

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

In the Matter of:

CLAIMANT

v.

NORTH BAY REGIONAL CENTER.

DDS. No. CS0009767

OAH No. 2023100004

DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, who served as the hearing officer, heard this matter on November 9, 2023, by videoconference.

Beth DeWitt, Director of Client Services, represented North Bay Regional Center (NBRC).

Claimant was represented by his father. Claimant was not present at the hearing.

The record remained open for claimant's father to submit email correspondence from claimant's teacher, and for NBRC to file an optional response.

The email correspondence was timely filed and admitted into evidence as claimant's Exhibit A. NBRC did not file a response.

The record closed and the matter was submitted for decision on November 17, 2023.

ISSUE

Is claimant eligible for regional center services?

FACTUAL FINDINGS

Procedural Background

1. Claimant is five years old and lives with his family. He is in kindergarten at a public elementary school.
2. Claimant received Early Start services. His age when these services were first provided was not established.
3. NBRC assessed claimant for ongoing services right around his third birthday, in 2021. Claimant was found to be provisionally eligible for Lanterman Act services and continued to receive services from NBRC. Provisional eligibility was based on his Autism Spectrum Disorder (ASD) diagnosis and substantial limitations in receptive and expressive language and self-direction.
4. NBRC assessed claimant again around the time of his fifth birthday, in August 2023. An eligibility team that included a physician and a psychologist met to review the evidence and determined that claimant did not satisfy eligibility criteria.

NBRC issued a Notice of Action to claimant's family on September 20, 2023, stating that NBRC had found claimant ineligible. An appeal was submitted on September 26, 2023, challenging NBRC's determination. NBRC staff met with claimant's family at an informal meeting, but did not change the determination.

Regional Center Eligibility Criteria

5. To be eligible for services under the Lanterman Act, an individual must have a developmental disability that originates prior to age 18, the disability must not be solely physical in nature, the disability must be expected to continue indefinitely, and the disability must constitute a substantial disability for the individual. (Welf. & Inst. Code, § 4512, subd. (a)(1).) A substantial disability is defined as the existence of significant functional limitations in at least three of the following major life activity areas: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (*Id.*, subd. (l)(1).) The last two major life activities are generally not taken into consideration when evaluating a young child such as claimant, because all children of this age are not typically capable of living independently and are not expected to be economically self-sufficient.

The parties agree that claimant has a developmental disability (ASD) and significant functional limitations in self-direction. Claimant contends that he has further significant functional limitations in other major live activity areas. NBRC disagrees.

Evaluations

6. At the request of NBRC, Melanie Johnson, Ph.D., performed a psychological evaluation of claimant in 2021, when he was three years old. She

interviewed claimant's parents, reviewed records, and performed assessments. Dr. Johnson concluded that claimant meets the diagnostic criteria for ASD.

Regarding expressive and receptive language, she wrote that claimant's articulation was poor and that he found it difficult to participate in a reciprocal conversation, and that his parents believed that he understood more than he could express. She also wrote that he had trouble integrating verbal and non-verbal communication and was generally less communicative than other children his age.

Dr. Johnson recommended that claimant's family seek services for his ASD from the school district and recommended asking his pediatrician about home-based behavioral services. The family followed up on these recommendations.

7. On behalf of the Vacaville Unified School District, Sarah Barrett, M.S., a speech language pathologist, performed a comprehensive speech language assessment of claimant in April 2023, when he was four years and eight months old.

Barrett found that claimant made articulation errors which significantly impact his ability to be understood. Barrett found claimant's expressive and receptive language assessment scores to be in the average range. Claimant was able to understand complex sentences, modified nouns, quantitative concepts, pronouns, plurals, spatial, and descriptive concepts. He was able to use complete sentences, formulate questions, and use modified noun phrases and prepositions. Claimant also demonstrated age-appropriate pragmatic/social language skills. Claimant was friendly with Barrett, and she observed him interacting happily with peers.

Barrett concluded that claimant satisfied criteria for special education services under the articulation disorder category, and but did not satisfy the criteria for the

language disorder category due to his average scores in expressive, receptive, and pragmatic language.

8. Ashley Hazel, Ph.D., performed a psychological evaluation of claimant right around his fifth birthday, in August 2023, at the request of NBRC. Dr. Hazel did not have claimant's school records.

