

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2018070553

DECISION

This matter was heard before Regina Brown, Administrative Law Judge, State of California, Office of Administrative Hearings, on August 14, 2018, in Salinas, California.

Claimant was represented by his mother.

James Elliott, M.S.W., Fair Hearing Designee, represented service agency San Andreas Regional Center (SARC or regional center or service agency).

The record remained open pending receipt of a legible copy of Exhibit 5, which was received on August 22, 2018, and marked for identification and received in evidence as Exhibit 5A.¹

The matter was submitted for decision on August 22, 2018.

¹ Exhibit 3, SARC's Determination of Eligibility for Services, had the margin cut off on page 4 and there was no more legible copy available.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)² because he has autism spectrum disorder?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant was born on July 28, 2009, is in the fourth grade, and lives with his mother and five siblings. Claimant has been diagnosed with several disorders, including autism spectrum disorder (ASD). Claimant has an individualized education plan (IEP) through his school district.

2. According to his mother, Claimant is honest, creative, imaginative, and he has "a good heart." He is very protective of his mother. He enjoys drawing and playing with his stuffed animals. Claimant is ambulatory and can run, jump, climb and play outdoors without difficulty. However, he occasionally needs guidance when walking because he does not stay focused. He talks in short sentences and tends to repeat himself. He echoes and repeats things. He has difficulty communicating and prefers to be alone. Claimant's mother reports that he is a difficult child and is physically and verbally abusive and exhibits disruptive and aggressive behaviors daily at home and at school. He yells, screams, punches, breaks toys, and becomes angry when he does not get his way. He elopes from the school grounds. He requires constant supervision. He has low blood sugar and has trouble sleeping. Claimant's mother assists with his toileting and dressing.

² All citations are to the Welfare and Institutions Code unless otherwise indicated.

3. In July 2017, Claimant's mother applied on his behalf to SARC for eligibility consideration seeking services including behavior therapy, respite, and advocacy at school when needed. An intake social assessment was completed on July 12, 2017, by SARC Intake Service Coordinator Veronique Torne. Claimant had a comprehensive diagnostic evaluation by SARC's psychologist who ruled out ASD as an SARC eligible condition. SARC denied Claimant eligibility for services. Claimant did not appeal.

4. In 2018, Claimant's mother submitted a request for an intake assessment with SARC. SARC reviewed Claimant's 2018 IEP. On June 11, 2018, SARC determined that there was no evidence of a developmentally disability, and refused to conduct a new intake assessment. On June 29, 2018, 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.

5. On July 5, 2018, Claimant's mother filed a request for fair hearing.

DIAGNOSTIC CRITERIA FOR ASD

6. 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 or preoccupation with unusual objects, excessively circumscribed or perseverative 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.

- 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.

SARC ELIGIBILITY DETERMINATION

7. In July 2017, Claimant reapplied to SARC for regional center services. On July 25, 2017, clinical psychologist Ubaldo F. Sanchez, Ph.D., administered several instruments to Claimant including: the Wechsler Intelligence Scale for Children - V (WISC-V); the Autism Diagnostic Observation Scale - 2 (ADOS-2), Module 3; and reviewed the diagnostic criteria for ASD in the DSM-V. Dr. Sanchez also reviewed the Adaptive Behavior Assessment System - Third Edition (ABAS-3) completed by Claimant's mother.

8. During the evaluation, Dr. Sanchez observed that Claimant was very hyperactive and noticeably immature, while constantly moving. Claimant displayed a full range of facial expressions and had a great smile. He became silly at times and joked when tasks got too difficult. Claimant's mother reported to Dr. Sanchez that the family had moved from Yuba County in February 2017, and lived in shelters and their car until May 2017. Claimant's father was verbally and physically abusive and when Claimant was four years old, she left his father.

9. On the WISC-V, Claimant scored in the lower limits of the low average range of measured intelligence. However, Dr. Sanchez noted that Claimant's scores were deemed to be an underestimate because Claimant was acting silly and sometimes did

not put forth full effort. Claimant scored very low in verbal comprehension and working memory; low average in visual spatial and fluid reasoning; and average in processing speed. His full scale composite score was 83 which placed Claimant in the low IQ classification.

10. On the ABAS-3, completed by his mother, Claimant scored extremely low in the areas of conceptual, social, and practical indicating impairment in his communication, functional academic, home living, health and safety, leisure, self-care, self-direction, and social skills.

