

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022120318

DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 6, 2023, by videoconference.

Ron Lopez, Director's Designee, represented Westside Regional Center (WRC or Service Agency).

Claimant's Mother (Mother) represented Claimant who was not present.

Oral and documentary evidence was received, and the matter was submitted for decision on February 6, 2023.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 9, 2022, WRC issued a Notice of Proposed Action (NOPA) informing Claimant that he provisionally qualified for Lanterman Act services, but did not meet the criterion for full eligibility because he was not developmentally disabled within the meaning of the Lanterman Act. Claimant filed a timely request for hearing appealing the determination. All jurisdictional requirements have been met.

Claimant's Background

2. Claimant is a three-year-old boy diagnosed with Autism Spectrum Disorder in 2021. He was made provisionally eligible for WRC services based upon his diagnosis of Autism Spectrum Disorder and is subject to re-evaluation. He lives with his parents in the family home. His two adult siblings lived in the home until recently. Claimant's parents are concerned with his frequent elopement, sleeping difficulties, aggressive behavior with adults and other children, sensory integration, and social issues.

3. Claimant seeks a determination that he is eligible for services under the Lanterman Act. Claimant would like to access In-Home-Supportive-Services (IHSS) funding through the Medi-Cal waiver program, assistance with co-payments, and to

explore the Self-Determination Program (SDP). Because Claimant is only provisionally eligible, the Medi-Cal waiver and SDP program are not available to him. Claimant's family income may be a barrier to assistance with co-payments according to his service coordinator.

4. Claimant attends a privately funded pre-school program three days a week and is accompanied by an Applied Behavioral Analysis (ABA) trained aide funded through Kaiser Permanente (Kaiser), his family health insurer. Claimant was determined not eligible for Early Start Services. Claimant applied for, but was denied, special education eligibility through his local school district. Currently, he is in the special education hearing appeals process. WRC has provided advocacy services to Claimant.

Assessments

KAISER

5. Claimant was assessed at Kaiser by a multi-disciplinary team including a counselor, a psychologist, an occupational therapist, a medical doctor and a speech pathologist. After a full multi-disciplinary assessment using a variety of measures, the multi-disciplinary assessment team concluded that Claimant met criteria for diagnosis of Autism Spectrum Disorder. The assessment report provided that Claimant has "disruptive behaviors, inconsistent eye contact, inconsistent social reciprocity, sensory avoidant behaviors, stereotypical behaviors and strong attachment behaviors." (Ex. 11.) It was also reported that Claimant "showed decreased eye contact, with no coordinated gaze while using his words. [Claimant] had a hard time engaging interactively during the activities with the providers, and was noted to play mostly in a self-directed way." (Ex. 11.)

WRC ASSESSMENT

6. Claimant was assessed by Naz Bagherzadeh, Psy.D., a psychologist consultant, retained by WRC on August 10, 12 and 15, 2022. Dr. Bagherzadeh did not testify at the administrative hearing. According to her report, Dr. Bagherzadeh reviewed the WRC November 21, 2021 Psycho-social assessment and the Kaiser Assessment report and conducted her own clinical observation. She administered the Bayley Scales of Infant and Toddler Development (Bayley), the Autism Diagnostic Observation Schedule (ADOS-2), Developmental Assessment of Young Children (DAYC-II), Vineland Adaptive Behavior Scales-Third Edition (Vineland-3), and Wechsler Preschool and Primary Scales of Intelligence: Third Edition (WPPSI-IV).

7. Dr. Bagherzadeh observed Claimant and noted his behaviors in her report. According to Dr. Bagherzadeh, Claimant exhibited multiple instances of maladaptive behaviors. Of note, Claimant ran from the waiting room to the back side of the office and entered an empty office, ran from the assessment room down the hall and attempted to get on the elevator and refused to sit in a chair. Claimant became more aggressive as the observation continued. He climbed on to the assessor's back, pulled her hair and attempted to grab her breast. He also bit his mother's hand when she physically blocked him from leaving the assessment room.

8. Claimant scored within the average range on the WPPSI-IV, a test of cognitive ability. The assessor noted that she was not able to administer the Picture Memory subtest because Claimant was non-compliant. Accordingly, she was not able to score his visual working memory, visual-spatial working memory and his "ability to resist proactive interference when using attention, concentration, mental control and reasoning skills." (Ex. 3.) She noted that based upon Mother's reports and her own observations, these may be "areas of weakness" for Claimant. (Ex. 3.)

