

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH NO. 2018040457

DECISION

Administrative Law Judge (ALJ) Carmen D. Snuggs, Office of Administrative Hearings (OAH), State of California, heard this matter in Culver City, California, on October 31, 2018.

Claimant, who was not present, was represented by his mother who is Claimant's authorized representative.¹

Lisa Basiri, M.A., Fair Hearing Coordinator, represented the Service Agency, Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on October 31, 2018.

ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

EVIDENCE CONSIDERED

The Service Agency's Exhibits and Witnesses: Service Agency's exhibits 1-8. Kaely Shilakes, Psy.D. testified on behalf of WRC.

Claimant's Exhibits and Witnesses: Exhibit A. Claimant's mother testified on his behalf.

FACTUAL FINDINGS

1. Claimant is a male who is eight years and seven months old. He claims to be eligible for regional center services under the qualifying category of autism.

2. Claimant currently lives with his mother, younger sister, and maternal grandparents. He receives special education services due to Specific Learning Disability and Speech or Language Impairment. Claimant suffered from school-and-social related anxiety and sensory sensitivity, for which he received treatment at the UCLA Psychology Clinic from February to August 2017. When Claimant terminated treatment, he showed significant improvement in confidence and willingness to engage in social activity, but still reported elevated social-related anxiety. He is being treated by psychiatrist Benjamin Schneider and takes Focalin for Attention Deficit Hyperactivity Disorder (ADHD) symptoms.

3a. In July 2017, Claimant was referred to the ADD Diagnosis and Treatment Center of Manhattan Beach for purposes of ruling in/out a diagnosis of ADHD and/or "Spectrum Disorder." (Ex. 8, p. 1.) He was assessed by Valerie Maxwell, Ph.D., who diagnosed him with ADHD, Combined Type and Generalized Anxiety Disorder.

3b. In her August 21, 2017 report, Dr. Maxwell noted that Claimant could not make eye contact during testing and alternated between perfectionism and dysregulation. Claimant "scored a high level of spectrum behaviors on the [Social Responsiveness Scale]."

(Ex. 8, p. 1.) Accordingly, Dr. Maxwell diagnosed Claimant with "Spectrum Disorder" and noted that his school district could further evaluate him and confirm the diagnosis.

3c. Claimant's October 27, 2017 Individual Education Plan Team Meeting Notes indicated that elevated scores on the autism index of the Gilliam Autism Rating Scale: Third Edition based upon the reports of Claimant's mother and teacher, but the results of the Autism Diagnostic Observation Schedule (ADOS)² – Second Edition, indicated that autism was "not likely." (Ex. A, p. 3.)

4. Claimant was referred to WRC because of his mother's concerns regarding autism.

5a. Rebecca R. Dubner, Psy.D., is a licensed psychologist. On October 30, 2017 and November 21, 2017, Dr. Dubner conducted psychological evaluations of Claimant, at the request of the Regional Center, for the assessment of autism and/or intellectual disability. Dr. Dubner reported that during both assessment sessions, Claimant maintained "appropriate" eye contact and did not engage in any unusual behaviors, fixations, or repetitive behaviors. Although Claimant committed articulation errors, he was "very talkative" and creative during play. (Ex. 6, p. 4.)

5b. Claimant had some challenges with attention and anxiety that affected his ability to participate in cognitive testing to some degree, and had to be reminded to stay in his seat. However, Dr. Dubner was able to assess Claimant's cognitive skills through the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition. Claimant's full scale score was in the low average range based upon his combined scores in the following areas: reasoning, crystallized intelligence and ability to access and apply acquired knowledge (average range); and processing speed, working memory, and ability to

² The ADOS is an assessment of communication, social interaction, and play, or imaginative use of materials.

understand visual spatial relationships (low average range).

5c. Dr. Dubner assessed Claimant's academic functioning by means of the Wide Range Achievement Test, Fourth Edition. His word reading, spelling, and math computation scores were in the low range.

