BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

DDS No. CS0009240

OAH No. 2023090438

DECISION

Thomas Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on February 21, 2024.

Ron Lopez, Education Advocacy Specialist, represented the Westside Regional Center. Claimant's guardian represented him. Claimant's and his guardian's name are not used to protect privacy and confidentiality.

The Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885 (Lanterman Act) and implementing regulations

govern this matter. Each regulation cited below is a section of title 17 of the California Code of Regulations.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on February 21, 2024.

STATEMENT OF THE CASE

Claimant received services in the Early Start Program for deficits in language and learning ability. The Service Agency had a psychological evaluation performed in May 2023, when Claimant was four and a half years old. The determination of its eligibility team, disputed by Claimant, is that Claimant does not have a developmental disability within the meaning of the Lanterman Act and is ineligible for services at present.

FINDINGS OF FACT

Jurisdiction

1. The Service Agency's August 22, 2023 Notice of Action (NOA) informed Claimant it found him ineligible for services under the Lanterman Act. In an appeal the Service Agency received on August 30, 2023, Claimant timely requested a hearing.

Background

2. Claimant is five years old. As an infant he and siblings were removed from home after police found that their parents were using illicit drugs. Claimant's guardian and caregiver is his aunt. Claimant's care is monitored by Social Worker (SW)

Nequoia Williams, Department of Children and Family Services (DCFS). Claimant received services in the Early Start Program and was deemed provisionally eligible for regional center services due to a diagnosis of unspecified language disorder.

Denial of Eligibility

3. In an August 22, 2023 letter, Exhibit 3, enclosing the Service Agency's NOA, Thompson Kelly, Ph.D., Director of Clinical Services, wrote Claimant's guardian that material available to the Service Agency did not support a finding Claimant was:

> substantially disabled in 3 or more major life areas by an eligible regional center diagnosis of [i] Intellectual Disability, [ii] Autism Spectrum Disorder (ASD), [iii] Epilepsy, [iv] Cerebral Palsy or [v, under the fifth category] a condition similar to Intellectual Disability. [Claimant] was made Provisionally Eligible for Regional Center services in 2021 based on unspecified language disorder. At this time, we do not have evidence supporting continued services after he turns 5 years old, although he has a diagnosis of Autism he would need to demonstrate having substantial disability in three or more major life areas.

4. The Service Agency summarized the facts and laws supporting its August 22, 2023 NOA, Exhibit 4, including reference to legal authority on "substantial disability in three or more major life areas," writing: "Although [Claimant] has a diagnosis of Autism, a multidisciplinary team reviewed all available assessments and reports and determined [Claimant] is not substantially disabled by that condition pursuant to WIC 4512 (l) and 17 CCR 54001."

5. "WIC 4512 (l)" in the NOA is a reference to Welfare and Institutions Code section 4512, subdivision (*l*)(1);

> "Substantial disability" means 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:
>
> (A) Self-care.
>
> (B) Receptive and expressive language.
>
> (C) Learning.
>
> (D) Mobility.
>
> (E) Self-direction.
>
> (F) Capacity for independent living.
>
> (G) Economic self-sufficiency.

At the hearing, Dr. Kelly discussed each category of the statute, noting that Claimant did not have any of the substantial disabilities described in the statute's categories, although, given that Claimant is a young child, it is difficult to evaluate his status under the last three categories, (E) through (G), as these are generally more applicable to adults and adolescents.

6. "17 CCR 54001" in the NOA refers to these provisions of Regulation 54001:

> (a) "Substantial disability" means:

> (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
>
> (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age . . . .

The regulation's categories of "major life activity" are identical in substance to the categories, (A) through (G), in Welfare and Institutions Code section 4512, subdivision (*l*)(1), quoted above.

April 2023 Testing for Epilepsy

7. When Claimant was four years old, he had been observed to have "staring spells" or absence seizures. During such episodes, more common in children than adults, a person briefly loses consciousness. As stated in an April 19, 2023 report, physicians in the Neurology Clinic at Children's Hospital Los Angeles tested Claimant by electroencephalogram (EEG), but there were no significant findings.

8. The testing turned up no indications of epilepsy or epileptiform discharges and no paroxysmal responses, such as to photic stimulation, no clinical or electrographic events or seizures, and no obvious dysrhythmia. Claimant was not observed or tested while sleeping. The medical impression, set out in Exhibit 7, was "Normal awake only EEG."

