

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2017010599

DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter at Pomona, California on March 8, 2017.

Claimant's foster mother and father represented claimant, who was not present. The names of Claimant and his foster parents are omitted to protect their privacy.

Daniela Santana, Fair Hearing Manager, represented San Gabriel/Pomona Regional Center (SGPRC).

The matter was submitted on March 8, 2017.

ISSUE

Is Claimant eligible for services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED UPON

Documents: SGPRC Exhibits 1 through 10; Claimant's Exhibit A. Testimony: Daniela Santana; Claimant's foster parents.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. SGPRC determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)¹

2. Claimant is a seven-year-old boy. In July 2016, his foster mother asked SGPRC to provide services to him under the Lanterman Act.

3. SGPRC assessed Claimant and determined he was not eligible for services, because he did not have a developmental disability as defined in the Lanterman Act. (See § 4512, subd. (a).) SGPRC sent a Notice of Proposed Action dated November 30, 2016, explaining the determination.

4. On January 6, 2017, SGRPC received a Fair Hearing Request on Claimant's behalf from a representative of the Los Angeles County Department of Children and Family Services (DCFS). On February 9, 2017, the Office of Administrative Hearings received a revised request from his foster parents.

CLAIMANT'S BACKGROUND

5. Claimant was born in December 2009, and is the youngest of five children. According to a school psychologist interview of his biological mother, his early developmental milestones (e.g., sitting up, crawling, walking, speaking, and toilet training) were within normal limits. DCFS placed him with his foster parents in July 2016, and all of his siblings are also placed there. Three of his four siblings receive regional

¹ Undesignated statutory references are to the Welfare and Institutions Code.

center services: two for Autism Spectrum Disorder (ASD), and one for mild intellectual disability.

6. Claimant's foster mother contacted SGPRC on the recommendation of a DCFS worker, due to concern he had ASD or an intellectual disability. He performed "far below grade level" in kindergarten during the 2015-2016 school year, and was determined to be eligible for special education services. His foster mother also reported to SGPRC that he required assistance with all daily living tasks, had speech delays, and displayed behaviors such as crying, non-compliance, and breaking toys on a daily basis.

SGPRC'S ASSESSMENTS

7. Deborah Langenbacher, Ph.D., a psychologist for SGPRC, performed an initial review of Claimant's school records, which included reports of borderline to low average cognition, low adaptive skills, and assessment results "suggest[ing] [Claimant's] probability of [ASD] is 'Very Likely'" according to the Gilliam Autism Rating Scale, Third Edition (GARS-3). But the same "Psycho-Educational Assessment" reporting these results also determined he did not meet special education criteria for intellectual disability or autism. Instead, the Psycho-Educational Assessment determined he had a specific learning disability involving "deficits in the areas of auditory processing and association, conceptualization, and expression." (Exhibit 8, pp. 9-10.) Dr. Langenbacher recommended additional evaluations, including an IQ test, adaptive skills testing, and testing using the Autism Diagnostic Observation Schedules (ADOS).

8. Maria Nuñez, an Intake Coordinator for SGPRC, completed a Social Assessment of Claimant in August 2016. His foster mother reported he was not able to bathe, toilet, or dress independently, and tended to run away when he was in the community. She also reported he had no friends, did not know how to play appropriately with other children, and tended to be aggressive with them. He was able to express himself in two to three word sentences, but mostly used single words, and

“engage[d] in a lot of ‘baby talk’ and ma[de] baby noises.” Ms. Nuñez referred him for a psychological assessment.

9. Jennie Mathess, Psy.D., a Clinical Psychologist, reviewed Claimant’s school records and assessed him at SGPRC on October 18, 2016, administering the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V); the Vineland Adaptive Behavior Scales – Second Edition, Parent/Caregiver Rating Form (VABS-II); and the Autism Diagnostic Observation Schedule - Second Edition, Module 2 (ADOS-2). She also interviewed his foster mother, and conducted the Autism Diagnostic Interview – Revised (ADI-R). The WISC-V is a standardized intelligence test that measures verbal and nonverbal cognitive functioning. The ADOS-2 is a standardized assessment for ASD. The VABS-II assesses adaptive functioning, including communication, independence, and social functioning.