5d. To assess Claimant's affective/behavioral functioning skills, Dr. Dubner employed the Childhood Autism Rating Scale, Second Edition (CARS-2), using information supplied by Claimant's mother and Dr. Dubner's observations and interactions with Claimant. The CARS-2 uses the ratings of 15 behaviors to identify autism. Dr. Dubner found that the results did not support the presence of ASD because:

[Claimant] did not present with behaviors typical of children with [ASD]. He was able to appropriately imitate when he chose to do so and paid adequate attention. He was able to engage in appropriate eye contact with examiner and was not unusually shy. He had no significant difficulties participating in testing, though he was anxious. His emotional responses appeared age appropriate and not out of the ordinary. His motor movements and coordination seemed appropriate. He used objects appropriately and functionally and no fixations or obsessions were evident. He was able to transition between tasks adequately. His visual responses appeared typical and he was not seen looking at objects out of the corner of his eye. His listening responses were appropriate as he responded when his name was called or when he was asked a question. He did not appear to be unusually fearful, though as previously mentioned he was nervous during cognitive and academic testing. He had a

normal use of touch. His verbal communication was below age appropriate. He was able to point and use gestures appropriately. His activity level was normal. The results obtained do not support the presence of [ASD].

(Ex. 6, p. 6.)

5e. During the second evaluation of Claimant on November 21, 2017, Dr. Dubner administered the ADOS - Module 3. While Dr. Dubner reported that Claimant experienced difficulty regulating his body and was in constant motion, Claimant was able to interact appropriately with others during the session. His facial expressions were appropriate and expansive, he did not engage in repetitive language or vocalizations, and he did not demonstrate fixations or perseverations. In addition, Claimant did not demonstrate hand or finger mannerisms.

5f. On January 24, 2018, Dr. Dubner observed Claimant at school. In her report, she described her observations in detail. In sum, Claimant engaged in appropriate conversation with multiple peers during lunch and engaged in appropriate play with his peers during recess. Dr. Dubner did not observe any behaviors consistent with ASD. In addition, Claimant's school psychiatrist reported that at the start of the school year, Claimant was initially anxious and had challenges with social interaction, but made more friends and typically interacted with several children on the playground. In addition, although Claimant continued to experience academic challenges, he did not present with behavioral issues and no oddities in his behavior were reported within the school setting.

5g. Dr. Dubner reviewed with Claimant's mother the diagnostic criteria for ASD as outlined in The Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (DSM-5).³ She also discussed with Claimants mother Claimant's communication and

³ The ALJ takes official notice of the DSM-5 as a generally accepted tool for

socialization skills, as well as his behaviors. To receive a diagnosis of ASD, an individual must meet all three criterion regarding persistent deficits in social communication and social interaction across multiple contents, and two of four criterion regarding restricted, repetitive patterns of behavior. Based upon the information reported by Claimant's mother, Claimant did not meet any of the criteria with respect to persistent deficits in social communication and social interaction across multiple contents. He met one of the four of the criteria regarding restricted, repetitive patterns of behavior, interests, or activities.

5h. Dr. Dubner assessed Claimant's adaptive functioning skills using the Vineland Adaptive Behavior Scales – 2nd Edition, a tool that is used to assess adaptive behavior, or the performance of day-to-day activities. Claimant's mother served as the informant. Claimant scored "moderately low" in each of the major domains (communication, daily living, and socialization skills). Therefore, his composite adaptive behavior composite was also in the moderately low range.

6. Dr. Dubner concluded that Claimant did not presently meet the criteria for a diagnosis of ASD. She explained that while Claimant has historically demonstrated deficits in his social communication, she attributed those deficits to school related social anxiety. She diagnosed Claimant with Speech Sound Disorder and, "By History," Learning Disorder, ADHD, and Social Anxiety Disorder. (Ex. 6, p. 10.)

