

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

J.N.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2012020388

DECISION

Amy C. Yerkey, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on March 29, 2012, in Culver City, California.

Michelle N., Claimant's mother, represented J.N. (Claimant).¹

Lisa Basiri represented the Westside Regional Center (WRC or Service Agency).

The matter was submitted for decision on March 29, 2012.

ISSUE

The question in this matter is whether Claimant is eligible to receive regional center services under the Lanterman Act, by virtue of an autism diagnosis.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-11; Claimant's exhibit A.

Testimonial: Thompson J. Kelly, Ph.D.; Claimant's mother.

¹ Initials have been used to protect Claimant's privacy.

FACTUAL FINDINGS

1. Claimant is a three-year-old female. At two years old, she was referred to the regional center for an evaluation. Claimant was initially given a provisional diagnosis of Pervasive Developmental Disorder, and she received some regional center services.

2. By letter dated January 18, 2012, WRC informed Claimant's parents that the WRC eligibility team determined that Claimant was not eligible for regional center services. The stated reason for the decision was because Claimant is not substantially handicapped by intellectual disability, autism, cerebral palsy, epilepsy, or other condition similar to intellectual disability as referenced in the California Welfare and Institutions Code section 4512, and the California Code of Regulations, title 17, section 54000.

3. Claimant timely filed a fair hearing request.

4. Claimant underwent multiple evaluations, and there was a discrepancy between the WRC findings, and those outside WRC. To begin with, WRC requested a psychological evaluation to address Claimant's eligibility for regional center services after she turned three years old. Carol Kelly, Ed.D., performed a psychological evaluation of Claimant in February 2011. Dr. Carol Kelly administered the Wechsler Preschool and Primary Scale of Intelligence III (WPPSI-III), the Gilliam Autism Rating Scale-2 (GARS-2), and the Vineland Adaptive Behavior Scales-II (VABS-II) to assess Claimant. On the WPPSI-III, Claimant obtained a verbal composite score and a general language composite score in the average range; her performance composite score and full scale composite scores were within the low average range. Using the GARS-2, with Claimant's mother as the informant, Dr. Carol Kelly found that Claimant's probability of autism was unlikely. On the VABS-II, Claimant scored as follows: within the low average range on the communication domain; within the borderline range on the daily living skills and socialization domains; and in the upper limits of the borderline range on the motor skills section. In summary, Dr. Carol Kelly did not find any diagnosis on Axis II and III, and noted that Claimant may have a

receptive-expressive language disorder. She noted that her observation of Claimant, and her interview with Claimant's mother did not indicate that Claimant presents with behaviors on the autism spectrum.

5. Over the summer, Claimant's mother began noticing what she believed were autistic-like behaviors; for example, Claimant repeated random phrases. This prompted Claimant's mother to obtain an evaluation from UCLA. Pegeen Cronin, Ph.D., Associate Clinical Professor, and Tamar Apelian, Psy.D., Staff Psychologist at the Semel Institute for Neuroscience and Human Behavior, Stewart and Lynda Resnick Neuropsychiatric Hospital at UCLA (UCLA), assessed Claimant in July 2011. They administered the following measures: Achenbach Child Behavior Checklist (CBCL); Achenbach Teacher Report Form (TRF); Autism Diagnostic Interview – Revised (ADI-R); Autism Diagnostic Observation Schedule (ADOS) – Module I; Mullen Scales of Early Learning (MSEL); and the Vineland Adaptive Behavior Scales – Second Edition (VABS-II). After a two-day assessment, they issued a detailed 32-page report, in which they diagnosed Claimant with Autistic Disorder.

6. The ADOS assessment test is considered the best practice for diagnosing autism. When UCLA administered this test Claimant demonstrated communication issues: “[Claimant evidenced significant deficits in the area of verbal communication . . . [Claimant]’s speech was more stereotyped and repetitive, such that she often repeated the same utterances and relied on certain catch phrases. On multiple occasions, [Claimant] also immediately echoed the verbalizations of others with the same intonation.” With regard to social behaviors, the ADOS revealed that “[Claimant] also displayed several impairments in her reciprocal social interaction,” citing examples.

7. The autism diagnosis from UCLA is consistent with the findings from Pediatric Minds, Early Childhood Treatment Center (Pediatric Minds), who treated Claimant for several months, ending in November 2011. In its discharge summary report, Pediatric Minds noted that Claimant has a history of behavioral problems and eloping behaviors.

