

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NANCIE C.,

Claimant,

v.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case No. 2012060757

DECISION

Administrative Law Judge Jankhana Desai, Office of Administrative Hearings, State of California, heard this matter on September 13, 2012, in Culver City, California.

Nancy C.¹ (Claimant) was present for part of the hearing; she was represented by Jane DuBovy, Attorney at Law. Fair Hearing Coordinator Lisa Basiri represented the Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received on September 13, 2012. The record was held open to allow the parties to submit written closing argument by the close of business on October 1, 2012. Both parties timely submitted closing briefs. Claimant's closing brief was marked as Exhibit C, and WRC's closing brief was marked as Exhibit 18. On October 12, 2012, the record was reopened to allow Claimant to submit additional

¹ The surnames of Claimant and her family have been omitted to protect their privacy.

evidence by October 29, 2012, and to thereafter allow both parties to submit supplemental closing briefs by November 5, 2012. On October 29, 2012, Claimant submitted additional evidence marked and received as Exhibit D. On November 5, 2012, Claimant submitted a supplemental closing brief marked as Exhibit E. On November 21, 2012, the record was reopened to have a telephonic conference with the parties, which was held on December 5, 2012, after which the record closed and the matter was submitted.

ISSUE

The parties agreed that the following issue is to be decided in this case:

Did WRC properly conclude that its determination in 1999 that Claimant was eligible to receive regional center services on the basis of autism was clearly erroneous?

FACTUAL FINDINGS

1. Claimant is an unconserved 19-year-old female who receives services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500, et seq.² In June 1999, WRC determined that Claimant was eligible for regional center services on the basis of a diagnosis of autism. She has been receiving services since that time. In 2011, WRC reassessed Claimant's eligibility and concluded that its prior determination of eligibility was clearly erroneous. In a letter and a Notice of Proposed Action dated May 18, 2012, WRC informed Claimant that it had determined that she does not have an eligible regional center diagnosis, and therefore she was no longer eligible for regional center services. Claimant filed an appeal from that determination.

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

INITIAL ELIGIBILITY

2. Efrain A. Beliz, Jr., Ph.D., a clinical and forensic psychologist, conducted a psychological evaluation of Claimant in June 1999, when Claimant was six years old. Dr. Beliz administered the Peabody Picture Vocabulary Test III, Leiter International Performance Scale, Wide Range Achievement Test-3, and the Vineland Adaptive Behavior Scales test. Aside from conducting formal testing, Dr. Beliz also gathered Claimant's history from her mother and clinically observed Claimant's behaviors. Dr. Beliz wrote a report in which he concluded that Claimant had autistic disorder. Dr. Beliz did not administer the Autism Diagnostic Observation Scale (ADOS) test; however, the evidence showed that the ADOS test was not utilized in 1999.

3. In his report, Dr. Beliz wrote:

Nancie meets diagnostic criteria for Autism. She does not use her language to communicate with others and exhibits little to no social reciprocity. She prefers to isolate herself from others and has a difficult time with changes in her routine. Nancie engages in a variety of repetitive behaviors and does not responded [sic] appropriately to her environment.

4. The Service Agency's eligibility review committee found Claimant eligible for regional center services in 1999. Claimant has been receiving services since that time.

SCHOOL

5. In 1996, a preschool assessment was conducted and Claimant was assessed by the school district as being qualified for Special Education due to a learning disability. She was reevaluated in the first grade and was again found eligible due to a specific

learning disability. Beginning in sixth grade, Claimant was placed in a school specializing in children with autism. Claimant currently attends a transition program at the same nonpublic school.

CURRENT STATUS

6. Claimant's April 12, 2012 Individual Program Plan (IPP) indicated that no formal program is funded by WRC. As set forth in the IPP, Claimant lives with her maternal grandmother, aunt, and uncle. She has irregular contact with her mother and has no contact with her father. She also has a sister with whom she has regular contact. Claimant is under the care of a psychiatrist for a diagnosis of depression, and is on medication to treat her depression. She has a history of depression and self-injurious behavior in the form of cutting her forearms. She takes antidepressant medication, but does so inconsistently if not supervised. Claimant is also seen weekly by her therapist at school. She is a full-time student at a transition program and also takes an art class at a community college. She has her own art business and is able to generate a small income from the business. She is an excellent artist. She is independent with regard to hygiene, is able to prepare simple meals, do her laundry, and clean. She has a checking account and a debit card but needs assistance with money management and budgeting. She also has a Paypal account. Claimant currently takes the bus with accompaniment; she is afraid to take the bus alone due to fear of getting lost, of being robbed, or being approached by strangers. She does not drive and receives rides from family members. A cab takes her to and from her school and then her college counselor drives her to and from her art class.