11. On the ADOS-2, Module 3, language and communication section, it was determined that Claimant did not use any stereotyped/idiosyncratic words or phrases, and he did not echo. He offered information and was able to provide an account of a routine event. Claimant told Dr. Sanchez that he plays on his tablet and spends most of his day with his mother. He was able to respond appropriately to questions about his feelings and thoughts and sustained a reciprocal conversation with Dr. Sanchez. Claimant gave eye contact and directed facial expressions toward Dr. Sanchez. He showed pleasure in their interaction. He attempted to gain and maintain the doctor's attention. He did not engage in any unusual sensory interest in play materials, he did not display any unusual or repetitive interest, he did not engage in any stereotyped or self-injurious behaviors. Claimant's social affect and restricted and repetitive behavior score on the ADOS-2, Module 3, was a 7 as compared to 4 which did not place him on the ASD spectrum.

12. Dr. Sanchez reviewed the diagnostic criteria for ASD under the DSM-V, and found the following:

a. Claimant had no deficits in social-emotional reciprocity. Claimant was able to engage in a long reciprocal conversation and showed others when he got a gift.

b. Claimant had no deficits in nonverbal communicative behaviors used for social interaction. Claimant was able to use gestures to regulate his social interaction, gave eye contact, and was able to show a range of facial expressions.

c. Claimant had no deficits in developing, maintaining, and understanding relationships. Claimant engaged in some pretend play. He has some friends, but is not good at socializing with them.

d. Claimant has no stereotyped or repetitive motor movements in the use of objects or speech. He may repeat something once in a while.

e. Claimant does not insist on sameness and does not have an inflexible adherence to routines or ritualized patterns of verbal or nonverbal behavior. He has a healthy appetite and is not a particularly picky eater.

f. Claimant does not have highly restricted, fixated interests that are abnormal in intensity or focus.

g. Claimant is not hyper- or hyporeactive to sensory input or have an unusual interest in sensory aspects of the environment. Claimant is sensitive to noise and does not like bright lights, but he is not sensitive to textures or smells.

13. Dr. Sanchez wrote a psychological evaluation report. He concluded that Claimant's scores do not fall within the ASD cut-off and does not meet the DSM-V criteria for ASD. Claimant's ability to understand and respond to increasingly complex requests is not impaired. His ability to socially integrate with his peers and adults in an age appropriate manner is mildly to moderately impaired due to his ADHD symptoms. Dr. Sanchez concluded that Claimant's ability to engage in and sustain an activity for a period of time is markedly impaired.

Dr. Sanchez indicated that children exposed to domestic violence tend to suffer from nightmares and other sleep disturbances, and this trauma may lead to great insecurity and confusion causing regressive behavior such as clinging to adults and/or

fear of abandonment. Also, they tend to believe that violence is an appropriate method of trying to resolve conflicts. Violence in families impedes a child's development as well as academic and community involvement and their self-esteem. Dr. Sanchez believes that Claimant should be involved in individual psychotherapy to address the history of domestic violence. In addition, he should be reevaluated for the possibility of psychotropic medication to decrease his ADHD symptoms and help him focus. It is typical for children with ADHD to display social and emotional behaviors that lag behind their chronological age by three to four years and they have difficulty remaining focused and regulating their behavior. Dr. Sanchez believes a high level of structure and consistency will help manage Claimant's impulsivity and hyperactive behavior with the help of psychotropic medication and/or diet. According to Dr. Sanchez, Claimant meets the DSM-V criteria for ADHD; other specified disruptive impulse control and conduct disorder; disruption of family by separation or divorce; and Post-traumatic Stress Disorder (PTSD).

14. SARC psychologist Nancy Tokar, Ph.D., completed a written determination of eligibility for services report dated October 5, 2017. Dr. Tokar based the report on a review of the intake social assessment, Dr. Sanchez's psychological testing results, a Monterey County IEP dated April 21, 2017, and 2015 records from Marysville Joint Unified School District.

15. Dr. Tokar noted that during the intake social assessment, Claimant was engaging and participating in conversation, had good eye contact, asked questions, and enjoyed sharing his life. His mother reported that he was a difficult child, and is physically and verbally abusive, disruptive, and has aggressive behaviors at home and school. His mother also reported that Claimant yells, screams, punches and breaks toys, becomes angry when he does not get his way, and elopes from school.

