

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

CENTRAL VALLEY REGIONAL
CENTER,

Service Agency.

OAH No. 2013040836

DECISION

A fair hearing was held on December 10, 2013, before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Visalia, California.

Claimant's mother represented claimant.

Shelley Celaya, Client Appeals Specialist, represented Central Valley Regional Center (CVRC).

Evidence was received, the record was closed, and the matter was submitted for decision on December 10, 2013.

ISSUES

Did CVRC establish that its original determination that claimant qualified for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., on the basis of autism was clearly erroneous?

FACTUAL FINDINGS

1. Claimant was born in January 2006. He is currently seven years old.

NOVEMBER 21, 2008 PSYCHOLOGICAL ELIGIBILITY EVALUATION

2. On November 21, 2008, when claimant was two years and 10 months old, he was evaluated for eligibility for services from CVRC under the Lanterman Act by Kathy Sullivan, Ph.D., ABPP,¹ a licensed psychologist who is board certified in Clinical Child & Adolescent Psychology, and Elisabeth Ganiron, Psy.D., a Psychological Assistant, at the Sullivan Center for Children. During the evaluation, the following tests were administered: (1) Leiter International Performance Scale; (2) Peabody Picture Vocabulary Test, Third Edition (PPVT-III); (3) Vineland Adaptive Behavior Scales: Second Edition (Survey-Interview Form) (Vineland-II); and (4) Childhood Autism Rating Scale (CARS). After these tests were administered, Drs. Sullivan and Ganiron reached the following impressions:

[Claimant's] nonverbal intellectual functioning was measured in the Superior range using the Leiter. His receptive language skills are Average according to the PPVT-III. For the most part, [claimant's] adaptive abilities are age-appropriate, with the exception of his interpersonal social skills. Despite his appropriate intellectual and adaptive functioning, [claimant] shows little interest in interacting with others and appears quite fearful of non-family members. Behavioral observations, reports by [claimant's parents], and information gathered from CARS were used to determine

¹ ABPP stands for American Board of Professional Psychology.

whether [claimant] meets the diagnostic criteria for Autistic Disorder, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). He meets the diagnostic criteria as stated below.

Drs. Sullivan and Ganiron found that claimant: (1) met four of the four diagnostic criteria for impairment in reciprocal social interactions; (2) three of the four criteria for impairment in communication; and (3) two of the four criteria for impairment in activities and interests. Drs. Sullivan and Ganiron diagnosed claimant with Autistic Disorder, finding that:

According to the DSM-IV-TR, at least six criteria must be met in order to qualify for an Autistic Disorder diagnosis.

[Claimant] met nine out of 12 criteria. His rating on the CARS, which indicated Severely-Autistic behaviors, further supports these findings.

3. Based upon the November 2008 evaluation, CVRC determined that claimant was eligible for services under the Lanterman Act in the developmental disability category of autism.

MARCH 23, 2011 TRIENNIAL ASSESSMENT REPORT

4. Claimant is a student in the Visalia Unified School District. Brenda K. Pace, M.A., School Psychologist, conducted a triennial assessment of claimant when he was five years and two months old, and issued a report dated March 23, 2011 (Triennial Assessment Report). Claimant was referred for evaluation by his IEP team to prepare for his transition to kindergarten. The report noted that claimant had received Speech/Language Therapy and Occupational Therapy (OT) through the school district for two years due to deficits in pragmatic language and fine motor development. He

also participated in the Resource Preschool Program. At the time of the report, he was enrolled in the Head Start Home Base program, and not in a general education preschool program. The report noted that claimant qualified for special education services due to speech/language impairment, but there was a question of whether he was also eligible for additional services under the categories of Autistic-Like Behaviors and Other Health Impairments. The report also noted that claimant had been diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and was taking prescribed medication at that time.

5. During the triennial assessment, the following tests were administered: (1) the Developmental Assessment of Young Children (DAYC); (2) the Gilliam Autism Rating Scale – Second Edition (GARS-2); (3) the Conners' Rating Scale – Revised (S); and (4) the Vineland Adaptive Behavior Scales, Second Edition (Vineland II).

6. A student found to have Autistic-Like Behaviors is eligible for special education services from the school district. There are seven criteria that a school district reviews when determining whether a student displays Autistic-Like Behaviors: (a) an inability to use oral language for appropriate communication; (b) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (c) an obsession to maintain sameness; (d) extreme preoccupation with objects or inappropriate use of objects or both; (e) extreme resistance to controls; (f) peculiar motoric mannerisms and motility patterns; and (g) self-stimulating, ritualistic behavior.