Her presenting concerns included daily behavioral meltdowns and temper tantrums four to five times per day, lasting an average of 20 minutes. During the meltdowns, she is aggressive toward her older siblings. She also displays self-injurious behaviors and will hit herself during meltdowns. She has limited ability to stay focused and is easily distracted. She has poor safety awareness and needs constant monitoring for her safety; for example, she will grab hot objects. Pediatric Minds noted that Claimant shows social deficits and becomes very anxious in front of other children, and will “shut down.”

A team of professionals from Pediatric Minds evaluated Claimant, using the following assessments: Adaptive Behavior Assessment System, 2nd Edition, (ABAS-II); Sensory Profile; Psychoeducational Profile – 3rd Edition, Mullen Scales of Early Learning: AGS Edition, and direct observation. As of result of these diagnostic tests, Pediatric Minds found the following in its 17-page report:

Testing revealed that [Claimant] is having difficulty with some aspects of the activities of daily life, likely secondary to deficits in sensory processing. [Claimant] is having difficulty with processing sensory information and these are likely to be interfering with activities of daily life. Most prominent were difficulties with Auditory Processing, Multisensory Processing, and how these impact her emotional and behavioral responses.

Other testing results revealed that [Claimant] is showing weaknesses in her cognitive functioning and significant deficits in fine motors abilities which may be impacting her adaptive skills. Despite intact pre-academic skills, her overall cognitive and adaptive skills were found to be significantly

delayed as evidenced by difficulties with communication, her resourcefulness in her community, issues with health and safety, and leisure, as well as self-care, self-direction, and social skills.

During her treatment, [Claimant] exhibited severe anxiety and irritability which would often impede her ability to learn. When she was able to regulate herself emotionally with assistance from a therapist, she was able to achieve pre-academic and relational progress.

These scores suggest that her cognitive and adaptive functioning skills require ongoing intervention and treatment.

8. These autism diagnoses are also consistent with the findings from Claimant's school, El Segundo Unified School District, Eagle's Nest Preschool (Eagle's Nest Preschool). In November 2011, Eagle's Nest Preschool conducted a Special Education Assessment, which consisted of a parent interview, an interview with Pediatric Minds, behavioral observations of Claimant in the preschool classroom and in small group and individual settings, as well as review of previous assessments. In sum, Claimant qualified for special education, based on a primary eligibility of "Autistic-Like Behaviors."

9. Thompson J. Kelly, Ph.D., WRC Chief Psychologist and Manager of Intake and Eligibility, testified at the hearing. Dr. Kelly reviewed the conflicting diagnoses, and he wanted to observe Claimant for himself. In December 2011, Dr. Kelly, along with Mayra Mendez, Ph.D., who has an extensive background in diagnosis and treatment for young children, among other areas, visited Claimant's school for approximately one

hour, to observe her in a natural setting. During the school visit, Dr. Kelly and Dr. Mendez observed that Claimant was able to transition from one activity to another without incident, she responded to verbal and visual prompts, and she was able to orient to appropriate tasks. Dr. Kelly noted that Claimant interacted with her peers.² Dr. Kelly and Dr. Mendez reported their findings in a three-page memorandum. In sum, Dr. Kelly did not observe Claimant display any characteristics which would support a formal diagnosis of autism. Dr. Kelly conceded that there were some social delays and some idiosyncratic behaviors, which might cause Claimant to be “on the spectrum,” but he maintained that Claimant did not meet the classic criteria, citing that she did not engage in whole-body rocking or hand-flapping. Dr. Kelly observed that Claimant was easy to engage and did not have atypical physical mannerisms; nor did he observe any behavioral challenges. He acknowledged that Claimant is not interacting socially in a way that is typical for her age.

10. In response to the school district’s assessment of Claimant, Dr. Kelly explained that “autistic-like” disorder is not a formal diagnosis; rather, it focuses on whether Claimant had deficits in communication and social behavior. However, as noted in Dr. Kelly’s own report, deficits in social behavior and communication are included in the criteria description for a formal diagnosis of autism.

11. On cross-examination, Dr. Kelly conceded that he did not contact Claimant’s mother to obtain information, and in hindsight, he should have taken her

² Initially, Dr. Kelly had referred to Claimant’s interaction with a “friend,” but after a subsequent conversation with the school psychologist (who also participated in the observation), Dr. Kelly amended his report to note that Claimant had interacted with a “peer.” On cross-examination, Dr. Kelly acknowledged that he mistakenly referred to this other child as a friend.

