

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2014050302

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Chico, California, on August 19, 2014.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Claimant was represented by her mother.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on August 19, 2014.

ISSUE

Is claimant eligible to receive regional center services and supports under the Lanterman Act based on a qualifying condition of autism pursuant to Welfare and Institutions Code section 4512?¹

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FACTUAL FINDINGS

1. Claimant is a three-year-old (40 months) girl who lives in the family home with her parents, younger brother and older stepbrother. At age 29 months, she became eligible for California Early Start services after being referred due to concerns relating to a seizure disorder. At that time, her possible seizure disorder was unspecified and was not treated with medication. Due to health insurance issues, claimant had not yet received a neurological consultation.

Claimant qualified for California Early Start services through FNRC pursuant to the California Early Intervention Services Act,² which provides early intervention services for infants and toddlers from birth to 36 months who have disabilities or are at risk of disabilities, to enhance their development and to minimize the potential for developmental delays.

She is reported by parent to have experienced multiple health issues since infancy. "She has a diagnosis of systemic mastocytosis with preleukemia, in addition to

¹Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

² California Government Code section 95000 et seq.

an unspecified seizure disorder. [Claimant's] condition causes a variety of uncomfortable symptoms that include: anaphylaxis, shortness of breath, low blood pressure, hives/swelling, nausea/vomiting, diarrhea, fainting and musculoskeletal pain. She has a compromised immune system and has experienced several bouts of pneumonia." She takes a number of medications, including prednisone, which caused weight gain. At 29 months, she weighed 53 pounds.

2. On October 17, 2013, Assessment Specialist Gail Collins with Parent Infant Programs, Inc., completed a Developmental Assessment of claimant for the purpose of making Early Intervention programming recommendations. At the time of this assessment, claimant's mother expressed concern with claimant's speech and behaviors. Ms. Collins suggested that claimant "may benefit from a speech and language evaluation" and "from an autism evaluation, as per her mother's request." Claimant received Early Intervention services from Parent Infant Programs.

3. On December 20, 2013, at 32 months of age, claimant was evaluated at the Chico Speech and Language Center by Abigail Delmatier Zhang, M.A., CCC-SLP. Ms. Zhang administered the Preschool Language Scale -5 (PLS-5) to assess claimant's receptive and expressive language skills and reported that the scores obtained "show that [claimant's] receptive and expressive language skills are within the normal range for children of her age. Speech therapy is not warranted at this time. However, [claimant's] speech development should be monitored and re-evaluated if her intelligibility does not improve with age."

Claimant "received a receptive language standard score of 93 and an age equivalency score of 2 years 6 months, placing her in the 32nd percentile for her age. She received an expressive language standard score of 87 and an age equivalency score of 2 years 1 month, placing her in the 19th percentile for her age. An overall language

standard score of 89 and an age equivalency score of 2 years 4 months was obtained, placing [claimant] in the 23rd percentile for children age 2.6 to 2.11.”

4. Eligibility for Early Start extends only until a child is three years of age. As claimant was approaching her third birthday, FNRC evaluated whether claimant would be eligible for regional center services and supports under the Lanterman Act.

5. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500 et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines “developmental disability” as follows:

“Developmental disability” means 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 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 [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

6. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to

mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(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.

7. Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" as:

(l) The existence of significant functional limitation 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.

8. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(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; and

(2) The existence of functional limitation, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(1) Receptive and expressive language.

(2) Learning.

(3) Self-care.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

9. The FNRC Eligibility Team determined that claimant did not meet the eligibility criteria for regional center services. As a result of that determination, a Notice of Proposed Action (NOPA) was issued on April 10, 2014, informing claimant that FNRC determined she was not eligible for regional center services. The NOPA stated:

Reason for action:

[Claimant] does not have intellectual disability and shows no evidence of epilepsy, cerebral palsy, autism, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. Eligibility Review (multi-disciplinary team) determined on 04/[9]/14 that [claimant] was not eligible for FNRC services based on reports by Dr. Lisa Benaron, FNRC Medical Director dated 02/20/14 and Parent Infant Programs dated 02/20/14.

10. Claimant's mother filed a Fair Hearing Request dated April 30, 2014, disputing claimant's ineligibility for regional center services. The reason for requesting a fair hearing was, "Family does not agree with Autism eval. outcome." She sought "a new autism eval."

At hearing, the parties testified that claimant had obtained medical services and her seizure disorder was no longer a concern as it was being managed with medications and was not substantially disabling to claimant. Therefore, the issue was whether claimant qualified for regional center services and supports based on the qualifying condition of autism.

11. On February 20, 2014, Beth Tucker, MSW, Parent Infant Programs Assessment Supervisor, completed an evaluation of claimant which included administration of the Bayley Scales of Infant Development III. This instrument provides assessment of five basic developmental domains:

1. Cognitive Development (which includes sensorimotor development, exploration and manipulation, object

relatedness, concept formation, memory, and other aspects of cognitive functioning.)

2. Receptive Language Development (measuring vocabulary development, morphological development [pronouns and prepositions], morphological markers [-ing, -ed] and possessives.)

