

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GWENDOLYN T.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2012010418

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 22, 2012, and August 13, 2012, in Culver City.

Matthew M. Pope, Attorney at Law, represented Claimant. Claimant's mother and father were present.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (Service Agency or WRC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on August 13, 2012.

¹ Claimant and her parent are identified by titles or first name and initials to protect their privacy.

ISSUE

Whether Claimant is eligible for regional center services on the basis of autism.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-10; Claimant's exhibits A-G.

Testimonial: Thompson Kelly; Linda Andron-Ostrow; Nancy A. Blum; Patricia Cracchiola; Claimant's mother; and Claimant's father.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a seven-year-old girl. She lives in the family home with her parents and four-year-old sister.
2. Claimant's parents requested regional center services for Claimant. On or about December 15, 2011, the Service Agency sent Claimant's parents a letter and Notice of Proposed Action notifying them of its determination that Claimant is not eligible for services. On or about January 12, 2012, Claimant's parents filed a fair hearing request, on Claimant's behalf, to appeal the Service Agency's decision.
3. Claimant's parents contend Claimant should be found eligible for regional center services based on her diagnosis of autism. Claimant was diagnosed with autistic disorder in June 2011 by clinical psychologist/neuropsychologist Nancy A. Blum, Ph.D.

CLAIMANT'S BACKGROUND

4. Claimant is described as an adorable young girl who is intellectually gifted, enthusiastic, and creative. She has strong cognitive and academic skills. She is ambulatory and verbal. Her speech is normal and her articulation is excellent.

5. Claimant currently attends a combination first grade-second grade regular education classroom. The school district provides her with special education services in the eligibility category of autism. Claimant receives occupational therapy, RSP, adapted PE, and language/speech services.

6. Claimant's individualized education program (IEP) dated April 26, 2011 was presented at the hearing. Claimant was in kindergarten at the time of this IEP. According to the IEP, Claimant has difficulty transitioning between activities, especially from preferred to non-preferred activities. She is able to engage in imaginative and interactive play and parallel play with her peers. She has difficulty cooperating with her peers and taking turns, sharing and reading social cues. At times, she needs prompts to play cooperatively with peers and sometimes her peer interactions are not always age-appropriate due to immature and silly behavior. Claimant is rigid in her thinking and behaviors, such as writing certain letters or numbers her own way instead of the correct way as directed by her teachers. She has difficulty adapting to situations and poor coping skills. She seems unaware of others, does strange things, seems out of touch with reality, and acts strangely.

7. Patricia Cracchiola has been Claimant's RSP teacher for one year. She testified credibly at the hearing regarding her observations of Claimant in the classroom. Claimant often will resist doing a non-preferred activity. She avoids eye contact, makes mean faces, growls and snorts. She has difficulty with any change. She is comfortable with a specific routine. Claimant prefers to play alone. She gets

upset if someone intrudes on her space. When she plays with other children, she only wants to play with the one child exclusively; she becomes upset if a third child comes to play. Claimant has difficulty sharing her ideas in a group. She has difficulty dealing with the feelings of others, as well as her own feelings. She is direct and literal in what she says and does not realize how it might affect the feelings of others. Ms. Cracchiola has found it is hard for Claimant to understand and express her feelings, wants, and needs, which Ms. Cracchiola feels causes Claimant to get mad and want to be left alone. Ms. Cracchiola feels that Claimant is improving in her ability to transition between activities, but still needs prompting. She is still resistant to non-preferred activities. Claimant avoids activities where she might receive public praise or positive attention.

EVALUATION BY DR. BLUM

8. Nancy A. Blum, Ph.D., clinical psychologist/neuropsychologist performed a comprehensive neuropsychological evaluation of Claimant during January to April 2011, and prepared a written report of her findings dated June 2011. Dr. Blum reviewed available medical and school records, conducted clinical interviews of the parents, observed Claimant at school, and administered testing including, but not limited to, the Autism Diagnostic Interview-R (ADI-R), Autism Diagnostic Observation Scale (ADOS), and Vineland-II Adaptive Behavior Scales (Vineland). She spent 10 hours testing Claimant, and three to four hours interviewing Claimant's parents. Dr. Blum testified at the hearing.

9. On the ADI-R and ADOS, Claimant's scores were within the range for autism. On the Vineland, her communication functioning overall was in the average range, her daily living skills overall were below average, and her socialization skills

were below average overall. Based on her evaluation of Claimant, Dr. Blum concluded that Claimant met the DSM-IV diagnostic criteria for Autistic Disorder.