(a) The Triennial Assessment Report found that the first criterion was not met. A current speech/language evaluation reflected that claimant's "receptive, expressive, language concepts, articulation and pragmatic language skills to be in the average and above average ranges." The report noted that claimant's speech was "organized and appropriately sequenced. Socially he

- uses greetings, appropriately gets the listener's attention, and utilizes turn-taking and topic maintenance."
- (b) The report found that it was "unclear" if claimant met the second criterion. Claimant's parents stated that claimant had "difficulty relating to people as he is shy and does not know how to play with other children." But the observations made by a school district specialist indicated that claimant was "engaged in activities, that his [*sic*] is friendly and not too withdraw in educational therapy settings [*sic*]; his eye contact has been reportedly inconsistent."
- (c) The report found that the third criterion was not met. Although claimant's parents reported that claimant "did things in a certain ritualistic manner" and became "upset when routines are changed or disrupted," the school district specialist did not observe or report these behaviors "to a significant degree."
- (d) The report found that the fourth criterion was not met. Although claimant's parents indicated that claimant did not play appropriately with toys at home, the school district specialists observed claimant to "play appropriately with the toys in the classroom and cleaned up without difficulty or protest when instructed to do so."
- (e) School district specialists did not observe a resistance to controls when they interacted with and tested claimant.
- (f) Although claimant's parents noted that claimant walked on his tiptoes, flapped his hands and fingers, and exhibited peculiar motoric mannerisms, claimant did not demonstrate these types of mannerisms during the assessment and they were not observed during claimant's speech therapy and OT sessions.
- (g) Although claimant's parents reported that claimant engaged in self-stimulatory behaviors, claimant did not demonstrate these types of behaviors

during the assessment and they were not observed during claimant's speech therapy and OT sessions.

7. In the March 23, 2011 Triennial Assessment Report, the school district concluded that claimant did not meet the special education criteria for Autistic-Like Behaviors. The school district also found that claimant did not meet the special education criteria for Other Health Impairments.

OCTOBER 18, 2011 OCCUPATIONAL THERAPY TRIENNIAL EVALUATION

8. When claimant was five years and nine months old, and in a general education kindergarten classroom, Kathryn O'Connor, M.S., a registered and licensed Occupational Therapist, conducted an occupational therapy triennial evaluation due to concerns with claimant's fine motor and visual skills. The evaluation consisted of clinical observations of his motor coordination and sensory processing, a consult with his teacher, and a standardized test (Motor-Free Visual Perception Test – Second Edition). The evaluator described claimant as a "very sweet and polite boy, who appeared to enjoy what was asked of him throughout the assessment." The evaluator concluded that claimant's "strengths include his visual perceptual/motor skills and fine motor skills. At this time there appears to be no occupational therapy areas needing to be addressed that are hindering [claimant's] performance in his educational setting." The evaluator found that claimant did not qualify for occupational therapy.

NOVEMBER 14, 2011 MULTIDISCIPLINARY PSYCHOEDUCATIONAL RE-ASSESSMENT REPORT

9. At the request of claimant's mother, when claimant was five years and 10 months old and in kindergarten, Liz Lawson, a School Psychologist, conducted a Multidisciplinary Psychoeducational Re-Assessment and issued a report dated November 14, 2011. The components of this re-assessment included a medical history, vision and hearing screening, a review of school records, classroom observations, and a

formal assessment. During the formal assessment, the school district administered: (1) an academic achievement assessment (the Woodcock-Johnson Psychoeducational Battery III); (2) two processing assessments (the Motor-Free Visual Perception Test - Third Edition, and the Test of Auditory Processing Skills – Third Edition); and (3) two behavioral assessments (the Conners Early Childhood Behavior – Long Form, and the Gilliam Autism Rating Scale – Second Edition (GARS-2)).