3. Expressive Language (which includes vocabulary development, naming, attributes [e.g. color and size], multi-word utterances and verb tense.)

4. Fine Motor Development (which measures prehension, perceptual-motor integration, motor planning and motor speed.)

5. Gross Motor Development (which includes movement of limbs and torso, static positioning, dynamic movement, balance and motor planning.)

12. At a chronological age of 34 months, Claimant received the following scores:

	Raw Score	Scaled Score	Composite	Age Equivalency
Cognitive	67	8	90(83-99)	27 months
Receptive Lang.	30	8		28 months
Expressive Lang.	33	8		27 months
Language		16	89(83-97)	
Fine Motor	49	11		37-39 months
Gross Motor	53	5		
Motor		16	88(81-97)	19 months

13. Ms. Tucker concluded that, based on her evaluation and claimant's scores on the Bayley Scales of Infant Development III, "it does not appear that she will be eligible as a [client] of the Regional Center at the age of three. It is my understanding that she will receive an evaluation to rule out/confirm the presence of an Autism Spectrum Disorder. [Claimant] would greatly benefit from attending a preschool setting that would allow her daily opportunities to engage with peers and continue to develop skills necessary for school readiness."

14. Lisa Benaron, M.D., FAAP, FACP, is the Medical Director for FNRC. She is double-board certified in internal medicine and pediatrics and is an expert in neurodevelopmental disabilities. Diagnosing components of autism spectrum disorders is one of her main areas of expertise. Dr. Benaron is also a member of the FNRC Eligibility Team.

On February 20, 2014, Dr. Benaron completed an Autism Spectrum Disorder Evaluation that included a thorough review of all available records and administration of the Autism Diagnostic Observation Schedule, Module 2 (ADOS-2). Dr. Benaron also reviewed DSM-IV-TR diagnostic criteria for Autism Disorder, Pervasive Developmental Disorder not otherwise specified, and Asperger's Disorder, and reviewed DSM-5 diagnostic criteria for Autism Spectrum Disorder. An unstructured play observation conducted by Rochelle Hugaboom, MA/SLP, accompanied this evaluation.

15. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR³) was the standard for diagnosis and classification when claimant first began receiving Early Intervention services.

³ The DSM-IV-TR is a multiaxial system which involves five axes, each of which refers to a different domain of information as follows:

DSM-IV-TR section 299.00, Autistic Disorder, states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual . . . The impairment in reciprocal social interaction is gross and sustained . . . The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills . . . Individuals with Autistic Disorder have restricted, repetitive, and stereotyped patterns of behavior, interests, and activities.

Axis I Clinical Disorders

Other Conditions That May Be a Focus of Clinical
Attention

Axis II Personality Disorders

Mental Retardation

Axis III General Medical Conditions

Axis IV Psychosocial and Environmental Problems

Axis V Global Assessment of Functioning

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

The DSM-IV-TR classified PDD-NOS and Asperger's Disorder separately from Autistic Disorder.

16. Dr. Benaron summarized her review of the DSM-IV-TR criteria as follow:

In summary, it is difficult to definitively assess the DSM-IV criteria for autism due to the fact that [claimant's] behaviors are highly dependent on the environment. Although she does tend to withdraw from interaction at times, she is capable of interacting in a typical manner. Based on observations, [claimant] does not meet the criteria for an autism spectrum disorder. Based on parental reports of lack of interest in peers and restricted and repetitive behaviors, a diagnosis of pervasive developmental disorder, not otherwise specified remains a diagnostic consideration. To further clarify the diagnostic impression, the Autism Diagnostic Observation Schedule-2 (ADOS-2) was administered.

17. The Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5) was released in May 2013. It no longer recognizes a specific diagnosis of autistic disorder. The DSM-5 established a diagnosis of Autism Spectrum Disorder which encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

The plain language of the Lanterman Act's eligibility categories includes "autism" but does not include other Pervasive Developmental Disorders (PDD) diagnoses in the DSM-IV-TR (Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-5 to reflect the current terminology of Autism Spectrum Disorder. Therefore, Dr. Benaron evaluated claimant's eligibility under both the DSM-IV-TR and the DSM-5.

18. DSM-5 section 299.00, Autism Spectrum Disorder, states:

The essential features of Autism Spectrum Disorder are persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interests or activities (Criterion B).

These symptoms must be present in early childhood and limit or impair everyday functioning. (Criterion C and D). . .

The impairments in communication and social interaction specified in Criterion A are pervasive and sustained . . .

Manifestations of the disorder also vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. Autism spectrum disorder encompasses disorders previously

referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

To diagnose Autism Spectrum Disorder, it must be determined that an individual has persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. The individual must also have restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and/or (4) hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment. In addition, symptoms must be present in the early developmental period and must cause clinically significant impairment in social, occupational, or other important areas of current functioning.

19. Dr. Benaron concluded that claimant “does not meet criteria for an ASD due to failure to meet all 3 of the criteria under social-communication.”