7. Claimant testified at hearing. She presented well and was able to understand and answer the questions presented to her. She testified that she wishes to be more independent and pursue her work in the art business. She also testified that she does not feel that she is ready to be fully independent and if her regional center services were stopped, she fears that she may "go backwards."

ELIGIBILITY RE-EVALUATION

8. Claimant was re-evaluated on November 8 and 21, 2011, by Janet Wolf, Ph.D. to monitor her progress and update her areas of need in view of her gradual transition from public school into adulthood. Dr. Wolf administered the Wechsler Adult Intelligence Scale-IV, ADOS Module 4, Vineland Adaptive Behavior Scales, and the Thematic Apperception Test (TAT). On the Vineland, Claimant scored a 69 in communication domain, which, according to Dr. Ann Simun, Psy.D., the expert who testified on Claimant's behalf, shows that Claimant is significantly impaired in this domain. On the ADOS Module 4, Claimant scored in the autism spectrum cut-off in communication, in the autism spectrum range in reciprocal interaction, and her total score was at the autism spectrum cut-off level. Although Dr. Wolf administered the ADOS, she wrote in her report, "To the best of my knowledge, the validity of the ADOS in differentiating between autism and other diagnoses has not been assessed." No school observation or teacher interviews were described in Dr. Wolf's report. Nor do any family interviews seem to have been conducted by Dr. Wolf. Dr. Wolf diagnosed Claimant with depression with self-injurious behavior, per history, and wrote that Claimant "did not meet diagnostic criteria for Autistic Disorder." Although Dr. Wolf was part of WRC's original assessment team in 1999, she does not address why the original assessment was erroneous.

9. The Service Agency's position is that its original diagnosis of autistic disorder from 1999 was clearly erroneous and not supported by the evaluation. It asserted that Claimant does not have a diagnosis of autistic disorder, nor does she demonstrate a substantial disability in three or more areas of major life activities. In a letter dated May 2, 2012, the Service Agency informed Claimant that its position was that Claimant's symptoms are "more consistent with a mental health diagnosis of Major Depressive Disorder."

10. Claimant's position is that Dr. Wolf did not conduct a comprehensive

reassessment. She, therefore, had Dr. Simun conduct an additional reassessment in August 2012. Dr. Simun conducted a Brief Social Emotional Evaluation, and administered the ADOS Module 4, Adaptive Behavior Assessment System II (ABAS-II), ASEBA (Achenbach) Child Behavior Checklist (CBCL), ASEBA Self Report (SRF), and the Gilliam Autism Rating Scale 2nd Edition (GARS-2). Dr. Simun interviewed Claimant's grandmother and teacher, conducted an in-office clinical observation of Claimant, conducted an individual diagnostic interview, reviewed the records, and conducted an in-school observation of Claimant. The psychological assessments conducted by Drs. Beliz and Wolf were included in the records that Dr. Simun reviewed.

- a. Dr. Simun administered the ADOS Module 4 and found that Claimant's language skills were "abnormal and consistent with Autism spectrum conditions." Dr. Simun also wrote in her report, "[Claimant] scored at the cutoff for Autism in the area of communication and social interaction, and above the overall cutoff for Autism. These findings are consistent with Autism."
- b. In the area of social emotional functioning, Dr, Simun wrote:

As noted above under the Adaptive scales, Nancie's social skills are significantly delayed. In addition, her leisure skills are significantly impaired. Nancie also has significantly impaired community skills. Self-direction was also impaired because she has significant difficulties managing her emotional reaction and dealing with frustration, changes of plan, and emotional expression. These latter issues appear to be resulting from the cognitive rigidity and emotional volatility associate [*sic*] with Autism and are not consistently representing depressive symptomology.