10. After conducting the Multidisciplinary Psychoeducational Re-Assessment, the school district found that claimant did not meet the eligibility criteria for special education services as a student demonstrating Autistic-Like Behaviors. The school district concluded that:

Results from the GARS-2 as completed by [claimant's mother] indicate that [claimant] demonstrates a significant amount of autistic-like behaviors in the home setting. On the GARS-2 completed by his teacher, [claimant] was noted as exhibiting very few autistic-like behaviors in the school setting. [Claimant] communicated appropriately with his peers and teacher during classroom observations. Previous cognitive and speech assessment indicate [claimant possesses] average verbal skills. He worked cooperatively with classmates when asked to clean-up and was observed to interact with peers on the playground. During the observations [claimant] transitioned from activity to activity without difficulty. He also responded to the substitute teacher appropriately. [Claimant] did not appear to engage in any self-stimulating or ritualistic behavior during testing or during classroom observations, though he was somewhat

wiggly in his seat. When [claimant's] attention wandered he was easily redirected with a verbal prompt. He was not observed to use any items inappropriately or to have extreme preoccupations with objects. [Claimant] was observed to move around the classroom and playground with normal gait. Academically [claimant] is performing within age/grade expectations.

The school district also found that claimant did not have a specific learning disability or other health impairment that would qualify him for special education services.

DR. SHARP'S OBSERVATIONS OF CLAIMANT IN SCHOOL AND AT HOME IN APRIL AND MAY 2012

11. Carol Sharp, Ph.D., is a clinical psychologist with an emphasis on children. She also has an elementary school teaching credential. For the past nine years, she has been employed by CVRC as a Staff Psychologist. Dr. Sharp observed claimant in his home and at school.

12. On April 18, 2012, Dr. Sharp spent two hours observing claimant at school, both in the classroom and on the playground. In the classroom, Dr. Sharp observed that claimant was attentive to directions, and raised his hand to answer a question asked by the teacher. He followed instructions to fill in the blanks on a worksheet. He held his pencil in an "awkward fist" pencil grip." He did not read to his partner when instructed by the teacher to do so, but neither did the other students at his table. He solved a problem he was having with his pencil himself by getting another pencil from a basket. When a class activity ended, he put his supplies away, pushed in his chair, and stood in line as directed. He completed independent activities, made direct eye contact with Dr. Sharp, and communicated with her.

During recess, claimant rode a tricycle, skipped, engaged in a "bit of chase," and played soccer with other boys, encouraging them in their play. At story time, he sat quietly on his designated square on the carpet, was attentive to and appeared to enjoy the story, and answered the teacher's questions.

Dr. Sharp spoke to claimant's teacher, who stated that the observed day was a "typical" day for claimant. His teacher considered him "one of her top students." He worked "well with others." When asked about his pencil grip, his teachers stated that claimant had the "best writing in the class so she has not made an effort to correct this."

Throughout the observation, Dr. Sharp did not observe any negative behaviors. Claimant "blended in with the rest of his class." He was "attentive, followed directions, interacted and played with other students, and demonstrated concern for others. No behaviors associated with autism were observed."

13. Dr. Sharp visited claimant at this home on May 31, 2012. Claimant greeted her on arrival, making good eye contact. He said he recognized her from when she had visited his classroom. After a few exchanges, he returned to his video game, but he remained attentive to the adult conversation. He interjected comments and added information. When his special toy was mentioned during Dr. Sharp's discussion with his parents, claimant, on his own initiative, fetched the toy to show Dr. Sharp and allowed her to hold it. He willingly answered questions regarding the game he was playing. He let his father play a video game with him and "readily negotiated the process of determining the game and player identities."

Claimant's parents described a number of concerns they had with claimant's behavior, including that he: (1) did not like swings, loud noises, or heights; (2) had difficulty with catching a ball and swinging a bat; (3) hit himself and walked into the TV; (4) chewed; (5) sucked his thumb; and (6) had volume control and articulation problems.

14. At hearing, Dr. Sharp testified that, during her observations, claimant did not “stand out as a kid with difficulties.” She observed no indication that claimant had an Autistic Spectrum Disorder.

NOVEMBER 27, 2012 NEUROPSYCHOLOGICAL EVALUATION

15. When the school district found that claimant did not qualify for special education services as a student demonstrating Autistic-Like Behaviors, CVRC decided to conduct a comprehensive reassessment to determine if claimant had been correctly diagnosed as having an Autistic Disorder. CVRC retained Howard J. Glidden, Ph.D., FACPN,² to conduct the reassessment. Dr. Glidden is a licensed psychologist, an Associate Clinical Professor of Pediatrics and Psychiatry at the University of San Francisco School of Medicine, and a Diplomate of the American Board of Professional Neuropsychology.