10. On the WISC-V, Claimant’s Full Scale IQ was 85, placing him in the low average range, a result Dr. Mathess determined “should be interpreted with caution due to some variability in his performance.” He scored in the average or low average range on most test indices, but in the borderline range on a Processing Speed subtest. On the VABS-II, his adaptive functioning was in the low range in all areas. Dr. Mathess prepared a Psychological Assessment report stating: “[t]he diagnosis of Intellectual Disability requires significant deficits in intellectual functioning with concurrent deficits in adaptive functioning. . . . Based upon his level of cognitive functioning, a diagnosis of Intellectual Disability is not indicated.”

11. On the ADOS-2, Dr. Mathess determined Claimant was “below the cutoff score for autism and autism spectrum disorder and fell in the non-spectrum range.” He displayed appropriate eye contact and vocalization during the testing, and directed a range of appropriate facial expressions toward her. He also engaged in at least some reciprocal social communication, and did not engage in restricted and repetitive

behaviors, except putting his fingers in his mouth on several occasions. According to Dr. Mathess, “[i]n regards to [ASD], diagnosis requires persistent deficits in social communication and social interaction, as well as the presence of restricted, repetitive patterns of behavior, interests and activities.” Claimant’s ADOS-2 test results did not meet these criteria.

12. Dr. Mathess observed Claimant was very restless during the testing, and had difficulty sitting still. In addition, he responded impulsively to test items at times, and had difficulty staying focused on tasks. His presentation during the testing raised concern with Dr. Mathess regarding Attention Deficit/Hyperactivity Disorder (ADHD). Her overall diagnosis was “Rule Out [ADHD], Combined presentation.”

13. On November 30, 2016, a SGPRC “eligibility team” met to review Claimant’s request for services, and concluded he was ineligible because he did not have a developmental disability as defined in the Lanterman Act. The same day, SGPRC issued the Notice of Proposed Action, which proposed to close his case for that reason.

CLAIMANT’S EVIDENCE

14. Claimant’s foster father, a general practice physician, testified that Claimant has an “interactive disconnect” with other children, displays repetitive behaviors and body motions, is unable to sit still for long, and has difficulty engaging in meaningful conversation. He believes Claimant is significantly delayed and disabled, and needs services right away.

15. Claimant’s foster mother testified that Claimant has more needs than two of his older siblings who already receive SGPRC services. He is very uncoordinated, unable to dress himself, and still not fully toilet trained. She believes Dr. Mathess’ assessment was too brief and incorrect, because she, her husband, and other professionals have noted Claimant’s significant deficiencies on a daily basis.

16. Claimant's foster parents provided notes from a "well child" visit to Claimant's pediatrician, in which the pediatrician referenced the GARS-3 results in Claimant's school records. The pediatrician did not testify.

LEGAL CONCLUSIONS

1. The Lanterman Act provides facilities and services to meet the needs of those with developmental disabilities, regardless of age or degree of disability. (§ 4501.) Under the Act, "'[d]evelopmental disability' means a disability that originates before an individual attains 18 years of age; 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." (§ 4512, subd. (a).)

2. SGPRC determined claimant does not have a developmental disability as defined in the Lanterman Act. Claimant disagrees, and has properly exercised his right to an administrative fair hearing. (Factual Findings 1-4; see §§ 4700-4716.) As an applicant seeking to establish eligibility for government benefits or services, he has the burden of proof. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; see also *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1136 [denying eligibility where an applicant's expert opinion evidence did not "sufficiently refute" the regional center's expert opinion evidence].) This burden requires proof by a preponderance of the evidence, because no law or statute (including the Lanterman Act) provides otherwise. (Evid. Code, § 115.)

3. Claimant did not meet his burden of proof. First, he did not prove he is intellectually disabled. He presented no professional diagnosis of intellectual disability,

and Dr. Mathess determined that diagnosis was “not indicated.” (Factual Finding 10.) He scored in the average to low average range on most WISC-V indices, and his Full Scale IQ was 85, which is in the low average range. (*Ibid.*) Considered together with his VABS-II score, these results indicated he is not intellectually disabled. (*Ibid.*) His school Psycho-Educational Assessment also stated he is not intellectually disabled for purposes of special education eligibility. (Factual Finding 7.)