- c. Dr. Simun also conducted the GARS-2 via interview with Claimant's maternal grandmother. Dr. Simun reported that Claimant's scores in "all areas were significant, and the overall score was significant, in the probable range of Autism." The areas in which Claimant's scores were significant included social interaction, stereotyped behavior, and communication patterns. Dr. Simun reported that Claimant "tends to be withdrawn in group situations" and "has problems with eye contact." Claimant's grandmother reported that Claimant tends to be withdrawn in group situations, which was consistent with Dr. Simun's observation of Claimant at her school in August 2012. Dr. Simun noted that at school Claimant "sat alone and was not observed to look at or interact with her peers."
- d. Dr. Simun wrote that Claimant has made "great strides in the area of speech, language, socialization, repetitive behaviors, and academics." At the hearing, she also explained that it is expected that a child with autism who has received intervention would make positive changes, but that does not mean that the person no longer has autism. Therefore, despite Claimant's progress, Dr. Simun concluded that Claimant has autism. In her report, she wrote:

Current evidence including teacher interviews, observation in multiple settings, historical records, formal rating sales, multiple interviews (client, grandmother, school staff), and self-rating scales clearly shows that Nancie's Autism continues to be present and that Autism is negatively impacting Nancie's ability to independently function in the areas of community integration, self-direction, self care and socialization.

- e. Dr. Simun also diagnosed Claimant with Major Depressive Disorder, partially

controlled. At the hearing, Dr. Simun explained that Claimant can have both autism and depression.

11. Dr. Thompson Kelly, Ph.D., licensed psychologist and WRC's chief psychologist, testified at the hearing. He opined that, although he felt that Dr. Wolf's report gave more examples of Claimant's specifics than did Dr. Simun's report, Dr. Simun's report was comprehensive and met the best practice standards of the industry. Although Dr. Kelly reviewed the records, he has never personally met or observed Claimant. Dr. Kelly summarily opined that Dr. Beliz's report was not comprehensive, but did not elaborate on specifics as to why Dr. Beliz's report was not comprehensive. Dr. Kelly did, however, suggest that the evaluation portion of Dr. Beliz's report was too short. Dr. Kelly opined that WRC's 1999 diagnosis was clearly erroneous. Like Dr. Simun, he testified that depression is commonly co-morbid with developmental disabilities including autism, and that he knows of other high functioning autistic patients who also suffer from depression.

LEGAL CONCLUSIONS

1. 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 from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous."

2. Section 4512, subdivision (a) defines "developmental disability" as follows:

"Developmental disability" means 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. 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.

3. California Code of Regulations, title 17, section 54000 provides:

(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social

functioning which originated as a result of the psychiatric disorder or

treatment given for such a disorder. Such psychiatric disorders include

psycho-social deprivation and/or psychosis, severe neurosis or personality

disorders even where social and intellectual functioning have become

seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests

as a significant discrepancy between estimated cognitive potential and actual

level of educational performance and which is not a result of generalized

mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

4. California Code of Regulations, title 17, section 54001 provides:

(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.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

- (c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.
- (d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

EVALUATION

5. The appropriate inquiry in this case requires that any change in Claimant's status as a regional center client is supported by evidence that the original determination of eligibility was "clearly erroneous." This means the burden rests with the Service Agency to offer proof that Claimant is not developmentally disabled. All of the evidence and arguments have been considered and it is determined that WRC did not establish that its original determination that Claimant has a developmental disability is clearly erroneous.

In 1999, Dr. Beliz based his assessment on clinical observations, interview, and formal testing. He concluded that Claimant met the diagnostic criteria for autistic disorder, and the Service Agency's eligibility committee, which included Dr. Wolf, subsequently found Claimant to be eligible for regional center services. Claimant has been receiving services, and the intervention has assisted Claimant in making positive strides. These positive strides are insufficient to establish that the original diagnosis was clearly erroneous. As late as August 2012, Dr. Simun evaluated Claimant and diagnosed her with autism. Dr. Simun interviewed Claimant's grandmother and teacher, conducted an in-office and in-school clinical observation of Claimant, conducted an individual diagnostic interview, and reviewed the records. The Service Agency's own chief psychologist, Dr. Kelly, concluded that Dr. Simun's evaluation was comprehensive and met the best practices standard. It is difficult to label Dr. Beliz's diagnosis as clearly erroneous when it was made

before Claimant received years of services and when it has recently been confirmed. In the existing circumstances, Dr. Wolf's lone present dissenting diagnostic opinion is insufficient to satisfy the Service Agency's burden of proof. Finally, Claimant's diagnosis of depression does not rule out the presence of autism because, as the Service Agency acknowledged, autism can be co-morbid with depression.

Accordingly, Claimant continues to be eligible for regional center services.

ORDER

Claimant's appeal from the Service Agency's reassessment of her eligibility is granted; Claimant continues to be eligible for Lanterman Act services.

DATED: December 19, 2012

_____/s/_____

JANKHANA DESAI

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days.