7. On February 28, 2018, WRC found Claimant did not have a condition that would make Claimant eligible for services. Claimant's mother then filed a Fair Hearing Request. (Exhibit 2.)

8. Kaely Shilakes, Psy.D., testified on behalf of WRC. She has been a staff psychologist in WRC's Intake and Assessment Department since June 2018. Her duties

diagnosing mental and developmental disorders. The DSM-5 was published in May 2013.

include reviewing psychological assessments to determine eligibility for Regional Center services. Prior to becoming a WRC staff psychologist, Dr. Shilakes was employed by WRC as a contract psychologist and performed assessments of potential WRC clients. Seventy-five percent of Dr. Shilakes' cases involve determining whether ASD is present in the individuals she evaluates. Dr. Shilakes obtained her doctorate in clinical psychology and is licensed to practice clinic psychology in California. Her background in developmental disability and behavioral services includes employment as a one-on-one behavioral therapist, as well as testing and assessment.

9a. Dr. Shilakes was a part of WRC's multidisciplinary team that observed Claimant on May 31, 2018, to clarify Claimant's diagnosis and determine his level of functioning. Ms. Basiri and WRC psychologists doctors Rita Eagle and Sylvia Young were also present. Dr. Shilakes reviewed Dr. Dubner's report of her assessment and interviewed Claimant's mother. Claimant's mother reported that Claimant had difficulty with same-age peers, but she had no major concerns regarding Claimant's behavior. Claimant's mother further reported to Dr. Shilakes that Claimant liked to do things "by the book," and follow rules, and that he was obsessed with animals and dinosaurs. Claimant's mother reported that he lacked flexibility and that a lot of his issues are sensory related. Finally, Claimant's mother informed Dr. Shilakes that Claimant had trouble dressing and tying his shoes, he makes a mess when he eats, and he has bathroom accidents.

9b. Dr. Shilakes reported that Claimant engaged in appropriate eye contact with her, but was "fidgety" and showed restlessness. He showed emotional reciprocity in that he was engaging and "talked excessively." Claimant did not exhibit any repetitive behaviors, but did mention pyramids often. He played with children in WRC's play area at the end of observation while Dr. Shilakes spoke with Claimant's mother. During the walk to the play area, Claimant engaged in spontaneous language, commenting on his surroundings and his career goal (zoo keeper). He also shared information with Dr.

Shilakes, stating that he was going to visit his grandparents and that they were going to take him to Las Vegas. Claimant hugged Dr. Shilakes as he was leaving.

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9c. To measure Claimant's cognitive abilities, Dr. Shilakes administered the Differential Ability Scales –II. All of Claimant's scores were in the average range, with exception of the spatial domain (low average range), and the recall of designs domain, (borderline range). Claimant demonstrated intact verbal and nonverbal reasoning abilities with challenges in spatial abilities. Claimant's scores were higher than those he obtained on a previous assessment at age seven, when he scored in the low average range.

9d. Dr. Shilakes concluded that Claimant does not meet the criteria for ASD or intellectual disability. Although Claimant's mother reported rigidity and sensory issues, Claimant's observed level of engagement and interaction with his peers, along with his lack of repetitive behaviors during the observation did not indicate ASD. In addition, Claimant did not engage in hand flapping, rocking back and forth or any of the behaviors associated with ASD. She attributed Claimant's deficits to ADHD.

10a. Claimant offered in support of his claim that he is eligible for Regional Center services, an August 27, 2018 report of his August 9, 2018 evaluation at the UCLA Child and Adult Neurodevelopmental (CAN) Clinic. He was evaluated by an interdisciplinary team that assessed him using the ADOS, Second Edition (ADOS-2) administered by Emily Moulton, Ph.D., Claimant's mother's interview responses, and well as her responses on rating scales used to assess Claimant's adaptive function and broader psychological and behavior function. The evaluation was observed by psychologist Patricia Renno, Ph.D., and psychiatrist Brandon Ito, M.D.

