

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2016100558

DECISION

This matter came on regularly for hearing on March 13, 2017, in Culver City, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Claimant was represented by her mother, who is her authorized representative. (Names are not used in order to protect their privacy.) Westside Regional Center (WRC or Service Agency) was represented by Lisa Basiri, Fair Hearing Coordinator.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act; Welfare and Institutions Code section 4500 et seq.)?

EVIDENCE RELIED UPON

Exhibits: Service Agency exhibits 1 through 10.

Testimony of: Service Agency witness Dr. Thompson Kelly, Claimant's mother and father.

FACTUAL FINDINGS

1. Claimant is a three-year-old female who previously received services from WRC under the Early Start program.¹ She resides with her mother, father and two brothers, one of whom is a WRC consumer due to a diagnosis of autism. As described in more detail below, the Service Agency claims that Claimant does not have a diagnosis of an eligible developmental disability. Claimant contends that she is eligible based on the developmental disability of autism.

2. As described in more detail below, the Service Agency evaluated Claimant and determined she was not eligible for services. The Service Agency notified Claimant's mother of its decision in a letter and Notice of Proposed Action dated September 28, 2016 (exhibit 2). Claimant's mother submitted a Fair Hearing Request form, which was received by the Service Agency on October 12, 2016 (exhibit 2). Claimant's mother requested a continuance of the hearing and signed a time waiver. The hearing was continued to March 13, 2017.

3. Claimant was eligible for the Early Start program based on a physical developmental delay and/or language delay. She received occupational therapy and

¹ The Early Start program provides services for children up to age three for certain conditions and diagnoses that can be different than the eligibility requirements for services under the Lanterman Act after age three. Therefore, children in the Early Start program are re-evaluated by age three to see if they are eligible for services under the Lanterman Act. The state statutes on Early Start are found in Government Code section 95000 et seq.

speech therapy under the Early Start program. At age 30 months, Claimant was assessed by Laura Miller, a pediatric occupational therapist, using standardized tests, observations, and parent interview. In her report (exhibit 8), Miller noted results in various tested skills in ranges from lows of 23 months (expressive language) and 25 months (receptive language) to a high of 32 months (fine motor). Overall, Claimant was found to be within age-appropriate levels developmentally. The WRC eligibility team did not consider Claimant as having an eligible condition for services under the Lanterman Act, but noted that Claimant should be referred to her school district to address possible speech needs. Under certain circumstances school districts may provide special education services to children starting at age three.

4. A speech and language progress report is dated June 30, 2016, when Claimant was age two years, ten months (exhibit 10). Progress from therapy was noted. However, it was difficult to understand her at the sentence and conversational speech levels. It was recommended that Claimant continue to receive therapy, and attend Early Head Start, a school program, to have exposure to other children using age-appropriate speech.

5. Claimant's mother expressed a desire for Claimant to have a psychological evaluation. (Exhibit 6.) A psychological evaluation was performed on June 21, 2016, by Jessica Quevedo, Psy.D., using standardized tests, observations, and parent interview. Claimant was age two years, 11 months at the time. In her report (exhibit 4), Dr. Quevedo summarized the test results, her review of prior reports, her observations of Claimant in the office and in a park, and her interview of Claimant's mother. Dr. Quevedo specifically referred to the characteristics of a person with Autistic Disorder as outlined in the Diagnostic and Statistical Manual-Fifth Edition (DSM-5).² Dr. Quevedo

² The DSM-5 refers to the condition as Autism Spectrum Disorder (ASD).

found that Claimant did not meet any of the requirements for such a diagnosis in the realms of persistent deficits in social communication and social interaction, or restricted, repetitive patterns of behaviors, interests or activities. Dr. Quevedo concluded that Claimant exhibited difficulty with receptive and expressive language skills, and diagnosed Claimant with Language Disorder-provisional, based on some limited responsiveness by Claimant. Dr. Quevedo also concluded, based on claimant's feelings of anxiety and test results, that a diagnosis of Generalized Anxiety Disorder should be a "rule out," meaning further review would be needed to see if the diagnosis was, or was not, appropriate.