16. Dr. Glidden conducted a Neuropsychological Evaluation of claimant on November 27, 2012. At the time of this evaluation, claimant was six years and 10 months old, and in the first grade. During the evaluation, the following tests were administered: (1) Wechsler Intelligence Scale for Children-IV; (2) Spatial Span Test; (3) Cancellation of Rapidly Recurring Target Figures Test; (4) Motor Examination; (5) Beery Visual-Motor Integration (5th Edition); (6) Behavior Rating Inventory of Executive Function; (7) Adaptive Behavior Assessment System-II; (8) Vanderbilt Assessment Scale; (9) Conners-3 General Index; (10) Interview for Autistic Spectrum Disorder Symptomatology; (11) Social Communication Questionnaire; (12) Mental Status Examination; and (13) Pre-Test Interview.

17. According to Dr. Glidden, “individuals with an Autistic Spectrum Disorder exhibit a relatively consistent triad of impairment:” (1) “Abnormal development of

² FACPN stands for Fellow American College of Neuropsychology.

language abilities in which receptive skills are often inferior to expressive skills, and gesture language is impaired as expressive speech"; (2) "Limited imitative abilities and imaginative play, insistence on maintenance of routines, obsessions and stereotypies"; and (3) "Impaired reciprocal social interaction." Dr. Glidden concluded that:

[Claimant's] behavior throughout this evaluation was contrary to these impairments. [Claimant] exhibited intact social interactive skills, such as taking turns, following directions and social pragmatics. When a task was discontinued and was one that [claimant] had enjoyed, he did not tantrum or exhibit difficulty in "transitioning." [Claimant] exhibited intact eye gaze, turn taking, topic selection and maintenance, imitation, and joint attention. In that [claimant] prefers to play with others rather than alone, seeks to share his accomplishments with his parents, imitates a model readily, does not exhibit stereotypies, and has intact social pragmatics, the diagnosis of an Autistic Spectrum Disorder does not, in this writer's opinion, appear warranted.

18. Dr. Glidden diagnosed claimant with ADHD and Phonological Disorder.³ He opined that claimant's "attention and mild motor challenges do have a cascading effect impacting social development as well as self-esteem, in that attention serves as an 'ingredient skill' for these more complex domains." He opined further that claimant "does appear to have the best of intentions, as well as knowledge of appropriate rules,

³ As set forth in the DSM-IV-TR, the "essential feature of Phonological Disorder is a failure to use developmentally expected speech sounds that are appropriate for the individual's age and dialect."

but exhibits poor 'follow-through' secondary to impulsivity and distractibility, which is fully consistent with the diagnosis of" ADHD.

19. Dr. Glidden's report noted that, on the Wechsler Intelligence Scale for Children-IV, claimant had a Full Scale IQ of 115, which is in the High Average range. But claimant's scores on the individual scales varied from a high of 124 on the Verbal Comprehension Index to a low of 94 on both the Processing Speed Index and the Cognitive Proficiency Index. He scored 127 on the General Ability Index, which is in the Superior range. At hearing, Dr. Sharp explained that the General Ability Index is calculated by taking into consideration a child's difficulties with attention, removing the timed items for children who do not perform well under pressure. Dr. Sharp also explained that, given claimant's intellectual functioning, he could not qualify for CVRC services under the developmental disability categories of mental retardation or a disabling condition that is closely related to mental retardation or requires treatment similar to that required for individuals with mental retardation (fifth category).

TESTIMONY OF CLAIMANT'S MOTHER AND LETTER FROM CLAIMANT'S PRINCIPAL

20. Claimant's mother testified that claimant is "very bright," but has "so many issues" that are hindering him. He "can't sit still" and "zones out." He has problems with pragmatic speech and difficulty getting his words out. He acts "like a four year old" and plays better with younger children than children his age. It seems as if his "brain and mouth are not connected." He cannot tie his shoes, or keep a swing going. He cannot ride a bike. He does not properly grasp a spoon, fork or toothbrush. He is "terrified of heights." He cannot button his shirts or put his t-shirts on correctly. He does not adequately wipe himself after using the toilet. He wet himself four times at school and walked around with urine on his pants. He "chews on everything." He runs into the street without looking. He has a hard time making friends. He does not know how to start a game. He "gets into the face" of other children, and touches them inappropriately. He

blurts out in class and other places. He has a “volume control problem” and makes noises in stores. He “flaps” and plays alone a lot. He seems to be “in his own world.” He is easily frightened by loud noises. In sum, claimant’s mother believes that claimant has autism. She would like him to continue to receive services from CVRC so he will get all the help he needs.