10b. The examiners at the UCLA CAN clinic reviewed Claimant's records from UCLA and Dr. Maxwell's report.

10c. Claimant's mother reported to the UCLA CAN clinic multidisciplinary team,

among other things, that Claimant had a limited range of facial expressions, his awareness of others' emotions and attempts to offer comfort were limited, and he is often not aware of social cues. Claimant's mother also reiterated similar concerns that Claimant demonstrated restricted patterns of interest, engaged in repetitive behaviors such as lining up toys, and in the morning he had to do things in a certain order. She also reported that Claimant was sensitive to loud noise, he had difficulty adapting to changes in his routine, and he lacked reciprocal friendships.

10d. The UCLA CAN clinic evaluator observed that Claimant committed regular articulation errors and that his conversations often lacked reciprocity. In addition, he had "significant difficulty" engaging in imaginative play and he demonstrated limited insight regarding relationships and social situations.

10e. The UCLA CAN clinic multidisciplinary team determined based on the evaluators' observations that Claimant's ADOS-2 results were consistent with a classification of ASD. His overall Adaptive Behavior Composite score of 61 on the Vineland Adaptive Behavior Scales-Third Edition was in the below average range.

10f. Claimant was found to meet all DSM-5 ASD criterion. Accordingly, the UCLA CAN clinic diagnosed Claimant with ASD without accompanying intellectual impairment, with language impairment (articulation, pragmatics). The UCLA CAN clinic classified the level of support needed for social communication and restricted, repetitive behaviors as level 1 and 2, respectively, with level 2 defined as substantial support. Claimant was also diagnosed with ADHD, combined presentation and Unspecified Anxiety Disorder.

11a. Dr. Shilakes reviewed all the documents submitted at the hearing, and concluded that Claimant does not have autism or any other diagnosis which would make him eligible for Regional Center services.

11b. Dr. Shilakes disagreed with Dr. Maxwell's diagnosis of "Spectrum Disorder." Her testimony established that Dr. Maxwell's diagnosis is deficient in that she did not

discuss or identify any indicators or criteria for the diagnosis such as lack of social and emotional reciprocity, lack of nonverbal communication, difficulty with establishing and maintaining relationships, and restrictive repetitive behaviors. In addition, Dr. Maxwell did not administer the ADOS, one of the standard tools used to evaluate the presence of ASD.

11c. Dr. Shilakes also disputed the UCLA CAN clinic's diagnoses and recommendations for several reasons. First, its multidisciplinary team concluded that the ADOS-2 results supported a finding of ASD but failed to list specific observations to support their conclusions. Second, assuming the observations listed under the "Mental Health Status" portion of the report included observations recorded during the administration of the ADOS-2, the findings are contradictory. For example, it is noted that Claimant's conversations often lacked reciprocity and he rarely asked the examiner about her interests, but the examiner also reported that Claimant "initiated interactions with the examiner by asking her questions, and on a few occasions inquired about the examiners' experiences." (Ex. A, p. 3.) In addition, the examiner reported that Claimant's eye contact improved over the course of the assessment, he directed a range of facial expressions to the examiner, and "showed clear shared enjoyment during several activities." (Ex. A, p. 3.) Further, the behaviors attributed to Claimant that would support a diagnosis of autism appeared to be based upon Claimant's mother's report and not direct observation. In addition, the fact that Claimant may not be aware of social rules and cues and he said things in public that are inappropriate, are not behaviors that are related solely to autism; lack of self-regulation is also attributable to ADHD.

11d. The opinions of Dr. Shilakes and Dr. Dubner are afforded more weight than the opinions expressed by the UCLA CAN clinic doctors. The UCLA CAN clinic examiners observed Claimant on one occasion, whereas WRC assessed Claimant four times over a period of seven months. In addition, WRC was able to obtain additional information about Claimant by observing Claimant at school, whereas the UCLA CAN clinic examiners did not.

