

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2017091096

DECISION

Chantal M. Sampogna, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 30, 2018, in Los Angeles, California.

Claimant's mother (mother) represented claimant, who was not present.¹ Mother was assisted by Marianna Rudy, a Spanish language interpreter.

Aaron Abramowitz, Attorney at Law, represented South Central Los Angeles Regional Center (SCLARC or Service Agency).

Oral and documentary evidence was received. The record was held open until February 13, 2018, for claimant to submit additional medical documentation of an Autism Spectrum Disorder (ASD) diagnosis. The record remained open until February 20, 2018, for Service Agency to respond. By February 20, 2018, no

¹ Titles are used to protect the family's privacy.

additional evidence was offered by either party and the record was closed and the matter submitted.

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ISSUE

Whether claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.).²

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 7; Claimant's exhibits A through C.

Testimony: Dr. Sandra Watson, Licensed Clinical Psychologist/Member of Service Agency Intake Team; Mother.

FACTUAL FINDINGS

1. Claimant is a five-year-old boy, who resides with his parents, older brother, and younger sister. Based on claimant's aggressive and noncompliant behavior and his social and relationship challenges, claimant seeks a finding that he has a developmental disability as defined in the Lanterman Act under the eligibility categories of Autism Spectrum Disorder, Intellectual Disability, or due to a disabling condition closely related to an intellectual disability or requiring treatment similar to that required for an intellectual disability (fifth category). (§ 4512, subd. (a).)

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

2. The Service Agency determined that claimant is not eligible under the Lanterman Act based on the results of visual and written assessments, and the lack of any qualifying conditions set forth in claimant's educational, medical, and psychological records, as described below.

3. On September 1, 2017, the Service Agency issued a Notice of Proposed Action and accompanying letter (NOPA) which informed claimant that he was not eligible for services under the Lanterman Act. On September 20, 2017, claimant filed a Fair Hearing Request.

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CLAIMANT ASSESSMENTS AND RECORDS

Compton Special Education Local Plan Area's Individualized Education Program (IEP) (May 9, 2017)

4. On May 9, 2017, claimant's IEP team met and assessed claimant's eligibility for special education services. The team determined that claimant exhibits articulation and expressive language delays that affect his ability to communicate effectively inside the classroom and therefore adversely affect him academically and socially, inhibiting him from accessing grade level curriculum. Claimant's teachers reported he is cooperative and well behaved, works well with others in small settings, and demonstrates appropriate pragmatic skills when participating in cooperative play. Based on this assessment, the team determined claimant qualifies for speech and language services due to deficits in the areas of speech articulation/phonology and expressive language. Mother agreed to all parts of the IEP.

Psychological Evaluation (June 22, 2017)

5. At the Service Agency's request, on June 22, 2017, Thomas Carillo, Ph.D., conducted a psychological evaluation of claimant. Dr. Carillo administered the following tests: Wechsler Preschool and Primary Scale of Intelligence (Fourth Edition), Vineland Adaptive Behavior Scales (Second Edition), Gilliam Autism Rating Scale (Second Edition), and the Childhood Autism Rating Scale (Second Edition). Dr. Carillo also conducted interviews with mother and claimant. Dr. Carillo observed claimant to be playful and engaging, and to have delays in cognitive functioning and significant delays in receptive and expressive language abilities. Dr. Carillo determined claimant's greatest strength in his adaptive functioning were his socialization skills, and that claimant's adaptive delays are secondary to his cognitive deficits. Claimant had the following testing scores: Full-Scale Intellectual Quotient (FSIQ), 77; Gilliam Autism Rating Scale score, 59 (unlikely probability of ASD); and his Childhood Autism Rating Scale score, 22 (minimum to no symptoms of ASD). Dr. Carillo concluded that claimant has borderline intellectual functioning, and a language disorder with related borderline delays in adaptive functioning, and that claimant does not meet the criteria for ASD.