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10 Dr. Blum concluded that Claimant's developmental disability is attributable to autism and results in more than three areas of substantial functional limitations in major life activities, as stated in her report as follows:

- (A) Receptive and Expressive Language: "There is no problem with [Claimant's] receptive language. With regard to expressive language, there is substantial functional limitation in pragmatic language. [Claimant] has marked impairment in the ability to initiate and sustain a conversation with others. Her conversations often are very one-sided and lack reciprocity."
- (B) Learning: "[Claimant] has functional limitations in the areas of sustained attention and inhibitory control. [Claimant] has many problems with real world executive functioning. There is poor ability to modulate actions, responses, emotions, and behavior via appropriate inhibitory control. There is difficulty moving flexibly among actions, responses, emotions, and behavior. There also are problems with her developing ability to initiate, plan, organize, implement, and sustain future-oriented problem solving."
- (C) Self-Direction: "[Claimant's] behavioral problems impede her ability to function independently. When required to perform tasks that raise her level of anxiety, such as writing a digit a different way or participating in certain types of group activities in her social skills group, [Claimant]

withdraws or become oppositional with the function of avoiding the task. She similarly became avoidant when exposed to high levels of noise, such as during a fire drill, or when exposed to a feared object, such as the school nurse. Until recently, she used to tantrum when required to transition from a preferred activity in the classroom. [¶]
With regard to her emotional functioning, [Claimant] struggles with an extremely heightened level of anxiety. Her anxiety interferes with her functioning in many ways. For example, [Claimant] avoids even making bowel movements, unless treated with stool softener, and is too fearful to see a dentist. Until recently, she wouldn't even let her mother take her temperature with a forehead thermometer. Furthermore, coping skills are quite weak, and are at the equivalent of a child two years, 10 months old."

(D) Capacity for Independent Living: "Daily living skills are below average overall. Personal living skills are low, at the level of a child two years, 10 months old. With her fine motor problems, [Claimant] still can't close all fasteners. She is not even toilet-trained yet. Domestic living skills are below average, at the level of a child two years, eight months old. Not only does the student not [help] with simple household chores, she does not even clean up her play or work area at the end of an activity or put away her personal possessions."

(E) Economic Self-Sufficiency: "With [Claimant's] rigidity and impaired social skills, she is unlikely to show the flexibility needed to get along with a supervisor and coworkers."

EVALUATION BY DR. ARIZPE

11. Melissa Bailey Arizpe, Psy.D., licensed clinical psychologist, performed a psychological evaluation of Claimant, based on her evaluation of Claimant on September 9, 2011, and November 11, 2011. Dr. Arizpe prepared a written report of her findings.² She reviewed available records, including Dr. Blum's report, conducted clinical interviews, made behavioral observations, and administered the following testing: Wechsler Intelligence Scale for Children-Fourth Edition (WISC), Vineland Adaptive Behavior Scales-Second Edition (Vineland), Autism Diagnostic Observation Schedule-Module 3 (ADOS), and Gilliam Autism Rating Scale-Second Edition (GARS). She did not observe Claimant at school. Dr. Arizpe did not testify at the hearing.

12. Based on the results of her evaluation of Claimant, Dr. Arizpe concluded that Claimant did not meet the DSM-IV diagnostic criteria for Autistic Disorder. However, Dr. Arizpe diagnosed Claimant with Asperger's Disorder. She summarized her conclusion, in her report, in part, as follows:

The WISC was used to determine [Claimant's] cognitive functioning. She is functioning in the average to superior range on all subtests. Notably, her verbal skills are in the high average to superior range.

Adaptively, the Vineland was used to assess

² The written report has many typographical errors. For example, Dr. Arizpe identified Claimant as a "boy" and incorrectly used the pronoun "he" instead of "she." The errors establish sloppy report writing but do not invalidate Dr. Arizpe's findings.

[Claimant's] abilities. Based on her mother's endorsements, [Claimant] is functioning in the average range on the communication and motor skills domains. Her social skills are in the borderline range and her daily living skills are in the delayed range. Socially and emotionally, the ADOS and GARS were administered to [Claimant]. On the ADOS, [Claimant] scored below at the cut-off indicating no autism. On the GARS she did score in the "very likely" probability range of autism. However, these in isolation are not enough to diagnose autism. [Claimant] did have some repetitive vocalizations but they were not consistent. She was noted to ask questions and offer information with the examiner. In addition, she understood humor and showed a range of affect. Finally [Claimant] shows strength in her verbal skills which are not typical for a person with autism. Rather, based on current findings and reports, it is the opinion of this examiner that [Claimant's] symptoms are better categorized under Asperger's Disorder.³

³ Dr. Arizpe's summary also includes the statement, "In addition, to this, [Claimant] may have some mental health issues occurring." There is no evidence in the record indicating Claimant has been diagnosed with a mental health disorder.