9. The DAYC-2, a developmental skills rating scale, was completed by Mother. The DAYC-2 is used to measure functioning in the areas of communication, social-emotional ability, and cognitive ability. Claimant scored in the average range for expressive and receptive language in the Communication domain. He also scored within the average range in the Cognitive domain. In the Social Emotional domain, Claimant received a standard score of 83, within the below average range at an age equivalent of 21 months. According to the report, Claimant "does not or consistently does not: ask for assistance when having difficulty, look at a person when speaking with him or her, usually take turns, or quietly listen to story, music, movie or television." (Ex. 3.)

10. The Vineland-3 is a rating scale used to assess adaptive functioning skills. Claimant scored in the overall adequate range. His motor skills were scored in the moderately high range, his socialization skills in the moderately low range and his communication and daily living skills in the adequate range. On the CARS2-ST, an autism screening tool, Claimant received a total CARS raw score of 37.5, placing him in the lower end of the Severe Range of Autism Spectrum Disorder. On the ADOS-2, a semi-structured and standardized assessment for Autism, Claimant received an overall score indicative of Autism.

11. The WRC assessor agreed with the Kaiser team diagnosis of Autism Spectrum Disorder. She found that Claimant met the criteria for Autism Spectrum Disorder by displaying persistent deficits in social communication and social interactions across multiple contexts, displaying restricted and repetitive patterns of behavior and interests. She also found that the symptoms cause clinically significant impairment in multiple areas of function and are not better explained by intellectual disability or global delays.

Eligibility Determination

12. On October 12, 2022, the WRC Interdisciplinary team consisting of a service coordinator, a physician, a counselor and WRC psychologist Kaely Shilakes, Psy.D., met and reviewed Claimant's case for an eligibility determination. Claimant was determined provisionally eligible for Lanterman Services by the Interdisciplinary team. At the administrative hearing, Dr. Shilakes explained that although Claimant has a qualifying diagnosis of Autism Spectrum Disorder, Claimant was not determined to be substantially handicapped in three of the seven designated areas as required to establish the substantial disability for Lanterman Act eligibility. Of the seven areas: (1) Expressive and Receptive Language; (2) Learning; (3) Self-Care; (4) Capacity for Independent Living; (5) Economic Self-Sufficiency; (6) Self-Direction; and (7) Mobility, the team found Claimant to be disabled only in two areas (Learning and Self-Direction).

13. Claimant's scores on language assessments placed him in the average range for expressive and receptive language. For that reason, the team did not find him to show disability in the area of expressive and receptive language. The team considered Claimant's daily living skills to be adequate and age-appropriate based upon the assessment results. The team considered Claimant too young to demonstrate capacity for independent living or economic self-sufficiency. Claimant demonstrated average or above motor skills and was not mobility impaired. Accordingly, the team determined that as of October of 2022, Claimant did not meet all requirements for eligibility because he did not demonstrate three areas of substantial disability.

Claimant's Evidence

MOTHER'S TESTIMONY

14. Claimant's mother provided credible testimony about Claimant's aggressive and violent behavior. Additionally, she provided testimony about his nighttime wakefulness. She sleeps with him in a room separate from her spouse so that her spouse can sleep before going to work. She is up many times during the night attending to Claimant and preventing him from eloping from the home. Claimant will run away from his caregivers at the first opportunity and has no concern for traffic or other dangers. Claimant's pre-school requires him to have an adult present to attend to him because of his behavior and elopement. He bites and kicks his mother, and he is aggressive with caregivers, teachers and other children. He is not fully toilet trained and requires assistance to dress.

FUNCTIONAL BEHAVIOR ANALYSIS

15. Kristine Cummings, a psychologist and board-certified behavioral analyst (BCBA) prepared a January 2023 Functional Behavior Analysis (FBA) Report. The FBA was funded by Kaiser. In the report, Ms. Cummings recommended 20 hours per week of direct intervention for six months, four hours per week of supervision and one hour per week of family training. The services are delivered three days per week in a private pre-school setting and two days per week in the home and community. The FBA targets 18 "learning-to learn" skills (i.e., sitting, raising hand, requesting items, interactive play, asking peers for items, giving up items, seeking attention appropriately, transitioning independently), three self-help goals (i.e. dressing, toilet training) and three parent goals related to Claimant's behavior. (Ex. A.)