16. Dr. Tokar noted that Claimant's initial entry into special education was in June 2015. His most recent IEP was dated April 20, 2017, with his primary disability as autism and secondary disability is speech and language impairment. His IEP had a behavior intervention plan. Claimant had also been diagnosed with ADHD, Oppositional Defiant Disorder (ODD), Intermittent Explosive Disorder, and PTSD. He had received mental health treatment in 2015.

Dr. Tokar also reviewed the documentation of his developmental behavioral history which indicated that Claimant was evaluated by the school psychologist at the Marysville School District. On the Gilliam Austim Rating Scale - 3rd Edition (GARS-3) teacher's and mother's questionnaires, the results were at level 3, very likely range. The ABAS-3 completed by his teacher indicated that no skill areas were in the extremely low range. The ABAS-3 completed by his mother had all scores in the extremely low except for community use which was in the low range. According to the WISC-V, Claimant's full scale IQ was 70, in the borderline range. His mother and teacher also completed the Behavior Assessment System for Children - 2nd Edition (BASC - 2), which found him at risk in the areas of externalizing problems, hyperactivity, aggression, internalizing problems, adaptability, social skills, and study skills. The areas that were considered as clinically significant were communication skills, adaptive skills, withdrawal, atypicality, learning problems, attention problems, school problems, and depression.

17. Dr. Tokar wrote in the determination of eligibility of services report that based on a review of the observations of Claimant, his records, and testing, he does not have an eligible regional center diagnosis. Dr. Tokar concurred that Dr. Sanchez had ruled out ASD, although Claimant has challenging behaviors that can be seen in ASD which allowed him to access special education supports under the educational category of autism-like behaviors. However, that is not the same clinical diagnosis under the DSM-V. Dr. Tokar concluded as follows:

In order to be eligible for [SARC] services, [Claimant] must also be substantially disabled in at least three adaptive skill areas. [Claimant's] FSIQ was 83, in the Low Average and is considered an underestimate of his intellectual abilities. His IQ testing is compromised by ADHD behavior and being unable to focus.

His self-care, and receptive and expressive language, may be affected by ADHD symptoms, but it is not substantially disabling. He needs boundary setting, routine and guidance for appropriate decision-making, organizing, and management of his hyperactivity and impulsiveness.

[Claimant] does not have deficits in the Extremely Low or < 3rd PR in adaptive skills. [Claimant] is not eligible for [SARC] services.

In summary, SARC provides services under the Lanterman Act for individuals with substantial disabilities who are unable to care for themselves indefinitely due to a life-long developmental disability. Based on the current assessment and record review, Claimant did not meet these qualifications. His records indicated ADHD, PTSD, and other disorders that may impact functioning, but are not eligible conditions under the Lanterman Act.

ASSESSMENTS PERFORMED AFTER SARC'S 2017 DENIAL OF SERVICES

18. In May 2018, Claimant was reassessed to determine continuing eligibility for special education services by the Monterey County Special Education Local Plan Area. An assessment of Claimant's cognitive/educational history/social-emotional was

prepared by school psychologist Jorge De Leon; a speech and language assessment was prepared by speech and language specialist Laurie Coleman; a fine motor, visual motor, gross motor, and sensory assessment was prepared by occupational therapist Stephanie May, and an academics assessment was prepared by his special day class teacher. They administered standardized assessment instruments and made observations in the classroom.

Claimant was given the Wechsler Nonverbal Scale of Ability (WNV) as a measure of his intellectual abilities. According to De Leon, Claimant was unable to complete the test due to lack of attention and a lack of interest in completing the test. Claimant's performance in the sections that he was able to complete were in the low average range.

On the composite language testing, Claimant scored significantly below the expected age level. According to Coleman, Claimant is somewhat social, but often demonstrates inappropriate social skills. Claimant presents as a student who is significantly delayed in the use and understanding of language, which is not unexpected of a student on the spectrum with scores consistently low across all areas.

According to the Woodcock Johnson III Academic Achievement Test, Claimant's academic skills are within the extremely low range. Claimant's teacher reported that his academic strengths are in touch math and number lines, but he is unable to apply math skills because of his inability to read word problems. He participates in all subject areas, but needs to be constantly reminded to stay on task during instruction. Claimant's teacher is concerned about his bullying and aggressive behavior toward other students.

The occupational therapist noted that Claimant has difficulty regulating his emotions. However, based on the current evaluation, Claimant did not meet the eligibility for educational occupational therapy because his fine manual control, fine motor coordination and sensory motor skills are in the average range.