TESTIMONY OF DR. KELLY

13. Thompson Kelly is a licensed clinical psychologist, who is WRC's chief of psychology. Dr. Kelly oversees WRC's psychology department and participates on WRC's eligibility committee. Dr. Kelly testified at the hearing based on his review of available records, including but not limited to the written reports by Dr. Blum and Dr. Arizpe, respectively. Dr. Kelly has never met or evaluated Claimant.

14. Dr. Kelly's opinion is that Claimant's profile, as reflected in the available records, is not consistent with a profile of autism. For example, Dr. Arizpe found Claimant was responsive and interactive with her and she showed spontaneous interaction, and Claimant did not exhibit marked impairment in eye contact. Further, Claimant's scores on cognitive testing reflected high verbal abilities. Dr. Blum's WISC results showed Claimant was in the gifted range linguistically. Persons who are autistic have substantially delayed communication skills. Dr. Kelly was "surprised" at Dr. Arizpe's diagnosis of Asperger's Disorder. He testified that the Asperger's diagnosis could be Dr. Arizpe's way of saying that Claimant has "spectrum characteristics" and because of her high verbal scores on the WISC, she qualified for an Asperger's diagnosis.

15. Dr. Kelly testified that eligibility for regional center services requires both an eligible diagnosis and a showing the person is substantially handicapped by the condition. Based on his review of records, Dr. Kelly opined that Claimant is not substantially handicapped in at least three of seven major life areas for the following reasons. His opinion finds deficits in only two areas. She is handicapped in the area of self-direction, based on the descriptions for "learning" and "self-direction" set forth in Dr. Blum's report (described in Finding 10, above). He also opined Claimant has deficits in the area of capacity for independent living. In Dr.

Kelly's opinion, Claimant is not impaired in receptive and expressive language, given her high verbal abilities. Deficits in pragmatic language are not sufficient. Next, Claimant is not substantially handicapped in learning, as her test scores indicate high academic and cognitive functioning. Dr. Kelly explained "learning" means that the person can learn a subject when placed in a learning situation. Claimant's strong academic and cognitive abilities demonstrate she can learn. In terms of economic self-sufficiency, Dr. Kelly's opinion that Claimant, given her high cognitive abilities, would be able to function in a work environment, but she would have difficulties in her social abilities. The life area of "mobility" is not at issue in this case, as Claimant is ambulatory and can move without equipment or devices.

TESTIMONY OF PARENTS

16. Claimant's mother and father testified at the hearing regarding Claimant's developmental background and current functioning. Mother now recognizes Claimant's present and past behavior as being consistent with autism, based on her own research, her conversations with other parents of autistic children, and comparing Claimant's functioning with that of her younger sister, whose self-care skills and reading social cues, for example, have surpassed Claimant's abilities. The parents have found Claimant is impaired in her communication, in that she cannot initiate and maintain a conversation with another person; she engages in an ongoing monologue with herself. She makes verbal statements in front of others but without the purpose or intent of engaging in conversation. She requires prompts to say hello, good-bye, and thank you. While she will answer questions on a preferred topic, she will cover her ears or put her face in the couch when questioned on a non-preferred topic. Claimant rarely makes eye contact with her family members. Claimant has difficulty socializing with

others. The parents have also observed Claimant engaging in repetitive, stereotyped behaviors. For example, Mother was present during Dr. Arizpe's administration of the ADOS; during that time, Claimant played with a metal apron attached to the table, banging it and moving it up and down. Other examples the parents have observed are Claimant spinning herself and spinning her toys. Claimant has also demonstrated fixations with objects, for example, carousels.

17. Mother feels that Claimant does not understand social expectations. For example, at birthday parties or other gatherings of children, Claimant will express, out loud, her displeasure about the party or having to be present, which is disruptive and rude. Claimant does not know how to read social cues and adjust her behavior depending on the environment and situation. For example, she does not lower her voice in quiet places, like the library or museum or during a church service. Claimant takes expressions literally. For example, when she heard the expression "keeps you on your toes," Claimant stared at Mother's feet. If Mother tells Claimant to stop "playing" with an object, Claimant will not stop because in her mind she is "touching" the object, not "playing" with it. Claimant gets anxiety and will shut down when frustrated or agitated. Claimant has poor safety awareness and does not know how to safely cross the street. Mother has to hold her hand but Claimant pulls away.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁴ A state level fair hearing

⁴ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the regional center's decision. Where a claimant seeks to establish eligibility for services, the burden is on the appealing claimant to demonstrate that the regional center's decision is incorrect. Claimant has met her burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a) defines "developmental disability" as:

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, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability." California Code of Regulations, title 17, section 54001 states, in pertinent part:

(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:

(A).Receptive and expressive language;

(B). Learning;

(C). Self-care;

(D). Mobility;

(E). Self-direction;

(F). Capacity for independent living;

(G). Economic self-sufficiency.

