

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2017100338

DECISION

This matter was heard before Regina Brown, Administrative Law Judge, State of California, Office of Administrative Hearings, on October 30, 2017, in San Jose, California.

Claimant was represented by his father.<sup>1</sup>

James Elliott, M.S.W., Fair Hearing Designee, represented service agency San Andreas Regional Center.

The matter was submitted for decision on October 30, 2017.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)<sup>2</sup> because he has autism?

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<sup>1</sup> Claimant's name is not used to protect his privacy.

<sup>2</sup> All citations are to the Welfare and Institutions Code unless otherwise indicated.

## FACTUAL FINDINGS

### INTRODUCTION

1. Claimant was born on October 30, 2013. He lives with his parents, paternal grandparents and younger brother in the catchment area for service agency San Andreas Regional Center (SARC).

2. Claimant is an adorable and shy boy. He is ambulatory. Mandarin is the primary language spoken at home. He is able to speak in sentences of three words or more to communicate his needs and wants. His parents report that he displays temper tantrums, and his behaviors include crying, refusing, kicking, and throwing things. He engages in hand flapping, finger posturing and flicking, tongue flicking, and body tensing and repeatedly scratches the same side of his face. He has inconsistent eye contact. He covers his ears for loud noises. He will insist on wearing the same clothing every day. He does not like to be touched and insists that when others touch his things that the items must be cleaned. He says that he does not like his younger brother. His social interactions are preferred with adults, relatives, and well-known peers.

3. Claimant received a diagnosis of autism spectrum disorder (ASD) from the Kaiser Autism Spectrum Disorders Center (Kaiser). Claimant's parents submitted an application for regional center services to SARC. SARC evaluated Claimant and opined that he meets the criteria for ASD, but he is not substantially disabled. His application was denied. As set forth below, the preponderance of the evidence established that Claimant meets the diagnostic criteria for ASD; however, at this time, his condition is not substantially disabling so as to qualify him for regional center services.

### DIAGNOSTIC CRITERIA FOR AUTISM DISORDER

4. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-V), section 299.00, sets forth the diagnostic criteria for ASD as follows:

- A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative not exhaustive):
- (1) Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
  - (2) Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
  - (3) Deficits in developing, maintaining, and understanding relationships, ranging for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.
- B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive):
- (1) Stereotyped and repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies lining up toys or flipping objects, echolalia, idiosyncratic phrases).
  - (2) Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal and nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

- (3) Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to a preoccupation with unusual objects, excessively circumscribed or pervasive interests).
- (4) Hyper- or hypoactivity to sensory input or unusual interest in sensory aspects of the environment (e.g. apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).
- C. Symptoms must be present in the early development. (They may not become fully manifested until social demands exceed limited capabilities, or may be masked by learned strategies in later life).
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
- E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make co-morbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

#### KAISER DIAGNOSIS AND TREATMENT

5. Claimant was evaluated by clinical psychologists James Thatcher, Psy.D., and Kelly Behrens, Psy.D., at Kaiser on February 13, 2017. Mandarin interpreters were present. Dr. Thatcher and Dr. Behrens administered diagnostic tests, including the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), Module 2; and the Visual Reception scale of the Mullen Scales of Early Learning Developmental Profile 3rd Edition (DP-3). They also reviewed forms that were completed by Claimant's parents including the Achenbach Child Behavior Checklist (CBCL) (Parent report); the Social

Communication Questionnaire (SCQ); and Developmental and Medical History Form. Additionally, they reviewed Claimant's medical and psychiatric records, observed Claimant's behaviors, and interviewed his parents. A report was issued (Kaiser report).

6. Claimant was diagnosed with ASD, Level One on the DSM-V. The Kaiser report indicated that Claimant's history, testing and observed behaviors during the assessment indicated severity on social communication due to his noticeable social deficits and restricted and repetitive behaviors due to his inflexibility of behaviors interfering with functioning. Specifically, Claimant did not answer his name when called and rarely shared interests, and had inconsistent eye contact. He had difficulty in adjusting his social interactions to fit the context of the situation and flexibly engaging in cooperative play with his peers. He engaged in motor stereotypes such as finger posturing, body tensing and tongue flicking. He insisted that others play with him in certain ways. He displayed pronounced tantrum behaviors during transitions to other activities. He displayed hyper-sensitivity to loud noises, feeling wet and smells. These behaviors combined are indicative of an ASD diagnosis. At the time of his assessment, Claimant had never attended daycare or preschool.