LETTER FROM PRE-SCHOOL

16. Kathy Sultan is the Director of Claimant's preschool. She wrote a letter dated November 10, 2022 detailing Claimant's behavior and elopement. In relevant part she wrote:

We continue to have safety concerns regarding [Claimant] in our preschool environment. It is necessary to have a teacher with him constantly as he tends to be an "escape artist." He tries to open closed/locked doors to get out, runs away when called, tries to and sometimes succeeds climbing over fences and gates.

(Ex. B)

17. Ms. Sullivan gave multiple examples of Claimant's escape attempts and maladaptive behavior:

At a Sports enrichment class he demands constant attention as he runs around and does not follow the coach's instructions. This included climbing up on off-limit stairs to the stage, ran away from me and attempt to exit down unlighted stairs. Another time he wildly ran around the large room, running out the door, necessitating the teacher to call for assistance and leave the class to run after him.

While in the classroom he constantly tries to run through the bathroom into the classroom next door in order to try to get out to the play yard. [. . .]

While outside he tries to open gates and climb the fence to get to the other side. [. . .]

During music class he tends to leave the group and wander around the room disrupting class. He constantly needs reminders to stay with the group and play the instruments or participate with other children. Without teacher intervention he gets up from the rug and tries to get into the teacher's desk in the corner of the room. He also will go over to the bookshelves and remove all the books from the shelves. The classroom teacher often has to keep him in her lap while the music teacher leads the class.

One morning before school he somehow got into the hall behind the Preschool Office and ran in to the Preschool Office, startling the administrative assistant. Soon after, his father ran to find him.

He has become more physically aggressive with the other children, forgetting to use words to communicate instead of hitting or pushing [. . .]

(Ex. B.)

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.).
A state level fair hearing to determine the rights and obligations of the parties, if any,

is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing, and therefore jurisdiction for this case was established.

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him or her. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].) The standard of proof in this case is preponderance of the evidence. (Evid. Code, § 115.) Thus, Claimant has the burden of proving his eligibility for services under the Lanterman Act by a preponderance of the evidence.

3. In order to be eligible for regional center services, a person must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

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.

4. Welfare and Institutions Code section 4643, subdivision (b), provides that in determining if an individual meets the definition of developmental disability

contained in Welfare and Institutions Code section 4512, subdivision (a), the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources.

5. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, the individual must show that he or she has a "substantial disability." Pursuant to Code section 4512, subdivision (l)(1):

"Substantial disability" means the existence of significant functional limitations in three or more of the following major life activity, as determined by the regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

6. Very similar language is found in California Code of Regulations, title 17, sections (Regulations) 54000 and 54001. Regulations section 54000 repeats the

requirement that an eligible developmental disability must "constitute a substantial disability for the individual." Substantial disability is defined in Regulations section 54001, subdivision (a)(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." Subdivision (a)(2) repeats the seven areas of major life activity to be examined, again "as appropriate to the person's age."

7. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, learning disabilities and/or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) If a person's condition is solely caused by one or more of these three "handicapping conditions," the person is not entitled to eligibility.

8. WRC does not dispute that Claimant is properly diagnosed with Autism Spectrum Disorder, a qualifying eligible category of developmental disability. Additionally, WRC does not dispute that Claimant meets the first prong of establishing a substantial disability: His condition is a major impairment to his social functioning and that he requires the type of interdisciplinary services WRC provides. WRC also concedes that Claimant has significant functional limitations in the areas of learning and self-direction.

9. Claimant's elopement and failure to recognize danger are extreme and present functional limitations on his abilities to care for himself and for age-appropriate independence. Additionally, he requires assistance with dressing and toileting and is working on behavior goals related to those skills. While a three-year-old is not expected to care for all of his own needs or to live independently, the factors remain relevant in the analysis of whether Claimant is substantially disabled within the

meaning of the law. Claimant's elopement and violent behavior present real limits on his ability to engage in age-appropriate activities and to have any measure of independence. Because an adult caregiver must be within arm's reach and vigilant to prevent elopement and dangerous aggressive behavior, Claimant's academic, home and social environment are all necessarily very restrictive without age-appropriate independence. Additionally, Claimant's need for assistance with dressing and toileting present limits on his ability to engage in age-appropriate self-care. Claimant has demonstrated that he has functional limitations in self-care and the capacity for independent living. Accordingly, Claimant met his burden of proof establishing that he is eligible for WRC services under the Lanterman Act as a consumer substantially disabled by Autism.

ORDER

1. Claimant's appeal is granted.
2. Claimant is eligible for regional center services as a person with substantially disabling Autism.

DATE:

GLYNDA B. GOMEZ
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.