6. Thompson Kelly, Ph.D., is the WRC Chief Psychologist and Manager of Intake and Eligibility Services. He was familiar with Dr. Quevedo and her report. Dr. Kelly described the DSM-5 as a generally accepted manual listing criteria of numerous mental health conditions and developmental disabilities. Dr. Kelly opined that Dr. Quevedo performed the type of tests, interviews and observations that are appropriate to assist in the determination of whether someone is eligible for services under the Lanterman Act. He agreed with Quevedo's conclusion that the evidence did not support a diagnosis of ASD for Claimant.

7. Dr. Kelly also knows the other eligibility criteria for services under the Lanterman Act. He was familiar with the reports and documents submitted to the Service Agency to review. He did not find any evidence that Claimant suffers from intellectual disability, cerebral palsy, epilepsy, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, also known as the fifth category.

8. The Preface to the DSM-5 notes that it was developed for use in clinical, educational and research settings, and is designed for use by those with appropriate training and experience, including a specialized body of knowledge and clinical skills.

The Introduction (DSM-5, p. 6) states: "Clinical training and experience are needed to use DSM for determining a diagnosis." The section titled "Use of the Manual" (DSM-5, p. 19) refers to the use of clinical judgment to determine the presence and severity of the criteria necessary to make a diagnosis, as well as to determine the valence of symptoms; i.e., how symptoms react or interact with other symptoms. "Diagnostic criteria are offered as guidelines for making diagnoses, and their use should be informed by clinical judgment." (DSM-5, p. 21.) It should not be applied mechanically or in a cookbook fashion. Therefore, behaviors and characteristics must rise to a level such that a trained clinician would find them to be significant.

9. The DSM-5 article on ASD notes that the diagnosis is made "only when the characteristic deficits of social communication are accompanied by excessively repetitive behaviors, restricted interests, and insistence on sameness. [¶] Autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met based on historical information, although the current presentation must cause significant impairment."

(DSM-5, pp. 31-32.)

10. Claimant's mother and father testified to their concerns about various behaviors of Claimant, including aggression to her brother, self-injurious behavior, hand flapping, walking on tip toes, lining up of toys, failure to look at mother when mother talks to her, lack of appreciation of dangerous situations and lack of fear, aversion to some noises, aversion to certain foods, and reactions to changes in routine.

11. Dr. Kelly agreed that some of these behaviors are consistent with a diagnosis of ASD. However, very few of these behaviors were noted by Dr. Quevedo. Dr. Kelly stressed that ASD is a pervasive developmental disorder, likely to be seen in various different settings. He stated that Claimant did not exhibit the consistent behaviors in a variety of settings required to meet a diagnosis of an eligible condition, and that many of her behaviors are age-appropriate. Further, Claimant showed a range of behaviors and a quality of engagement that was not supportive of a diagnosis of ASD.

LEGAL CONCLUSIONS

1. Claimant did not prove that she is entitled to regional center services.

2. Claimant bore the burden to prove she has a developmental disability that makes her eligible for services. The standard of proof is a preponderance of the evidence. Claimant failed to sustain her burden of proof.

3. Welfare and Institutions Code section 4512, subdivision (a) states:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. California Code of Regulations (CCR), title 17, section 54000 also defines a developmental disability, and contains the same criteria as Welfare and Institutions Code section 4512, but also excludes conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature.

5. Claimant's parents have valid concerns about her behaviors. However, no qualified clinician using appropriate testing, observation and interviews has concluded that Claimant suffers from a developmental disability that would make her eligible for services under the Lanterman Act.

ORDER

Claimant's appeal of the Service Agency's determination that she is not eligible for services from the Service Agency is denied.

Dated:

DAVID B. ROSENMAN
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.