May 2023 Psychological Evaluation

9. On May 3, 4, and 8, 2023, Sarah R. Foreman, Psy.D., registered psychological associate under the supervision of licensed psychologist Gabrielle du Verglas, Ph.D., conducted a psychological evaluation of Claimant, then four and a half years old. As Dr. Foreman noted, Exhibit 6, page A17, Claimant's Service Coordinator, Wendy Vargas, had requested:

> assessment of cognitive, adaptive, and social/emotional functioning in order to rule out the presence of an intellectual developmental disorder (IDD) and/or autism spectrum disorder (ASD). The present evaluation was limited to assessment of developmental disabilities, specifically IDD and ASD . . . .

10. Dr. Foreman noted that Claimant had previous evaluations, psychological and behavioral, but reports were unavailable. Regarding previous testing that was available to her, Dr. Foreman noted, Exhibit 6, page A19:

> [Claimant] was evaluated by Billy Stimson, MA, OTR/L, for his Occupational Therapy Developmental Evaluation on 09/17/2021. [Claimant] was two years, ten months of age. On the Bayley Scales of Infant and Toddler Development, [Claimant's] fine motor, gross motor, and expressive language skills placed in the average range, cognitive skills placed in the low average range, and receptive language skills placed in the borderline range. On the Developmental Assessment of Young Children, Second Edition (DAYC-2),

> [Claimant's] social-emotional skills placed in the below average range and his adaptive behavior skills were classified as poor.

11. Dr. Foreman's testing consisted of: (i) a clinical interview and behavioral observation; (ii) Modified Brief Observation of Symptoms of Autism (BOSA); (iii) Wechsler Preschool and Primary Scale of Intelligence - Fourth Edition (WPPSI-IV); (iv) Adaptive Behavior Assessment System - Third Edition (ABAS-3); and (v) Autism Diagnostic Interview – Revised (ADI-R).

12. Dr. Foreman observed, Exhibit 6, page A19, that Claimant's eye contact was "inconsistent but not clearly lacking." Dr. Foreman found that Claimant spontaneously showed toys and other items to others, but he had a tendency to try and control play, including when speaking to Claimant's guardian. Dr. Foreman observed Claimant as he engaged in spontaneous pretend play, but she found that he did sustain such activities.

13. Dr. Foreman considered symptoms of hyperactivity that Claimant had trouble sitting still, fell off a chair, crashed into a wall, and experienced full body tensing. She frequently had to encourage Claimant to stay on task during cognitive testing.

14. Using the WPPSI-IV for cognitive testing, Dr. Foreman reported Claimant's Full Scale IQ score of 99 was in the 47th percentile, in the average range. She concluded, Exhibit 6, page A22, "There are no concerns for an intellectual disability or cognitive delay." . . . [T]hough due to [Claimant's] history of attentional and communication difficulties, future reassessment of cognitive functioning may be indicated in the next couple of years to track his progress." Dr. Foreman further noted

that the WPPSI-IV tends to underestimate impairment in young children, another reason for Dr. Foreman's recommendation for future reassessment.

15. The ABAS-2 is for evaluating behavior and adaptive skills that relies heavily on an informant, a person familiar with the person evaluated, in this case Claimant's guardian, Using the ABAS-2, Dr. Foreman reported, Exhibit 6, page A22:

> [A]daptive scores are much lower than expected given [Claimant's] cognitive abilities, though his low adaptive functioning is consistent with his history of suspected prenatal drug exposure, hyperactivity and attentional difficulties, behavioral challenges, and communication and social delays.

16. Like the ABAS-3, the ADI-R relies heavily on an informant, in this case, again, Claimant's guardian. The ADI-R tests three domains of functioning: (i) Qualitative Abnormalities in Reciprocal Social Interaction, such as speech development and language skills; (ii) Qualitative Abnormalities in Communication, such matters as emotional sharing, smiling at others, and interpreting others' responses; and (iii) Restricted, Repetitive, and Stereotyped Patterns of Behavior. Dr. Foreman scored the test using an algorithm for diagnosis, as opposed to treatment.