The reassessment for special education services concluded that Claimant continued to qualify for special education services under the category of autism. He exhibits a developmental disability that significantly affects his verbal and nonverbal communication and social interaction. He engages in repetitive activities and stereotyped movements; is resistant to environmental change or change in daily routines; and has unusual responses to sensory experiences. These characteristics are not due to an emotional disturbance, and these characteristics adversely affect the student's educational performance and the student's needs cannot be solely met within the general classroom setting.

19. Claimant's mother submitted the May 9, 2018 IEP reassessment to SARC requesting an intake assessment.

20. In a letter dated June 11, 2018, SARC acknowledged the new information provided where Claimant was found eligible for special education under the category of autism. However, the letter indicated that the educational category of autism is not the same as a DSM-V diagnosis of ASD as required for eligibility for regional center services. The letter referred to Dr. Sanchez's comprehensive diagnostic evaluation performed in 2017. The letter suggested that Claimant may seek a comprehensive diagnostic evaluation through his medical provider. However, at this time, there is no evidence of a developmental disability as defined by the Lanterman Act and was unable to offer Claimant a new intake, but would review any new information.

21. In a letter, dated June 26, 2018, Claimant's pediatrician, Amanda Jackson, M.D., recommended that Claimant receive SARC services. According to Dr. Jackson, Claimant has ASD, ADHD, ODD and anger explosion disorder. Dr. Jackson believes that intellectually disability cannot be ruled out at this time because Claimant was unable to complete an intelligence evaluation during the IEP process because he was too distracted and uncooperative. Dr. Jackson has observed Claimant talking to himself

nonsensically, perform repetitive behaviors, and exhibit extreme hyperactivity. Dr. Jackson believes that Claimant would benefit from applied behavioral analysis (ABA) therapy. Currently, Claimant is taking risperidone to control his anger explosions and calm his hyperactivity, as prescribed by his psychiatrist.

PARENT'S TESTIMONY

22. Claimant's mother testified with credibility and candor regarding Claimant's current impairments and her opinion that he is eligible for regional center services. She disagrees with Dr. Sanchez's conclusions and believes that Dr. Sanchez was unfair because he told her during the assessment that Claimant "needed more discipline."

23. According to Claimant's mother, Claimant has had a year of behavioral therapy. She states that it is a constant struggle with Claimant and that she is trying her best. She believes that Claimant can get better if he has access to regional center services. She acknowledges that Claimant makes eye contact and he will initiate conversation. However, he gets easily agitated and aggressive. She indicated that Claimant was struck by a vehicle when he was younger, but the hospital in Yuba county refused to perform an MRI because it was not covered by medical insurance and they were concerned about the risk of cancer. Claimant has had no cognitive testing regarding traumatic brain injury, but she would like him to be evaluated.

24. There was no expert testimony proffered at the hearing.

ULTIMATE FACTUAL FINDING

25. SARC does not dispute that Claimant has a diagnosis of autism through his special education services. 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 is not convincing 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 to warrant a determination for a substantially disabling condition at this time. There is insufficient evidence to establish that his impairments will remain for an indefinite time and will render him substantially disabled by ASD.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. 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; *Assoc. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Assoc. v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

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. (§ 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. (7) Economic self-sufficiency.”³ Furthermore, a regional center cannot disqualify an individual for eligibility based on a comparatively high IQ, where the person otherwise establishes that he has a substantially disabling condition as that term is defined by section 4512. (*Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462.)

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. Claimant’s mother contends that SARC’s psychologist unfairly focused on whether Claimant is being disciplined. This contention was carefully considered. However, this contention does not undermine the persuasiveness of the evidence on the issue of whether Claimant is substantially disabled to be eligible for regional center services.

5. The evidence established that Claimant has deficits, struggles socially, and has been diagnosed with autism through special education services. However, the evidence falls short of establishing that, at this time, he has ASD or that he is substantially disabled in three adaptive skill areas. The evidence is not convincing that Claimant has significant functional limitations in self-care, and receptive and expressive language. In the event that Claimant obtains an updated psychological assessment determining that he meets the DSM-V criteria of substantial disability, he may reapply

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

for regional center services. At this time, he is not eligible for regional center services at this time. SARC's refusal to conduct a new intake assessment was appropriate.

ORDER

The appeal of Claimant is denied.

DATED: August 31, 2018

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.