

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KHYLE D.,

Claimant,

v.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

OAH No. 2012031109

DECISION

Administrative Law Judge Glynda B. Gomez, State of California, Office of Administrative Hearings, heard this matter in Lancaster, California, on May 16, 2012. Kyle D. (Claimant) was represented by advocate Brian Allen. Claimant's mother (Mother) was present for the hearing.

North Los Angeles County Regional Center (NLACRC) was represented by Contract Administrator Rhonda Campbell. At the request of the parties, the matter was consolidated for hearing purposes only with OAH case number 2012031110.¹

At Claimant's request, the record was held open for two days for submission of a closing brief. Claimant's closing brief was received on May 18, 2012 and marked as Exhibit

¹ Separate decisions will be issued for each case.

C for identification. The record was closed, and the matter was submitted for decision on May 18, 2012.

ISSUE

Whether NLACRC properly concluded that the May 2005 determination by Harbor Regional Center (HRC) that Claimant was eligible to receive regional center services was clearly erroneous.

FACTUAL FINDINGS

1. In May of 2005, HRC determined that claimant, then age two years and seven months, born August 21, 2002 was developmentally disabled and thus eligible for regional center services by reason of mild mental retardation. In November of 2005, Claimant's family moved to Lancaster within the catchment area of NLACRC. In 2011, NLACRC conducted a reassessment of Claimant and concluded that HRC's prior determination of eligibility was clearly erroneous. In a Notice of Proposed Action dated March 13, 2012, NLACRC informed Claimant that it had determined that he was not developmentally disabled, and therefore was no longer eligible for regional center services. Claimant filed an appeal from that determination, seeking to retain the respite and behavior services that he was receiving pursuant to his Individual Program Plan (IPP). Claimant contends that he is eligible for regional center services by reason of mild mental retardation and/or a condition that is similar to mental retardation and requires treatment similar to that of mental retardation.²

2. Carol Kelly, (Kelly), is a licensed psychologist and a vendor of the HRC. Kelly conducted a psychological evaluation of Claimant in April of 2005 in connection with HRC's consideration of Claimant's eligibility for services under the Lanterman Development

² This is sometimes referred to as the "fifth category" of eligibility.

Disabilities Act (Welf. & Inst. Code, § 4500 et seq.) (Lanterman Act).

3. Kelly attempted to administer the Stanford Binet Intelligence Scale-Fifth Edition (Stanford Binet), a standardized intelligence test, to assess Claimant's cognitive functioning. However, Claimant was unable to complete the test. The assessor opined that Claimant did not understand the instructions and was unwilling to complete the test. Kelly was unable to calculate a full scale intelligence quotient for Claimant because he failed to complete the Stanford Binet. Kelly administered the Vineland Adaptive Behavior Scales (VABS) to assess Claimant's adaptive functioning. The VABS is a behavior scale form that is filled out by parents or a caregiver. In her assessment report, Kelly noted that Claimant had limited expressive language. Kelly interviewed Mother, observed Claimant at play, and reviewed HRC's file on Claimant. Claimant's VABS scores showed deficits and delays in adaptive functioning. On the VABS, Claimant received a standard score of 67 with an age equivalence of one year and three months in the communication domain. In daily living skills, Claimant received a standard score of 62, also a one year and three months age equivalency. Claimant received a standard score of 62 in the socialization domain, which is within the 11 month age equivalency. Claimant also received a standard score of 54 in motor skills, which is within the one year age equivalency. The assessor noted that Claimant was experiencing some hearing problems and had been undergoing hearing testing.

4. On May 16, 2005, the HRC eligibility team determined that Claimant was eligible for regional center services based on Kelly's diagnosis of mild mental retardation and noted that the diagnosis should be revisited in two years with a new psychological assessment.

5. Los Angeles Unified School District (LAUSD) found Claimant eligible for special education as developmentally delayed in August of 2005. The LAUSD school psychologist, using alternative measures of intelligence and cognitive performance,

estimated that Claimant was functioning in the average range of intelligence, but was delayed in the areas of communication and social/ emotional development. Based upon the delays, Claimant was made eligible for special education services.

6. In November of 2005, Claimant's family moved from Los Angeles to Lancaster. Because of the move, Claimant transferred from the HRC catchment area to the NLACRC catchment area. Upon transfer, NLACRC continued providing services to Claimant without further assessment.

7. Claimant continued to receive special education services when he transferred to Lancaster school district until February 2007 when he was re-assessed, found not eligible for special education services, and exited from the special education.

8. On May 31, 2011, a new Individualized Education Program (IEP) meeting was held based upon Mother's request that Claimant be reassessed and made eligible for special education. A school Resource Specialist administered the Woodcock-Johnson Tests of Achievement III (WJIII) to Claimant. Claimant scored in the above average range on all subtests of the WJIII except math calculation where he scored in the superior range. Claimant's classroom performance on classroom testing measures ranged from below average to above average. Claimant continued to struggle with social, emotional and attention deficits, but was not found eligible for special education.