17. Interpreting the ADI-R evaluation, Dr. Foreman found that Claimant demonstrated limited reciprocal communication skills, delays in nonverbal communication and in social and play skills, some repetitive and rigid behaviors, some fixations, and sensitivity to sensory input. Dr. Foreman's conclusion was provisional, that Claimant's test results are consistent with autism spectrum disorder (ASD), but that future testing would be needed:

> [Claimant's] total scores exceeded the cutoff for clinical significance in all assessed areas, and therefore his symptoms are considered to be consistent with a diagnosis of ASD. However, his scores must also be interpreted in light of his likely prenatal drug exposure, which can contribute to hyperactivity, social and communication impairments, neuroatypicality, and developmental delays. Given's [Claimant's] complex symptom presentation, the diagnosis of ASD was coded on a provisional basis, with reassessment of autism related symptoms recommended in two years.

18. In a summary of her findings, Dr. Foreman referred to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), the standard reference used by medical professionals. Each diagnosis under the DSM-5 corresponds to a numerical code under the International Classification of Diseases (ICD) developed by the World Health Organization (WHO). Using criteria in the DSM-5, Dr. Foreman's diagnostic impressions were, Exhibit 6, page A29:

> 315.8 (F89) Unspecified Neurodevelopmental Disorder, likely associated with in utero drug exposure
>
> 299.00 (F84.0) Autism Spectrum Disorder, without accompanying intellectual impairment, without accompanying language impairment (fluent speech but history of stuttering and previously diagnosed with unspecified language disorder) (provisional)

- Level 2, social communication and social interaction, requiring substantial support.

- Level 2, restrictive/repetitive patterns of behavior, requiring substantial support.

Rule Out Attention-Deficit/Hyperactivity Disorder

19. A multidisciplinary clinical team, the Service Agency's eligibility team, reviewed and discussed Dr. Foreman's report. The members of the team were: (i) Ari Zeldin, M.D., who has a specialty in pediatric neurology; (ii) Jessica Haro, BCBA, an autism specialist; (iii) Mayra Mendez, Ph.D., LMFT, psychology consultant; and Kaely Shitakes, Psy.D., a manager and staff psychologist. On July 20, 2023, they decided against Claimant's eligibility, but found a substantial handicap in self-direction.

20. Besides his role as Director of Clinical Services, Dr. Kelly, who sent Claimant the NOA, is also the Service Agency's Intake Manager and Chief Psychologist. He reviewed the report of Dr. Foreman's psychological evaluation and testified that he agreed with her conclusions, with this reservation: Dr. Kelly believes that a diagnosis of Attention Deficit Hyperactivity Disorder may be better supported than Claimant's provisional diagnosis of ASD.

December 2023 Report re Fetal Alcohol Exposure

21. Haylee Turner, M.D., Los Angeles General Medical Center, examined Claimant on December 13, 2023, regarding potential Fetal Alcohol Spectrum Disorders (FASD). In her December 22, 2023 report, Exhibit 8, page A35, Dr. Turner wrote:

> Just a few weeks after child's birth biological mother had an incident of alcohol poisoning which raises my suspicion for

> a history of heavy alcohol use at least through pregnancy discovery, which was likely relatively late given social situation and lack of prenatal care. . . . Notably, he has a disproportionately very small head circumference (microcephaly) which is considered a hallmark physical feature of fetal alcohol effects. He has a constellation of behavioral and developmental impairments on the level of a neurodevelopmental disorder.
>
> Based on these findings, he is diagnosed within the fetal alcohol spectrum disorders and his difficulties are best understood as a reflection of brain based dysfunction resulting from prenatal alcohol exposure.

22. Dr. Turner went on to describe, in Exhibit 8, page A35, many difficulties, cognitive and otherwise, Claimant is likely to encounter over the years:

> General cognitive abilities (typically measured w/IQ testing) are usually within the average range in individuals with FASD, however they often have adaptive functioning problems, deficits in discrete domains of cognition, and self-regulation impairments that are disproportionate for their IQ. This is reflective of complex changes in the brain itself that are believed to interfere with the ability to process/integrate information and modulate responses in an appropriate manner. what appears to be a relatively bright child will be labeled as willful or defiant when in reality they are not in control of much of their own

behavior. There are often also significant sensory processing challenges that may be a subtle trigger for negative behaviors. Receptive language/verbal comprehension or pragmatic language abilities are often much lower than expressive skills. There is a relatively high risk of learning disabilities, which may not be evident until later school years when processing, memory, attention, and abstract thinking expectations are higher. Low threshold for additional psychoeducational testing in the future.