Dr. Hazel directed claimant's father to complete the Adaptive Behavior Assessment System, Third Edition (ABAS-3), an assessment tool for adaptive functioning. Dr. Hazel noted that claimant scored "low" in communication, "below average" in functional pre-academics, "low" in self-care, "extremely low" in self-direction, and "average" in motor skills. Overall, she concluded that the results of the ABAS-3 prepared by claimant's father demonstrated that claimant has skills below what is expected of a child his age in the conceptual, social, and practical domains.

Dr. Hazel administered the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV). Claimant scored in the 32nd percentile in verbal comprehension, which is classified as "average." Claimant's Full Scale IQ score was 81, which is "low average." Claimant's score on the General Ability Index was significantly higher than his Full Scale IQ score.

Dr. Hazel wrote that claimant demonstrated challenges in social and non-verbal communication.

Dr. Hazel concluded that claimant satisfied the diagnostic criteria for ASD with two specifiers: intellectual impairment -borderline intellectual functioning, and language impairment – full sentence speech reduced in pragmatics.

IEP

9. Claimant received special education services in preschool, which were beneficial. In an Individualized Education Program (IEP) dated April 2023, claimant was assessed for continuing eligibility for special education as he prepared to transition into kindergarten for the 2023-2024 school year. In the April 2023 IEP, claimant was found eligible for special education services under the category "Speech or Language Impairment." The IEP notes that claimant performed well on pre-academic assessments, that there were no concerns with claimant's academic or motor skills, and it was evident that claimant's ASD was not impacting his learning. The IEP also noted that claimant is an independent child and can take care of his personal belongings; is independent in the bathroom; knows how to clean up after himself; and gets his backpack and coat to line up to go home.

The IEP provides for claimant to attend a general education kindergarten class, with 20 minutes of speech therapy twice a week.

NBRC Eligibility Determination

10. Psychologist Daniel Silva, Psy.D., was on the eligibility team. He testified at hearing to explain NBRC's decision. The team reviewed documents including Dr. Hazel's evaluation report and claimant's school records. After NBRC notified claimant's family of the decision to deny eligibility, Dr. Silva attended the informal meeting with the family to further explain the decision.

11. The eligibility team determined that due to his ASD, claimant has significant functional limitations in self-direction, as reflected by his difficulties with social interactions, transitions, self-regulation, and using good judgment. The team also determined that claimant did not have significant functional limitations in the

areas of mobility, expressive and receptive language, self-care, and learning. Dr. Silva explained that limitations in self-direction are very typical of individuals with ASD.

12. Dr. Silva acknowledged that Dr. Hazel's cognitive testing of claimant in August 2023 produced lower scores than reflected in the school district's IEP of April 2023. Nonetheless, Dr. Silva and the other members of the eligibility team believed that the school district's assessment was more reliable. Dr. Silva explained that Dr. Hazel was not provided with the school district's records to inform her evaluation. He also opined that the language deficits she identified are better explained as deficits in social communication and not deficits in receptive and expressive language. The eligibility team took all available information into account, and concluded that claimant is doing well academically and does not have significant functional limitations in learning.

13. Dr. Silva discussed the team's determination that claimant does not have significant functional limitations in receptive and expressive language. The school district's speech and language assessment concluded that claimant required special education services only to address issues with articulation and not for language deficits. An articulation disorder does not constitute a significant limitation in receptive and expressive language.

14. The eligibility team saw no evidence suggesting that claimant has significant limitations in mobility or self-care. The team took into account all information provided by claimant's family regarding his functioning in these areas.

15. Dr. Silva reassured claimant's father that claimant can seek reassessment at any time, should the family have new information for review, and that it is possible that claimant might meet the eligibility criteria at a later age.

Claimant's Evidence

16. Claimant's parents have been taking care of him since he was two weeks old. His birth mother is a family member who abused drugs while pregnant. Claimant's parents also have three adult children. Claimant's family recently moved from Vacaville to Folsom to be closer to claimant's mother's sister, who is also very involved in raising claimant.