Service Agency Psycho-Social Evaluation (Signed August 27, 2017)

6. The Service Agency's Psycho-Social evaluation was conducted by the Service Agency's intake team on June 1, 2017, and signed by Service Coordinator Shirley Cardenas and Program Manager Gricelda James. Based on its meeting with claimant and reports from mother, the intake team made the following observations and conclusions: claimant receives speech therapy per his IEP for Speech or Language Impairment; claimant is bilingual, speaking both Spanish and English; claimant is fully ambulatory, and can perform basic self care activities, including preparing simple foods without cooking, making his bed, and washing dishes;

claimant displayed repetitive behavior (flapping his hands) when excited, but not otherwise, and had a startled response to loud sounds; and claimant does not independently care for his hygiene, and often resists mother's attempts to bathe him. During this evaluation, claimant's episodes of displaying anger were undetected or rare and appropriate to the situation. Based on mother's reports, claimant's other behavioral challenges include severe temper tantrums, during which he throws himself on the floor and throws toys, and include claimant running or wandering away (approximately one time per month), frequently endangering himself and requiring constant supervision.

7. Sandra Watson, Ph.D., a licensed clinical psychologist who vendors with the Service Agency and is a member of its intake team, testified at the hearing. Dr. Watson reviewed the reports and claimant's evidence identified in this Decision and supports the Service Agency's conclusion that claimant is not eligible under the Lanterman Act. In her testimony, Dr. Watson identified that during claimant's psychological evaluation with Dr. Carillo, claimant participated in imaginative play and simple humor, had no unusual speech patterns, and his socialization score of 100 placed him in the average range of socialization skills. Claimant's socialization skills were also observed and reported by the Service Agency's intake team and his IEP team. Both teams found claimant's behavior challenges seldom interfered with claimant's social participation, and he was able to use language in social situations to engage in cooperative play. Dr. Watson found claimant does not have ASD because he does not have the socialization deficits necessary for an ASD diagnosis. Dr. Watson also explained that claimant's FSIQ score of 77 placed him out of the category of intellectual disability; to qualify under the intellectual disability category, claimant would need to have a FSIQ of 70 or below, with a margin of error of five. Dr. Watson also found that although claimant's communication skills were low, his

daily living and social skills were in the average range, further demonstrating he is not eligible under Intellectual Disability category. Dr. Watson did not find any information supporting a finding that claimant was eligible for Lanterman Act services under the fifth category.

Claimant's Evidence

8. Mother testified that claimant's behavioral challenges include the following: deficits in speaking; using curse words; fighting with mother when it is time to bathe, brush teeth, or get ready for school; wandering off and trying to escape or runaway; placing his hands over his ears when near loud noises; avoidance of making friends with children he does not know; and getting angry about anything and then slamming doors, hitting his head against the wall, throwing items, and kicking his siblings. Based on a referral from claimant's pediatrician, mother has been taking claimant to a psychologist for approximately eight months. Mother testified that a psychologist diagnosed claimant with ASD. However, mother did not present any documents or witnesses supporting this assertion. Rather, mother presented three sets of two-page Medical Progress notes, created by Justin Bethoney, Nurse Practitioner, between July and August 2017 visits. These notes show claimant is being treated for ASD and that claimant is prescribed Tenex, one milligram per day. Mother did not present any assessments or information supporting this diagnosis or treatment plan.

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HOW THE DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION (DMS-V) DEFINES AUTISM SPECTRUM DISORDER AND INTELLECTUAL DISABILITY

Autism Spectrum Disorder

9. The DSM-V defines ASD as having the following four essential features. First, an individual must have persistent impairment in reciprocal social communication and social interaction (Criterion A), as manifested either currently or historically by all of the following: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. Second, the individual must have restricted, repetitive patterns of behavior, interests or activities (Criterion B), as manifested by at least two of the following: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and/or (4) hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment. These symptoms must be present in early childhood and limit or impair everyday functioning. (Criteria C and D).

Intellectual Disability

10. The DSM-V provides that the following three diagnostic criteria must be met to be diagnosed with intellectual disability:

- A. An individual must have deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing (Criterion A). Individuals with intellectual disability have FSIQ scores

between of 65 - 75, including a margin for measurement error (generally \pm five points). The DSM-V cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. The DSM-V explains that a person with an IQ score above 70 may "have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." (Ex. 6, at p. SCLARC000037.)