23. Dr. Turner understood that the Service Agency might not find Claimant eligible for services on first examining and evaluating him. As she stated in her report, Exhibit 8, page A35:

> - Regional Center to determine ongoing eligibility. Previously provided a Provisional ASD diagnosis and will reassess in appropriate time frame. Some children with FASD are co-diagnosed with autism since behaviors have a high amount of overlap; diagnoses are not mutually exclusive.
>
> - continue with mental health supports with behavioral focus to help develop self-regulation skills
>
> - consider working with an OT for picky eating challenges; likely related to sensory processing

Other Evidence

24. Claimant's guardian testified that since Dr. Foreman's evaluation, Claimant, no longer in pre-school, attends public school and is struggling with a learning disability. She and SW Williams believe that this disability should be considered as part of the eligibility determination,

LEGAL CONCLUSIONS

1. Claimant bears the burden of proof as the party asserting a claim or that seeks to change the status quo. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.).

2. Under Evidence Code sections 115 and 500, Claimant must meet the evidentiary standard of proof by a preponderance of the evidence, meaning Claimant must show that the evidence makes it more likely than not that he should prevail on his claim of eligibility.

Substantive Law

3. Welfare and Institutions Code section 4507 provides that "persons with developmental disabilities shall receive services pursuant to" the Lanterman Act.

4. There was no evidence that Claimant has or has had cerebral palsy or epilepsy. This matter concerns ASD, ID, and the fifth of the Lanterman Act's five categories of eligibility. As noted above, the categories are set out in Welfare and Institutions Code section 4512, subdivision (a)(1).

5. Regulation 54000 states that eligibility depends not only on whether a person's disability comes within one of the Lanterman Act's five categories, but also on characteristics such as whether the disability is likely to last indefinitely and is substantially disabling. Subdivision (c) of the regulation states that not included in disabilities that qualify a person for services are: (1) solely psychiatric disorders; (2) solely learning disabilities; and (3) disabilities that are solely physical. The regulation's provisions parallel provisions in Welfare and Institutions Code section 4512.

6. Regulation 54001, subdivision (a)(1), referenced in the NOA, is quoted above concerning what constitutes a substantial disability such as would make a person eligible for regional center services.

7. Regulation 54010 describes procedures for a Service Agency's decision on eligibility following intake and assessment, and how the decision may be appealed.

ANALYSIS

8. The expert psychological evidence, set out in detail by Dr. Foreman, with her supervisor, Dr. du Verglas, concurring, and later attested, with slight reservation, by Dr. Kelly, is that Claimant's deficits are not such as must be considered, in the words of the Lanterman Act, Welfare and Institutions Code section 4512, subdivision (*l*)(1): "significant functional limitations in three or more . . . areas of major life activity."

9. Claimant may be suffering from ASD. He has symptoms that could result from ASD, such as Claimant's limited skill at reciprocal communication, less than normal ability, that is, to engage in conversation or respond appropriately to communications from others. Another set of symptoms that may be due to ASD are Claimant's delays in nonverbal communication, such as while playing.

10. Claimant's symptoms are complex, however, as Dr. Foreman noted, and may be more due to ADHD and pre-natal exposure to drugs than to ASD. As Dr. Foreman also noted, Claimant's cognitive abilities are not for the most part below average. On the evidence presented, moreover, Claimant's symptoms are not enough to interpret as obstacles to his participation in social relationships. Claimant is able to speak with and interact with others. These abilities are inconsistent with a finding that Claimant is substantially disabled in three major life activities as categorized in the Lanterman Act.

11. Claimant has difficulty with, but the evidence does not show that he is substantially disabled from, receptive and expressive language, the major life activity described in Welfare and Institutions Code section 4512, subdivision (*l*)(1)(B).

12. Claimant has difficulty with learning, the major life activity described in Welfare and Institutions Code section 4512, subdivision (*l*)(1)(C). But the evidence is not enough to show that his disability in this area is substantial within the meaning of the Lanterman Act. To the extent that Claimant has a learning disability, there is not enough evidence to show that it is due to one of the five qualifying categories under the Lanterman Act, Welfare and Institutions Code section 4512, subdivision (a)(1).

13. The evidence of eligibility is inconclusive at this time. As Dr. Foreman wrote, it may be appropriate to test Claimant in the next two years for a clearer determination on his possible eligibility for services from the Regional Center.

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ORDER

Claimant's appeal is denied.

DATE:

THOMAS LUCERO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This. is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.