Despite Claimant's above average range of cognitive abilities, as determined by the diagnostic tests, he was delayed in social-emotional abilities but developing within normal limits in regards to his other functional abilities. The doctors recommended that Claimant receive behavioral treatment to support his areas of challenge. He was referred to the Kaiser Pediatric Developmental Disabilities Office for case management in regards to services.

7. In March 2017, Claimant was referred to Discover Hope Behavioral Solutions Inc., (Discover Hope) to determine eligibility and recommendations for an intensive ABA program. The assessment team, Mel Fisher, M.S., MFTi, and Amanda Smith, M.A., BCBA, conducted an interview of his parents and direct observation of

Claimant at home and in the community. They administered assessment tools including the Vineland Adaptive Scales, 2nd Edition (Vineland) and VB-MAPP. According to the Vineland, Claimant's adaptive behavior composite score fell in the moderately low range in comparison to typically developing peers. He presented with areas of relative strength in community daily living skills, expressive communication, domestic daily living skills and motor skills. His areas of weakness were identified in interpersonal socialization skills, and play and leisure time socialization skills. The VB-MAPP (a skills based assessment of language and social skills) determined that Claimant is currently demonstrating consistent skills across tact, listener responding, visual perceptual skills, and independent play. Discover Hope recommended intensive Applied Behavior Analysis (ABA) services.

8. Starting in April 2017, Kaiser authorized 20 hours of individual direct therapy of ABA services to be administered by Easter Seals/Discover Hope.

#### SAN MATEO-FOSTER CITY SCHOOL DISTRICT ASSESSMENT FOR SPECIAL EDUCATION SERVICES

9. Claimant was evaluated for special education services by the Campbell Union School District in April/May 2017. A preschool evaluation report was prepared by school psychologist Chrystal Gavaletz, M.Ed., speech and language specialist Amy Kilby, M.A., CCC-SLP; and occupational therapist Evelyn Chu, M.S., OTR/L. They administered standardized assessment instruments and conducted observations of Claimant.

On the Developmental Assessment of Young Children-2 (DAYC-2), the results indicated that Claimant's fine motor skills were within age expectations. However, his social-emotional skills were well below age expectations. On the Adaptive Behavior Assessment System-3 (ABAS-3), completed by Claimant's parents, the results indicated that Claimant was below average in the conceptual domain (including communication, functional pre-academics, and self-direction); extremely low in the social domain

(including leisure and social); and below average in the practical domain (including community use, home living, health and safety, self-care). His general adaptive composite score was 77 which is borderline. On the Autism Spectrum Rating Scale (ASRS), completed by his parents, the results were commensurate with the ADOS-2 results from Kaiser. The Preschool Language Scales-5 (PLS-5) which tested his receptive and expressive language abilities placed Claimant in the 37th percentile. The Expressive One Word Picture Vocabulary Test (EOWPVT-4) placed Claimant in the 45<sup>th</sup> percentile. The Peabody Picture Vocabulary Test-4 (PPVT) placed Claimant in the 50<sup>th</sup> percentile. On the Sensory Processing Measure-Preschool (SPM-P), completed by his father, Claimant scored in the definite dysfunction range on the social participation scale, vision scale, hearing scale, touch scale, body awareness scale, balance and motion scale, planning and ideas scale. Overall, he scored in the definite dysfunction range on the total sensory systems scale.

The preschool evaluation report noted that Claimant was observed over several sessions in a diagnostic placement in a preschool class. He was found to demonstrate typical language and social skills. It was concluded that Claimant has age appropriate cognitive, pre-academic, communication and motor skills. However, he has significant delays in social-emotional skills and has several elevated systems of ASD, and significant sensory processing concerns, as reported by his parents.

10. After an initial individualized education program (IEP) meeting on May 19, 2017, and a continuation meeting on June 13, 2017, the IEP team determined that Claimant was not eligible for special education services based on speech/language impairment or autism. The IEP team concluded that Claimant was ready for preschool and he did not need special supports in a preschool class.

11. Claimant's parents disagreed with the IEP team's conclusions. The status of any appeal from the denial of special education services was not established at hearing. At hearing, Claimant's father stated that they were not yet receiving any services.

#### SARC ELIGIBILITY DETERMINATION

12. On April 5, 2017, Claimant's father contacted SARC to apply for services. An interdisciplinary eligibility team was comprised of SARC staff members including intake service coordinator Nancy Lee, intake district manager Janet Juarez, and clinical psychologist Brenda Hart, Ph.D.

