharged after two days with normal newborn instructions. He sat without support at six months, crawled at seven months, stood and walked without support and said his first words at 10 months, and was toilet trained at three years of age. He lives with his mother and grandmother, and attends his local elementary school in a general education classroom.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

6. When Claimant was about five years old, he was diagnosed with attention deficit/hyperactivity disorder (ADHD) and began taking Ritalin. His mother stopped the medication in April 2016 after he complained of chest pain and was taken to the hospital. He received a chest x-ray and echocardiogram, with unremarkable results.

7. In October and early November 2016, Claimant's school district completed a functional assessment of him due to recurrent behaviors impacting learning, including difficulties in completing assigned tasks, noncompliance with teachers, and general disruptive behaviors such as yelling, interrupting others, and physical aggression. A psychologist intern observed him in the classroom on five days and noted multiple instances of noncompliance with teachers, raising his voice, physical aggression toward peers, and interrupting class instruction.

8. Jeannine Vieni, Psy.D., a school psychologist, assessed Claimant further on November 14, 2016, administering the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), the Gilliam Autism Rating Scales, Third Edition (GARS-3), and other tests. The WISC-V is a common instrument used to obtain an overall indication of a student's learning capacity, as well as strengths and weaknesses. The GARS-3 helps identify and diagnose autism spectrum disorder in children and young adults.

9. The WISC-V yielded a Full-Scale Intelligence Quotient (IQ) of 122, which fell within the very high average range. The GARS-3 yielded index scores of 95 and 80 from his teacher and mother, respectively, which both fell within the "very likely" range for autism spectrum disorder. According to Dr. Vieni, the GARS-3 results showed some stereotyped or restricted behaviors, limitations in social interaction and social communication, frustration or extreme reactions in response to various situations, and difficulties in cognitive style and maladaptive speech. However, Dr. Vieni further noted that Claimant's behaviors, "coupled [with] his strive for control, are also consistent with those of other potential diagnoses" apart from autism spectrum disorder. (Exhibit 5, p. 6.)

Considering his prior diagnosis of ADHD, Dr. Vieni determined that he met eligibility criteria for special education in the classification of "Other Health Impairment." (*Ibid.*)

10. Based on Dr. Vieni's assessment, Claimant's school district developed an Individualized Education Program for him, under which he receives regular specialized academic instruction and counseling and guidance services.

ASSESSMENTS AT ELARC

11. On January 19, 2017, Cindy Bui, an assessment coordinator for ELARC, met with Claimant and his mother to obtain his medical, family, educational, and social history, and to assess his current functioning. Bui reported that Claimant maintained adequate eye contact and was cooperative in responding to questions and requests. His mother described him as not sociable, with difficulties sharing, taking turns, and understanding and following social cues. She also described him as displaying frustration, tantrums, meltdowns, sensory processing difficulties, hyperactivity, inattention, and "autistic-like characteristics." (Exhibit 3, p. 4.) In addition, she stated that he required reminders and some coaching on a daily basis in order to care for self-help needs.

12. Renee Kim, Psy.D., a clinical psychologist, assessed Claimant at ELARC on the same day as his meeting with Bui, administering the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV); the Autism Diagnostic Interview – Revised (ADI-R); selected portions of the Autism Diagnostic Observation Schedule – Second Edition (ADOS-II), Module 3; and the Vineland Adaptive Behavior Scales, Second Edition (VABS-II). Dr. Kim also reviewed records, performed a clinical interview of Claimant's mother, and conducted a behavioral observation of him. The WPPSI-IV is an intelligence test for children ages two years, six months to seven years, seven months. The ADI-R is a standardized, semi-structured clinical interview of caregivers of children adults that assists in diagnosing whether an individual has autism spectrum disorder. The ADOS-II is a standardized assessment of a child's communication, reciprocal social interaction, and

imagination and creativity that consists of the assessor observing socially referenced activities to identify behaviors important to the diagnosis of autism spectrum disorder. The VABS-II measures 11 skill areas to assess adaptive functioning.

13. On the WPPSI-IV, Claimant's Full-Scale IQ was 112, placing him in the high average range of intelligence. On the ADI-R, Claimant scored a five for qualitative abnormalities in reciprocal social interaction, a three for qualitative abnormalities in communication, and a two for restricted, repetitive, and stereotyped patterns of behavior, which were below the autism spectrum disorder cutoff scores of 10, eight, and three, respectively. Dr. Kim's assessment report did not include numeric scores for the ADOS-II, but reflected that Claimant's performance on that test was also inconsistent with autism spectrum disorder. On the VABS-II, Claimant obtained an overall adaptive behavior composite of 70, which fell in the low range and at the fourth percentile.