Further, Dr. Shilakes' testimony established that Claimant presented consistently over time and his behavior did not suggest a presence of autism.

12. Claimant's mother contended that Dr. Maxwell's and the UCLA CAN clinic's reports and diagnoses support a finding that Claimant is eligible for Regional Center services. In addition, she testified regarding Claimant's deficits in adaptive functioning. Claimant requires assistance with getting dressed because he cannot button his clothing or tie his shoes. He has trouble with meals in that his food has to be easy to swallow, he has difficulty with different food textures, and he wants specific food every day. Claimant also experiences difficulty maneuvering his fork to his mouth while eating. He frequently needs help with bowel movements, specifically cleaning himself, and he has frequent accidents during the day at home. He has had two accidents at school during the current school year. Claimant receives one-on-one help at school to transition, and he receives speech language and occupational therapy. Claimant also receives modified work because he is not at grade level. As such, Claimant's mother believes Claimant would benefit from Regional Center services. However, while there is no dispute that Claimant has deficits, the evidence presented established that Claimant did not meet the criteria for a diagnosis of autism, as set forth in Factual Findings 5 through 11.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a Regional Center, a Claimant must have a developmental disability, which is specifically defined as "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 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 individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. &

Inst. Code, § 4512, subd. (a).)

2. Implementing regulations issued by the Department of Developmental Services contain the following exclusions from the definition of developmental disability:

[(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.

(Cal. Code of Regs., tit. 17, § 54000.)

3. Throughout the applicable statutes and regulations (Welf. & Inst. Code §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate

that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

4. No evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that he has either condition. He has not received a diagnosis of intellectual disability, and the evidence of cognitive functioning and adaptive skills received at the hearing tends to rule out the presence of intellectual disability, a condition closely related to intellectual disability, or one requiring treatment similar to that required by individuals with intellectual disability. Claimant's cognitive skills have been consistently measured by different evaluators in the low average range.

5. Claimant received diagnoses of ASD from the UCLA CAN clinic and "Spectrum Disorder" from Dr. Maxwell. However, the evidence adduced at the hearing is insufficient to support such a diagnosis. Dr. Maxwell did not support her diagnosis with any of the criterion contained in the DSM-5, nor did she discuss or identify any behaviors displayed by Claimant associated with autism. Moreover, while the UCLA CAN clinic multidisciplinary team administered tests to Claimant to identify the presence of autism, and identified observed behaviors that may be consistent with autism, Dr. Dubner conducted a more comprehensive evaluation over a longer period of time. Her testing and evaluation along with the testing and evaluation performed by Dr. Shilakes, demonstrated that Claimant did not present with autism. Rather, they opined that Claimant's deficits were attributable to ADHD and school-related anxiety. Their opinions are supported by Claimant's IEP Team's conclusion in October 2017, based on the Claimant's ADOS-2 results, that the presence of autism was "not likely."

6. Neither Dr. Dubner nor Dr. Shilakes found that Claimant met the diagnostic criteria for ASD. The other diagnoses that they made are well supported by the testing and Claimant's diagnoses of ADHD and anxiety disorders. These other diagnoses do not constitute developmental disabilities that would render Claimant eligible for Regional

Center services under the Lanterman Act.

7. The preponderance of the evidence supports the Regional Center's decision to deny eligibility for Claimant to receive services. The Regional Center's interpretation of the laws and regulations regarding eligibility, and application of them to Claimant, was not proven to be unreasonable or arbitrary.

8. It was not established that Claimant has a developmental disability within the meaning of the Lanterman Act, and he is not eligible to receive Regional Center services, by reason of factual finding numbers 1 through 12 and legal conclusion numbers 1 through 7.

ORDER

Claimant's appeal of the Service Agency's determination that he is not eligible for Regional Center services is denied.

DATED:

CARMEN D. SNUGGS
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.