13. On May 19, 2017, Dr. Hart and Lee met with Claimant and his parents for an intake social assessment. Lee took a history from the parents and memorialized her observations of Claimant's current functioning and behavior in a report. She observed him walking around the meeting room. Lee noted that Claimant's primary language is Mandarin, but he is learning English. He did not respond to his name and had difficulty expressing his wants and needs, but he would point to what he wanted. He had limited eye contact. He could recognize his numbers up to 10, most of the letters of the alphabet and his colors. According to his parents, he needs physical assistance with bathing and dressing. He is mainly fed by his parents. He uses the restroom without reminders when they are home, but sometimes has accidents when out in the community. His parents reported that he does not engage with peers or his brother. He likes to play with toy cars, go to the park, watch cartoons, and watch toys that spin. Claimant has a poor understanding of safety. He has multiple temper tantrums every day lasting up to two hours. He is irritable, and insists that his parents drive the same route. He has trouble sharing and will throw things that have been touched by others. He pushes his brother and hits his parents. He will cry when upset, pull his hair, scratch his face, and bang his head on the floor. Claimant insisted on having a parent next to him at all times. Overall, during the session, Claimant did not interact with the



examiners, it was clear that he has sensory sensitivities, and displays a variety of negative behaviors.

14. Dr. Hart reviewed Claimant's application for eligibility, and interviewed Claimant and his parents. She also reviewed the intake social assessment, the preschool evaluation report, the Kaiser report, the IEP report, and the Discover Hope report. During her direct observation of Claimant, Dr. Hart noted that he did not respond or look at her when greeted. He failed to demonstrate appropriate eye contact throughout the evaluation. At one point, he turned his back to Dr. Hart and began pulling his own hair and appeared very upset. Although his mother attempted to get him to interact in play, he did not appear to be interested. He played quietly with the toys during the evaluation. According to Dr. Hart, Claimant demonstrated "very flat affect, a lack of gestures, and no-to-minimal expressive language."

15. Dr. Hart administered the ABAS-3, parent/primary caregiver form. Dr. Hart found significant and unusual discrepancies between Claimant's domain score of the general adaptive composite and the practical domain standard score as she did not believe it was the best measure of Claimant's global adaptive functioning or overall practical adaptive functioning. She believed the results appeared to be an "under-estimation of Claimant's overall adaptive functioning, particularly for his communication/language skills." This was supported by the standardized testing and preschool classroom observations which did not indicate substantial impairment in either expressive or receptive language skills. And Kaiser did not find that Claimant had a language impairment associated with his ASD condition. This indicated to Dr. Hart that Claimant seems to have the "capacity to understand age-appropriate language, and he does have better expressive language skills than he chooses to demonstrate at times, perhaps in certain situations and environments. As such, his apparent language issues appeared to be driven by a social issue, rather than a language ability issue."

16. Dr. Hart completed a written eligibility determination report. In her report, Dr. Hart concluded that given Claimant's current assessment, her observations, interviews and records review, he meets the criteria for ASD, Level 1, without accompanying early childhood language impairments or intellectual impairments, and requiring support for social communication impairments and restricted, repetitive patterns of behavior. Also, it appears that due to his ASD condition, he currently has substantial impairment in his social and emotional functioning (self-direction). Also, from his parents' report alone, an argument could be made that he also has substantial impairments in age appropriate self-care. However, there did not appear to be adequate evidence that Claimant has substantial impairments due to ASD in learning, gross motor skills or communication (which requires both expressive and receptive language to be substantially impaired.)

17. In a letter to Claimant's parents, dated September 1, 2017, Dr. Hart wrote that she agreed with the ASD diagnosis, but determined that Claimant does not meet the substantial disability eligibility requirement. She continued in the letter as follows:

To be found eligible, Claimant would have to show substantial impairments (3rd percentile rank or lower) in at least three of the following areas: age-appropriate self-care; communication (both receptive and expressive language have to be substantially impaired); mobility; self-direction (social, emotional and judgment), and learning. According to observation, records review, interview, and testing, this requirement could not be established at this time. However, it should be noted that as social and academic demands increase in the future, his level of functioning may not rise to the expected levels. Also, when Claimant turns six years old,

the adaptive skill of independent living skills is also assessed for substantial impairment. Claimant may reapply at any time in the future. Should new evidence emerge of decline in age-appropriate adaptive functioning in the future without evidence of improvement, such evidence can be reviewed for SARC eligibility.

18. On September 1, 2017, SARC issued a Notice of Proposed Action denying eligibility for services because a clinical review had determined that at this time Claimant does not demonstrate the presence of a developmental disability and/or substantial handicap in three or more of the seven major life domains as required by law.