14. Considering the test results, records review, clinical interview, and behavioral observations, Dr. Kim determined that Claimant did not meet the criteria for autism spectrum disorder. Those criteria are listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM- 5), and include persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interest, or activities (Criterion B). Those symptoms must be present from early childhood and limit or impair everyday functioning (Criteria C and D), and not be better explained by intellectual disability or global developmental delay (Criterion E). (DSM-5, pp. 50-51 and 53.)

15. According to Dr. Kim, Claimant presented with clear social and communicative intent, and communicated verbally and nonverbally. Although some behaviors impacted his ability to display age appropriate peer relationships, such as poor impulse control and hitting peers, he also showed preferences for certain peers and sought to share enjoyment with others, which was inconsistent with autism spectrum disorder. He

presented no evidence of restricted or repetitive behaviors during the assessment, apart from clearing his throat on several occasions. Furthermore, Dr. Kim attributed his history of attention difficulties and distractibility to his prior ADHD diagnosis. Dr. Kim diagnosed him with ADHD by history, and recommended that he continue to receive appropriate education programming and mental health services to address that condition and his behavioral issues.

16. On May 2, 2017, Randi Bienstock, Psy.D., a clinical psychologist, reviewed Dr. Kim's assessment report and other records for ELARC, and determined that Claimant was not eligible for services because Dr. Kim's findings did not warrant a diagnosis of intellectual disability or result in a diagnosis of autism spectrum disorder.

TESTIMONY

17. Claimant's mother testified she disagrees with ELARC's determination, and that the assessment process with Bui and Dr. Kim was rushed, lasting only about an hour. She also testified that Bui and Dr. Kim did not consider important information from her, such as her son's obsession with Godzilla and dinosaurs. In addition, she objected to Dr. Kim taking her son out of her presence for part of the assessment. She requests reassessment by a different psychologist who is not so rushed, to supplement a recent assessment that she had a third-party psychologist perform. The results of that third-party assessment were still pending as of the hearing.

18. Dr. Bienstock testified that ELARC's assessment of Claimant was appropriate and met industry standards. According to Dr. Bienstock, parental input has great weight in an ELARC determination of eligibility, and ELARC's assessment did not ignore any important information from Claimant's mother.

LEGAL CONCLUSIONS

LEGAL STANDARDS

1. The Lanterman Act provides facilities and services to meet the needs of those with developmental disabilities, regardless of age or degree of disability. (§ 4501.) Under the Act, "'[d]evelopmental disability' means a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a).)

2. ELARC assessed Claimant and determined he does not have a developmental disability as defined in the Lanterman Act. Claimant, through his mother, requests a reassessment, alleging that the original assessment was deficient. Claimant has properly exercised his right to an administrative fair hearing on the request. (Factual Findings 1-4; see §§ 4700-4731.) As the party asserting a claim for relief, he has the burden of proving each fact essential to that claim. (Evid. Code, § 500.) This burden requires proof by a preponderance of the evidence, because no law or statute (including the Lanterman Act) provides otherwise. (Evid. Code, § 115.) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

ANALYSIS

3. Claimant did not meet his burden of proving that ELARC's assessment of him was deficient. Under section 4643, an "[a]ssessment may include collection and review of

available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs” (§ 4643, subd. (a).) ELARC may also “consider evaluations and tests, including, but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources.” (§ 4643, subd. (b).)

4. ELARC’s assessment of Claimant was consistent with these requirements. It included collection and review of historical diagnostic data, psychological evaluations and tests, and summaries of psychological findings. It also included consideration of his educational history, and his prior diagnosis of ADHD. (Factual Findings 11-16.)

5. Claimant asserts that ELARC’s assessment was rushed, and ignored important information from his mother about repetitive behaviors and other indicators of autism spectrum disorder. But section 4643 does not require an assessment to last any particular amount of time, and Dr. Bienstock testified that the assessment met industry standards and gave adequate consideration to the information from Claimant’s mother. (Factual Finding 18.) Bui and Dr. Kim were not required to recite every detail of behavior reported to them for the assessment to be adequate.

6. Claimant’s mother disagrees with the results of ELARC’s assessment, and asserts that her son has a developmental disability under the Lanterman Act. But absent evidence establishing that ELARC acted improperly, Claimant must develop evidence of his own to prove that assertion. The preponderance of the evidence established that ELARC’s assessment of Claimant was not deficient. Therefore, the order below is warranted.

ORDER

Claimant's request that ELARC reassess him for eligibility under the Lanterman Act is denied.

DATED:

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. Either party may seek judicial review of this decision in a court of competent jurisdiction within 90 days.