21. Claimant’s mother submitted a letter from Stephanie Gendron, the principal of claimant’s school. In her letter, Ms. Gendron stated that claimant’s teachers had shared that claimant has a “habit of chewing on items, particularly pencils and his clothing.” With “regularity,” claimant “struggles to correctly perceive social cues from his schoolmates.” Claimant has been placed in the “Special Friends Program where he receives individual attention from another adult on campus.” Ms. Gendron noted that claimant no longer qualifies for special education services from the school district. She described claimant as a “kind, bright, gentle young man whose presence adds to the caring climate that [they] are trying to foster at [their] school.”

DISCUSSION

22. Under the Lanterman Act, the legislature has authorized regional centers to provide services *only* to those individuals who have developmental disabilities that fall into one of the five distinct categories listed in Welfare and Institutions Code section 4512, subdivision (a): (1) mental retardation; (2) cerebral palsy; (3) epilepsy; (4) autism; or (5) a disabling condition that is closely related to mental retardation or requires treatment similar to that required for individuals with mental retardation.

23. When he was two years and 10 months old, claimant was diagnosed with having an Autistic Disorder and was therefore found to be eligible for CVRC services as a child with autism. After claimant’s school district found that claimant was not eligible for special education services as a student with Autistic-Like Behaviors, CVRC sent claimant for a reassessment by Dr. Glidden. Dr. Glidden conducted a comprehensive

reassessment and opined that claimant was not a child with an Autistic Spectrum Disorder.⁴ Dr. Sharp reviewed the findings of the school district that denied claimant special education services and Dr. Glidden's evaluation report, and observed claimant in his home and at school. From her review and observations, she agreed with Dr. Glidden's opinion that claimant did not have an Autistic Spectrum Disorder. She also opined that claimant was not "substantially disabled" as that term is used in the Lanterman Act because he did not exhibit significant functional limitations in three or more of the major life activity areas listed in the Lanterman Act. (Welf. & Inst. Code, § 4512, subd. (l).)

24. At hearing, claimant's mother described her concerns with claimant's behavior and submitted a letter from his school principal. That letter does not support that claimant has an Autistic Spectrum Disorder. Claimant's mother did not submit any evaluations or assessments by professionals qualified to opine about whether claimant has autism.

25. When all the evidence is considered, CVRC established that its original determination that claimant was eligible for services under the Lanterman Act on the basis of autism was clearly erroneous. Consequently, claimant does not qualify for continued services from CVRC.⁵

⁴ Dr. Glidden's comprehensive reassessment was conducted at a time when the DSM-IV-TR was in use. Since that time, the DSM-V has been issued. Dr. Sharp testified that Dr. Glidden's evaluation was not inconsistent with the DSM-V.

⁵ There was no argument or evidence that claimant has any of the other developmental disabilities listed in the Lanterman Act. (See Finding 19.)

LEGAL CONCLUSIONS

1. Under the Lanterman Act, regional centers provide services and supports to individuals with developmental disabilities. Welfare and Institutions Code section 4512, subdivision (a), defines a "developmental disability" to mean:

[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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this 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.

Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" to mean:

[T]he 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.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

2. Once an individual has been found to be eligible for services under the Lanterman Act, if a regional center seeks to terminate the individual's eligibility, it must comply with Welfare and Institutions Code section 4643.5, subdivision (b), which provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. After an assessment in November 2008, claimant was determined to be eligible for CVRC services under the Lanterman Act on the basis of autism. CVRC conducted a comprehensive reassessment of claimant in November 2012. Based upon that reassessment, CVRC determined that claimant could no longer be considered to have an Autistic Spectrum Disorder, or to be substantially disabled. After considering all the evidence submitted by the parties at the fair hearing, CVRC established that its original determination that claimant had a developmental disability was clearly

erroneous. (Welf. & Inst. Code, § 4643.5, subd. (b).) Consequently, claimant no longer qualifies for services from CVRC under the Lanterman Act.

ORDER

Claimant's appeal from Central Valley Regional Center's denial of eligibility for continued services is DENIED. Claimant is not eligible for continued regional center services under the Lanterman Act. The determination by Central Valley Regional Center to discontinue claimant's eligibility is SUSTAINED.

DATED: December 13, 2013

KAREN J. BRANDT

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)