5. In addition to proving a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with

mental retardation.” (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

6. The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association, also known as DSM-IV-TR) is a well respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders.

7. The DSM-IV-TR diagnostic criteria for Autistic Disorder (299.00) are as follows:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
 - (1) qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
 - (b) failure to develop peer relationships appropriate to developmental level
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)lack of social or emotional reciprocity
 - (2) qualitative impairments in communication as manifested by at least one of the following:

- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - (d) persistent preoccupation with parts of objects
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder. (DSM-IV-TR, p. 75.)
8. The DSM-IV-TR states: "Asperger's Disorder is not diagnosed if criteria are met for Autistic Disorder." (DSM-IV-TR, p. 74.)s

9. The DSM-IV-TR differentiates Asperger's Disorder from Autistic Disorder as follows:

[Asperger's Disorder] differs from Autistic Disorder in several ways. In Autistic Disorder there are, by definition, significant abnormalities in the areas of social interaction, language, and play, whereas in Asperger's Disorder early cognitive and language skills are not delayed significantly. Furthermore, in Autistic Disorder, restricted, repetitive, and stereotyped interests and activities are often characterized by the presence of motor mannerisms, preoccupation with parts of objects, rituals, and marked distress in change, whereas in Asperger's Disorder these are primarily observed in the all-encompassing pursuit of a circumscribed interest involving a topic to which the individual devotes inordinate amounts of time amassing information and facts. Differentiation of the two conditions can be problematic in some cases. In Autistic Disorder, typical social interaction patterns are marked by self-isolation or markedly rigid social approaches, whereas in Asperger's Disorder there may appear to be motivation for approaching others even though this is then done in a highly eccentric, one-sided, verbose, and insensitive manner. (DSM-IV-TR, p. 83.)

10. Based upon the evidence presented, Claimant has met her burden of proof that she has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001. She has a disabling condition due to autism. Claimant's disability, attributable to autism, constitutes a "substantial disability" within the meaning of California Code of Regulations, title 17, section 54001. She has significant functional limitations in receptive and expressive language, learning, self-care, self-direction, and capacity for independent living, based on the matters in Factual Findings 6, 7, 10, 16, 17. She has difficulty initiating and maintaining conversations and communication with others; she is often engaged in a running monologue with herself. Although her test scores indicate high academic abilities, her disability interferes with her ability to learn from social cues and adjust to changing situations in her environment.

11. After weighing the competing expert opinions presented by Claimant and the Service Agency, respectively, the law is clear as to the weight to be given the testimony of the expert witnesses in this matter. The testimony of Dr. Blum, who actually evaluated and observed Claimant in her clinic and at school, is given greater weight than the testimony of Dr. Kelly, who conducted a record-review only. The Court in *People v. Bassett* (1968) 69 Cal.2d 122, 141, had occasion to do a detailed analysis of the use of expert testimony when the issue is one of mental competence. The Court in *Bassett* gave little weight to the testimony of the experts who had not examined the defendant therein, but merely conducted a record review. The Court did give substantial weight to the evidence presented by the defendant's experts who thoroughly examined, tested and interviewed the defendant. For these reasons, Dr. Blum's opinion and testimony is entitled to substantial weight over the opinions and testimony of Dr. Kelly. Dr. Kelly reached

his conclusions based solely on his review of records, including Dr. Arizpe's report. He never met or evaluated Claimant. His testimony regarding the meaning of Dr. Arizpe's conclusions appeared, at times, speculative, such as his explanation of how Dr. Arizpe may have derived her diagnosis of Asperger's Disorder.

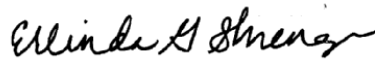
12. Based upon the evidence presented, Claimant has met her burden of proof that she has a substantial disability as defined by Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, section 54001. She has a disabling condition based on autism. Claimant is eligible to receive regional center services based on autism.

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ORDER

Westside Regional Center's determination that Claimant is not eligible for regional center services is overruled, and Claimant's appeal of that determination is granted. Westside Regional Center shall accept Claimant as a client forthwith.

DATED: August 27, 2012



ERLINDA G. SHRENGER

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.