4. Second, Claimant did not prove he has autism. He presented no professional diagnosis of ASD, and Dr. Mathess determined his autism test results “fell in the non-spectrum range.” (Factual Finding 11.) His GARS-3 results at school do not outweigh Dr. Mathess’ opinion, and did not even result in an autism diagnosis for special education purposes. Instead, the Psycho-Educational Assessment reporting the GARS-3 results determined he did not meet special education criteria for autism. (Factual Finding 7.) His foster parents’ testimony about social difficulties and behavioral issues is also insufficient to prove Claimant has ASD, given Dr. Mathess’ opinion he does not.

5. a. Third, Claimant did not prove he has a “fifth category” developmental disability, that is, a “disabling condition[] . . . closely related to intellectual disability or . . . requir[ing] treatment similar to that required for individuals with an intellectual disability. . . .” (§ 4512, subd. (a); see *Samantha C. v. State Dept. of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486-1487 (*Samantha C.*))

b. In *Samantha C.*, a young adult (Samantha) seeking regional center services was born prematurely and with hypoxia (oxygen deprivation). In elementary school, her cognitive abilities were measured to be in the average range, but she received special education services because of deficits in auditory processing, language, speech, and memory. She was later diagnosed with attention deficit disorder. She ultimately graduated from high school and enrolled in a junior college, but received

Supplemental Security Income (SSI) disability benefits and qualified for Department of Rehabilitation services. During the process of requesting regional center services, cognitive tests yielded scores of 92 and 87, with a full-scale IQ score of 90, placing her in the average range. Vineland testing revealed that she functioned adequately in daily living and social skills, but at a moderately low level in the area of communication. While various experts arrived at different conclusions, at least two experts (whom the court found persuasive) opined that she had major adaptive impairments and functioned in the range of someone with mental retardation (i.e., intellectual disability). The same experts opined that her hypoxia affected her brain and created a neurocognitive disorder explaining her various deficits. One expert stated that her cognitive and adaptive skills deficits “might all be subsumed under a diagnosis of Cognitive Disorder Not Otherwise Specified, indicating that they are secondary to a medical condition.” (*Samantha C., supra*, 185 Cal.App.4th at p. 1493.)

c. The court held that Samantha had a fifth category condition, and therefore was eligible for regional center services. First, the court concluded she had a disabling condition, i.e., she had “suffered birth injuries which affected her brain and that her cognitive disabilities and adaptive functioning deficits stem, wholly or in part, from such birth injuries.” (*Samantha C., supra*, 185 Cal.App.4th at pp. 1492-1493.) Since the evidence established that her cognitive and adaptive deficits were related to her hypoxic birth episode, there was no substantial evidence that her condition was solely psychiatric or solely a learning disability, which are two exclusions from the Lanterman Act definition of developmental disability. (*Id.*; see Cal. Code Regs., tit. 22, § 54000, subd. (c)(1)-(2).) Second, the court held that her condition required treatment similar to that required by individuals with intellectual disability, based on expert testimony comparing her treatment needs to those of intellectually disabled persons. (*Samantha C., supra*, 185 Cal.App.4th at pp. 1493-1494; cf. *Ronald F. v. Dept. of Developmental Services* (2017) 8

Cal.App.5th 84, 97-99 [“treatment” has “a different and narrower meaning” than “services” for persons with developmental disabilities, such as those listed in section 4512, subdivision (b)].)

d. In this case, neither party addressed the possibility of fifth category eligibility at the hearing. Furthermore, Claimant did not present expert testimony about the nature of his disabling condition or treatment needs, or whether those needs were similar to those of an intellectually disabled person. The evidence he did present raises concerns about a possible fifth category condition, but did not meet his burden of proving he has one. On this record, it cannot be determined if he does.

6. Finally, Claimant did not prove he has cerebral palsy or epilepsy. No medical professional has diagnosed him with either condition, and no evidence in the record suggests he has one of them.

7. Claimant clearly has special care needs. But on this record, he did not establish he has a developmental disability as defined in the Lanterman Act.

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ORDER

Claimant’s appeal is denied.

DATED:

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. Either party may seek judicial review of this decision in a court of competent jurisdiction within 90 days.