observations into consideration. Dr. Kelly could not explain the discrepancies between assessments, other than to note that autism is a very subjective diagnosis. He noted that the WRC eligibility team was perplexed; the varying reports seemed like they were describing a different child. When questioned about the possibility that when he observed Claimant, that she may have been having a "good" day, Dr. Kelly responded that autism is a chronic and pervasive disorder that impairs all functions, and that even on a good day, the characteristics would still be present. He maintained that in the school setting, he did not observe Claimant display characteristics consistent with an autism diagnosis. Dr. Kelly went on to state that neither her teachers nor the school psychologist reported that Claimant displayed autistic-like characteristics; however, the records show that in fact, multiple sources reported behaviors which Dr. Kelly contended that Claimant did not display. For example, as established by Claimant's mother's testimony, Claimant does engage in hand-flapping, toe-walking, and perseverative speech and behaviors. The Eagle's Nest Preschool report, from November 2011, noted that Claimant has issues with self-stimulatory behaviors, such as hand-flapping when excited, eye gazing during academic tasks, verbal stemming, and stating phrases repeatedly. Dr. Kelly noted that autism is sensory-related, and claimed that he did not observe Claimant demonstrating characteristics which were sensory response; however, the previous examples establish the contrary.

12. Dr. Kelly disagreed with UCLA's diagnosis. He noted that during the UCLA assessments, Claimant did not display maladaptive behaviors, she did not tantrum or demonstrate an inability to be redirected. However, as described above in the Pediatric Minds report, Claimant has frequent tantrums, difficulty with self-direction, and required assistance to regulate herself. Dr. Kelly stated that the primary deficits of autism are significant social and communication issues, and yet Claimant performed best on the language portions of the UCLA assessments. He maintained that if Claimant were truly

autistic, she would have scored lower. Dr. Kelly opined that Claimant was able to participate in many sequences of tasks, at a young age, and she performed quite well. He noted that UCLA described Claimant as affable, transitioning, engaging, and not perseverative. However, the UCLA assessment includes observations which are poignantly characteristic of autism, such as “[Claimant] displayed restricted interests and repetitive behaviors that sporadically intruded with the ease of the assessment . . . Further, [Claimant] engaged in sensory seeking behaviors by rubbing textures” and that her mannerisms “included hand flapping and posturing when excited and spinning her entire body.” Moreover, the UCLA assessment found that Claimant “demonstrated delays in communication and social interaction and repetitive interests and behaviors that indicate the diagnosis of Autistic Disorder.”

13. Dr. Kelly acknowledged that Claimant demonstrated mild autism-spectrum characteristics. WRC considered making Claimant eligible under a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified; however they did not find Claimant’s disability to be substantially handicapping. In direct contravention, the UCLA assessment found that Claimant “evidences substantial disability, which is gross and sustained, is evident across multiple areas of adaptation and functioning, and cannot be attributed to other family/cultural issues.” Considering the length of time spent in reaching this conclusion, combined with the diagnostic tools used (several of which included tests that Dr. Kelly acknowledged were the best practice tests for diagnosing autism), and its consistency with the observations and assessments of other service providers, UCLA’s assessment is credited over Dr. Kelly’s opinion.

14. Claimant’s mother testified at the hearing. As established by her testimony, Claimant’s behaviors have worsened; she often tantrums at home and is aggressive toward her siblings. She had great difficulty with socialization. Claimant needs to be taught how to play and interact socially. Claimant’s parents have been

privately funding multiple services for Claimant, such as intensive behavior and speech therapy, which has helped Claimant. Claimant's mother noted that three independent sources (i.e.; UCLA, the school, and Pediatric Minds) recognized that Claimant has autism. Further, UCLA has an excellent reputation and its report should be given appropriate weight.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's request for regional center services, as set forth in Factual Findings 1 through 12, and Legal Conclusions 2 through 5.

2. Claimant bears the burden of proving, by a preponderance of evidence, that she is eligible for government benefits or services. (*See* Evid. Code, § 115; *see also Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161-162.)

3. The Lanterman Developmental Disabilities Services Act ("Lanterman Act") governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, Claimant must show that she suffers from a developmental disability that "originates before an individual attains 18 years, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual." (Welf. & Inst. Code, § 4512, subd. (a).)

4. "Developmental disability" is defined to include 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 individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).)

5. "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" in the following categories: (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. (Welf. & Inst. Code, § 4512, subd. (l).)

6. Given this criteria, Claimant proved, by a preponderance of the evidence, that she has a developmental disability that constitutes a substantial disability, and is likely to continue indefinitely. Claimant has shown that she has a developmental disability; namely, autism. Claimant presented evidence from multiple sources, including independent evaluations, which indicated she has autism. In sum, Claimant is eligible for regional center services under the Lanterman Act because she meets the specified criteria.

ORDER

Claimant's appeal is granted. Westside Regional Center's decision denying Claimant's eligibility for regional center services is reversed.

DATED: April 9, 2012

AMY C. YERKEY
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.