17. Claimant's father submitted copies of email correspondence he has received from claimant's teacher since claimant began kindergarten in August 2023:

a. On Sunday, August 13, she wrote that claimant had a tough day the previous Friday, that he had several episodes of crying, and that he upset other children because he was so loud. She asked for input from the family on strategies to calm him. She wrote, "I know the transition to kinder can be challenging, and I just want to make sure we give him the support he needs."

b. On August 22, she wrote that claimant was making progress completing his work and had been excited at school that day when it was his turn to share. She identified one area of concern, "keeping our hands to ourselves," and noted that claimant was "definitely not the only child struggling with this." She wrote that she had taken away five minutes of his recess time that day, and asked his family to speak with him about keeping his hands to himself.

c. On October 10, she wrote that claimant and another student poured water over the playdough math station that day. She wrote that she did not know why he had made this bad choice when lately he had been making such good choices. She added that he was "not the only one" and that she was emailing several other parents

to make sure their children understand why it is important to take care of things in the classroom.

18. Claimant's father disagrees with NBRC's decision for many reasons. He believes claimant should have been found fully eligible rather than provisionally eligible when he turned three years old in 2021, and that NBRC has again erred by denying claimant eligibility at this time. He complained that NBRC did not complete the assessment sooner.

Claimant's father objects to Dr. Silva opining on claimant's functioning because Dr. Silva did not personally assess claimant and has never met him. He objects to NBRC relying on the opinions of Dr. Silva as opposed to the two psychologists who evaluated claimant. He accused the eligibility team of "guessing" and placing too much weight on the school district's records and not enough on the report of Dr. Hazel.

Claimant's father argued that NBRC should take into account all seven areas of major living activities set forth in the Lanterman Act, including capacity for individual living and economic self-sufficiency. He contends that claimant is disabled in all seven areas.

Claimant's father reported that claimant has no social skills and has no safety awareness. He described claimant as high functioning, but also struggling. He reported that claimant is literal, requiring detailed explanations, and needs prompts and games to motivate him to perform self-care activities. Claimant's speech is difficult to understand even by the family. Claimant's father also reported that claimant is clumsy, trips often, and is unable to play on the monkey bars. Claimant's father reported that his four-year-old grandson is more advanced than claimant in all areas.

19. Claimant's family has provided extra services to help him thrive, including extra speech and behavioral therapy which they have funded out of pocket.

20. Claimant's parents seek regional center eligibility because they are committed to pursuing all resources and services available to assist him. They are very concerned about claimant's future, especially because they are older parents, and they worry about whether he can make it in life should something happen to them.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. A developmental disability is a disability that originates before an individual attains age 18, is likely to continue indefinitely, and constitutes a substantial disability for that individual. (Cal. Code Regs., tit. 17, § 54000, subd. (b).) The term "developmental disability" includes intellectual disability, autism, epilepsy, cerebral palsy, and what is commonly referred to as the "fifth category." (Welf. & Inst. Code, § 4512, subd. (a).) The fifth category refers to "disabling conditions found to be closely

related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.” (*Id.*)

3. Pursuant to section 4512, subdivision (l), the term “substantial disability” is defined as “the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person: (1) Self-care. (2) Receptive and expressive language. (3) Learning. (4) Mobility. (5) Self-direction. (6) Capacity for independent living. (7) Economic self-sufficiency.” These last two major life activities are generally not relevant when evaluating a young child such as claimant.

4. It is claimant’s burden to prove that he has a developmental disability, as that term is defined in the Lanterman Act.

5. It is undisputed that claimant meets the diagnostic criteria for ASD, an eligible condition, and that he has significant functional limitations, relative to his peers, in self-direction. These limitations are directly related to his ASD.

6. The evidence failed to establish that claimant has significant functional limitation in any other relevant area of major life activity. Although claimant receives speech and language special education services, these services are to assist with his articulation. The evidence did not establish significant functional limitations in expressive and receptive speech, even taking into account the limitations identified by Dr. Hazel in her report. The evidence did not establish significant functional limitations in learning. Claimant attends a general kindergarten class and performed well on school district assessments in April 2023. The evidence did not establish that claimant has significant functional limitations in his mobility and self-care. The family provided anecdotal evidence that is not corroborated by any other evidence. The evidence did

not establish that claimant has significant functional limitations in his capacity for independent living or economic self-sufficiency, relative to other children his age. Claimant has not established that he is substantially disabled, within the meaning of the Lanterman Act.

7. Claimant has failed to meet his burden of establishing that he is eligible for regional center services at this time.

ORDER

Claimant's appeal is denied.

DATE:

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.