9. In 2011, Claimant's NLACRC service coordinator reviewed his file and requested that he be reassessed. NLACRC psychologist Heike Ballmaier conducted a psychological evaluation on May 24, 2011. Ballmaier used the Wechsler Intelligence Scale for Children-fourth edition (WISC-IV), a standardized intelligence test, the Wide Range Achievement Test, fourth Edition (WRAT-4) to measure academic achievement, the Adaptive Behavior Assessment System, Second Edition (ABAS-II), the Conners' Parent Rating Scale and a Child Supplemental Inventory 4 to evaluate adaptive functioning. Ballmaier also administered the Beery-Buktenica Developmental Test of Visual-Motor

Integration, Fifth Edition (VMI) to assess Student's visual motor integration. Claimant performed in the overall low average to average range on the cognitive testing. He received a composite score of 88 on the verbal comprehension section of the WISC-IV which is within the low average range, a composite score of 104 on the perceptual reasoning section, which is within the average range, a composite score of 91 on the working memory section which is within the average range and a composite score of 78 on the processing speed measure, which is within the borderline range. Claimant performed in the average range or above on all achievement tests. His adaptive behavior was measured using the ABAS-II and Conners' rating scales provided to his Mother. Claimant's adaptive behavior scores were in the extremely low range and were in the clinically significant range showing oppositional behavior, social problems, impulsivity and inattention. Ballmaier diagnosed Claimant as having Conduct Disorder and Attention Deficit Hyperactivity Disorder (ADHD).

10. Claimant has aggressive behaviors at home and at school. Claimant becomes frustrated and hits his brother with his fists. He also destroys property, steals and has been violent with pets and small animals. Claimant is supervised at all times and must be monitored to avoid behaviors such as putting lotion in light sockets and breaking light bulbs. Claimant is obsessed with lighters and likes to start fires. Claimant refuses to brush his teeth and must be prompted to brush his hair and bathe. Claimant was evaluated by Total Programs, a NLACRC vendor, which conducted a functional behavioral assessment in his home. Total Programs recommended a 30 hour per month behavior intervention program to target Claimant's aggressive behaviors and parent training in behavior management strategies.

11. The Diagnostic and Statistical Manual of Mental Disorders Fourth Edition, Text Revised (DSM-IV-TR) provides the criterion used by psychologists to determine a mental retardation diagnosis. The DSM-IV-TR states:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

12. The DSM-IV-TR specifies four degrees of severity of mental retardation: Mild Mental Retardation (IQ level 50-55 to approximately 70), Moderate Retardation (IQ level 35-40 to 50-55), Severe Mental Retardation (IQ level 20-25 to 35-40) and Profound Mental Retardation (IQ level below 20 to 25).

13. Claimant's full-scale IQ was 88, meaning he is not mentally retarded and there was no evidence to support the proposition that Claimant has a condition that closely resembles mental retardation or that requires treatment similar to that required by a person with mental retardation. Claimant has low to average cognitive ability. His behavior problems are consistent with his diagnosis of ADHD and Conduct Disorder.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4643.5, subdivision (b), provides that once an individual has been found to have a developmental disability, he or she "shall remain eligible for services . . . unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous." The evidence at hearing demonstrated that NLACRC conducted a comprehensive reassessment that satisfies the statutory

requirement.

2. The next consideration is whether HRC's determination in 2005 that claimant had a developmental disability that constituted a substantial handicap for him which could be expected to continue indefinitely was clearly erroneous.

3. The Lanterman Act defines the term "developmental disability" in subdivision (a) of section 4512: "'Developmental disability' means a disability that originates before an individual attains 18, continues, or can be expected to continue indefinitely, and constitutes a substantial handicap for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include 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." (See also Cal. Code Regs., tit. 17, § 54000, subd. (a).)

4. The term "substantial disability" is defined in subdivision (l) of section 4512: "'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: [¶] (1) Self-care. [¶] (2) Receptive and expressive language. [¶] (3) Learning. [¶] (4) Mobility. [¶] (5) Self-direction. [¶] (6) Capacity for independent living. [¶] (7) Economic self-sufficiency." (See also Cal. Code Regs., tit. 17, § 54001, subd. (a).)

5. Here, Claimant has been assessed multiple times by two school districts and by the NLACRC. Each time, he has performed in the low to average range on standard and non-standard measures of cognitive ability. Claimant does not demonstrate appreciable deficits in the adaptive areas of self-care, receptive and expressive language, learning, self-direction, independent living or economic sufficiency. Instead, he demonstrates behavior

difficulties consistent with his diagnosis of ADHD and Conduct Disorder.

6. HRC's diagnosis of mild mental retardation was made when Claimant was two and a half years old. The assessment was based upon incomplete testing data and made when he was suffering from a hearing problem. At the time of the diagnosis, HRC's psychologist recommended that the diagnosis be revisited in two years.

7. HRC's diagnosis of mild mental retardation was clearly erroneous because it could not be substantiated by any subsequent cognitive testing, did not consider the effects of Claimant's hearing impairment, did not and was not likely to continue indefinitely, and did not constitute a substantial handicap for Claimant.

ORDER

Claimant's appeal of NLACRC's determination of ineligibility for continued regional center services is denied. Claimant is no longer eligible for regional center services.

DATED: _____

Glynda B. Gomez

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal the decision to a court of competent jurisdiction within 90 days of receiving notice of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)