- B. Individuals with intellectual disability have deficits in adaptive functioning that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility, which, without ongoing support, limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community (Criterion B). This criterion is met when at least one domain of adaptive functioning - conceptual, social, or practical - is sufficiently impaired such that "ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." (*Id.* at p. SCLARC000038.) The levels of severity of ID are defined on the basis of adaptive functioning, and not IQ scores, because the adaptive functioning determines the level of supports required.
- C. Individuals with intellectual disability must experience the onset of these symptoms during the developmental period (Criterion C).

FIFTH CATEGORY

- 11. The Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to mental retardation or to require

treatment similar to that required for mentally retarded individuals," under the fifth category, but does "not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a); see *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) The fifth category is not defined in the DSM-V.

12. On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the Guidelines for Determining 5th Category Eligibility for the California Regional Centers (Guidelines). These Guidelines list the following factors to be considered when determining eligibility under the fifth category: whether the individual functions in a manner that is similar to that of a person with mental retardation; whether the individual requires treatment similar to that required by an individual who has mental retardation; whether the individual is substantially handicapped; and whether the disability originated before the individual was 18-years-old and is it likely to continue indefinitely. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval to the ARCA Guidelines and recommended their application to those individuals whose "general intellectual functioning is in the low borderline range of intelligence (1.Q. scores ranging from 70-74)" for fifth category eligibility. (*Id.* at p. 1477.)

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

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 claimant is eligible for Lanterman Act services. (Evid. Code, § 115.)

3. A developmental disability is a disability that originates before an individual turns 18-years-old, continue indefinitely, and must constitute a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, autism, an intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for an individual with an intellectual disability. (§ 4512, subd. (a); Cal. Code of Regs., tit. 17, § 54000.)

4. A substantial disability is the existence of significant functional limitations in three or more of the following areas of major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

5. As defined under the Lanterman Act, developmental disability does not include the following: solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder; solely learning disabilities which manifest as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss; and disabilities that are solely physical in nature. (Cal. Code of Regs., tit. 17, § 54000, subd. (c).)

6. Claimant does not have cerebral palsy or epilepsy. Claimant's speech delays, behavioral challenges, at times sensitivity to noise and resistance to making new friends, and his borderline intellectual functioning do not fall within the

behaviors or deficits required for eligibility under the Lanterman Act under the categories of ASD, intellectual disability, or fifth category. Claimant did not demonstrate persistent impairment in reciprocal social communication and social interaction; claimant did not demonstrate restricted, repetitive patterns of behavior, interests, or activities, nor did he submit evidence that a qualified psychiatrist or psychologist has diagnosed him with ASD. Accordingly, claimant is not eligible for Lanterman Act services under the category of ASD. Claimant's clinical and individualized, standardized intelligence testing results show claimant's FSIQ (77) score is above that which would identify someone as having an intellectual disability (70), even when accounting for the \pm five points for measurement error. In addition, claimant did not demonstrate such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning which might show his actual functioning is comparable to that of an individual with a lower FSIQ score. Claimant has borderline intellectual functioning and is not eligible for Lanterman Act services under the category of intellectual disability. Finally, claimant's adaptive functioning results do not show that he has failed to meet developmental and socio-culture standards for personal independence and social responsibility. Claimant did not establish he is eligible for Lanterman Act services under the fifth category.

7. Claimant did not establish that he has a substantial disability. Claimant's most pronounced and limiting symptoms are related to his expressive language delay, a speech and language disability for which he receives special education services, and which does not make him eligible for services under the Lanterman Act. Though claimant demonstrates at times significant behavioral challenges, these behaviors do not pose significant functional limitations on three or more of the major life activities identified in section 4512, subdivision(f).

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8. For the foregoing reasons, claimant is not eligible for services under the Lanterman Act. (Factual Findings 4-12.)

ORDER

Claimant is not eligible for services under the Lanterman Act. Claimant's appeal is denied.

DATED:

CHANTAL M. SAMPOGNA
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 the receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)