19. On September 28, 2017, Claimant's parents filed a request for fair hearing.

#### DR. HART'S TESTIMONY AT HEARING

20. Dr. Hart has been a SARC staff licensed psychologist since 2011. Her duties are to determine eligibility for regional center services through psychological assessment. She described the process to determine Claimant's eligibility for services. Dr. Hart confirmed her conclusion that Claimant met the diagnostic criteria for ASD and exhibited impairments in socialization, but concluded that his condition is not substantially disabling. She looked at Claimant's functioning at the 3rd percentile ranking or below which meets the definition of substantial disability in at least three areas out of five, including gross motor, expressive and receptive communication, learning, self-care, and self-direction. She found that Claimant had no substantial impairment in the areas of gross motor skills or learning. Although his parents reported issues with Claimant's self-care, Dr. Hart did not find this across reporting contexts, including school. Dr. Hart noticed that Claimant was having some difficulty with his expressive language, but there was no indication that he did not understand or had

issues with receptive language. She reiterated that there must be substantial impairment in both expressive and receptive communication which Claimant did not meet. Dr. Hart agreed that Claimant is substantially impaired in self-direction. Dr. Hart stated that as Claimant grows older, other areas may become impaired and it is possible that with a reevaluation, Claimant might be eligible for regional center services in the future. However, at this time, Claimant is not substantially impaired and does not qualify for services.

#### ADDITIONAL EVIDENCE

21. Claimant's father testified regarding Claimant's current impairments and his opinion that Claimant is eligible for regional center services. According to his father, Claimant needs help and his parents could benefit from respite and other services. They applied for Medi-Cal, which they could use to help pay medical co-payments, but the application was denied.

Claimant's father stated that Claimant had other issues with self-care, including that Claimant will not brush his teeth or change his clothes. Claimant also will not say when he is hungry and simply cry. He wets his pants. He has sensory issues with noise, smells in public, and certain colored lights. He has tantrums that can last up to three hours although his tantrums are getting better. Claimant will engage in head banging and kick until he bruises his own feet and leg. He does not like to be touched by others. He scratches his own face, but the frequency has lessened. He still cries when he is dropped off at preschool. His father agrees there is no problem with his gross motor skills. However, Claimant cannot hold a pen and grabs a pair of scissors with both hands to cut. He will not play with other kids, will not share, and makes no eye contact. Claimant's parents are overwhelmed and searching for all avenues of help for their son.

## ULTIMATE FACTUAL FINDING

22. SARC does not dispute that Claimant has a diagnosis of ASD, Level 1. As to the issue of substantial disability, the evidence established that Claimant does not have a substantial disability in learning and he does not have any mobility issues (the ability to use his limbs without assistance). The evidence did not establish that Claimant has significant functional limitations in self-care, and receptive and expressive language. He is substantially disabled in the area of self-direction which includes social skills. However, the evidence did not establish that he has met enough criteria for a substantially disabling condition at this time. He shows emerging skills, but there is insufficient evidence to establish that his impairments will remain. It is too early to determine whether as Claimant ages he will become substantially disabled by autism. Sufficient time for observations and documentation in an educational setting may dispel the concerns of whether Claimant's deficits and behaviors are evident across environments.

## LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (§ 4500 et seq.) The purpose of the Lanterman Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384.)

2. A developmental disability is a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." The term "developmental disability" includes autism. (Welf. & Inst. Code, § 4512, subd. (a).) Pursuant to section

4512, subdivision (l), the term “substantial disability” is defined as “the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a 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.”<sup>3</sup>

3. Neither the Lanterman Act nor its implementing regulations assign burdens of proof. In this case, Claimant asserts that he is eligible for regional center services. So, Claimant has the burden of proving that he has a condition that renders him eligible for services. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

4. The evidence established that Claimant has deficits, struggles socially, and has been diagnosed with ASD, Level 1, by his medical providers and is receiving treatment for autism. However, the evidence falls short of establishing that, at this time, he meets enough criteria of substantial disability to qualify for regional center services. In the event that Claimant obtains updated evidence to suggest that he meets the criteria of substantial disability, he may reapply for regional center services. The preponderance of the evidence did not establish that Claimant is substantially disabled as that term is defined in the Lanterman Act insofar as Claimant does not appear to suffer from significant limitations in three areas of life activity at this time. Therefore, he is not eligible for regional center services at this time.

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<sup>3</sup> The two areas of capacity for independent living and economic self-sufficiency are not considered in someone as young as Claimant.

## ORDER

The appeal of Claimant is denied. Claimant is not eligible for regional center services.

DATED: November 9, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
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REGINA BROWN

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.