20. Claimant was administered the Autism Diagnostic Observation Schedule-2 Module 1: Pre-verbal/single words (age 31 months and older) (ADOS-2). The ADOS-2 is “a semi-structured, standardized assessment of communication, social interaction, and behavior used in the evaluation of individuals referred for a suspected ASD. In the context of the ADOS-2, the examiner can directly observe the presence of behaviors consistent with autism and/or the absence of behaviors expected from a typically developing individual. Observed behaviors are scored in a standardized manner to allow comparison of individuals of similar ages and language abilities with and without ASDs.” The ADOS is considered by to be “the gold standard” when assessing for ASD.

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Claimant’s scores were as follows:

Social Affect (SA)	7
Restricted and Repetitive Behavior (RRB)	1
Total (SA +RRB)	8
Classification	Autism Spectrum
Level of autism spectrum-	Low
Related symptoms	

21. Dr. Benaron included the following in her conclusion:

Final Diagnostic Impression Regarding ASD:

Although [claimant] demonstrated some perseverative/repetitive behaviors during the ADOS testing on 02/20/14, she has not shown any atypical play during her developmental program. Her nonverbal communication is

coordinated with her mood when she is comfortable.

[Claimant] continues to demonstrate language delays and articulation problems that make her difficult to understand at times. Hopefully she will qualify for speech and language through special education preschool. My clinical opinion is that an ASD diagnosis (specifically, PDD-NOS) is not appropriate for [claimant] at this time. I reviewed my diagnostic conclusions with her mother during the evaluation and highly recommend preschool so that [claimant] will have a chance to interact with peers.

With regard to eligibility at Far Northern Regional Center, [claimant] does not appear to qualify for services at FNRC for two reasons: 1) Not currently substantially handicapped in 3 major life areas; and 2) my clinical opinion is that her behavioral profile is not well described by an autism spectrum disorder diagnosis. It should be noted that there is some degree of uncertainty in my final clinical opinion due to parental reports of the non-observed behaviors. If the school personnel see her as a child with ASD, she should be referred back to FNRC to re-assess eligibility . . .

22. FNRC agreed to defer the eligibility decision for claimant and to fund an additional autism evaluation. Melanie Drakulic, M.A., P.P.S., conducted a psychoeducational evaluation "specific to the possibility of autism spectrum disorder (ASD)," on June 26, 2014. The evaluation included an unstructured play observation conducted by Kendra Egan, M.A., SLP-CF, Chico Speech and Language Center.

23. Ms. Drakulic reviewed the DSM-IV-TR Diagnostic Criteria for Autistic Disorders and determined that claimant “seems to fully meet two of the twelve criteria outlined for autistic disorder, and two may be considered met at a subthreshold level. This would not be enough to consider autism as a probable diagnosis when reviewing the DSM-IV (a total of six or more items would be needed, with at least two from 1. and at least one each from area 2. And 3.)”

She also reviewed the DSM-5 Diagnostic Criteria for Autism Spectrum Disorder and concluded, “The number of criteria met would not be enough to consider autism spectrum disorder as a probable diagnosis when reviewing the DSM-5 (must meet criteria A1, A2, and A3; two criteria from Section B; and C, D, and E.)”

24. Ms. Drakulic administered the ADOS-2, Module 1, and reported the following scores:

Social Affect	6
(Communication and reciprocal social interaction)	
Restricted and Repetitive Behavior	0
Overall Total	6
Classification	Non-spectrum
Level of ASD-related symptoms	Low

25. Ms. Drakulic included the following information in her summary:

Considering all the information gathered for this evaluation in aggregate, results indicate an overall impression that [claimant] does **not** currently meet the criteria as a child with autism spectrum disorder. At the present time, [claimant] is able to integrate eye contact, gestures, and verbalizations with others. She demonstrates pleasure in interactions and includes others in her play. There are no restricted or

repetitive interests or behaviors reported or observed. [Claimant] was a generally happy seeming child during today's assessment. She engaged in all activities presented, transitioned smoothly, and shared enjoyment. She demonstrates good eye contact and facial expressions for communication and interacting socially. The areas that appear to be on-going difficulties for her include: medical concerns, aggressive behavior in the home setting, speech intelligibility and language for conversation and social interactions, and reported preference to play by herself. It is recommended that [claimant] be referred to her local school district for an evaluation to determine eligibility for special education. She will no doubt greatly benefit from speech and language therapy to increase her communication skills and intelligibility; and participation in a preschool classroom to have opportunity for appropriate peer interactions, group participation, behavior and pre-academic skills . . .

26. Claimant's mother testified about her concerns with claimant's behaviors that she observes. She stated that she was just seeking a diagnosis so she can determine how to help her daughter. She described claimant as rarely playing with other children except her younger brother and, on occasion, her cousins. Claimant likes to be by herself, tends to "zone out," and likes her things organized in a certain way, having outbursts if anyone moves them. Claimant reportedly bites her hands, rocks and makes grunting noises. She likes routine and has to use the same towel and blanket. Her mother feels that other children are mean to claimant and she does not know it. Claimant's mother opined that claimant has "special needs but not special enough."

Claimant's mother testified that an Individualized Education Program (IEP) had not yet been developed by claimant's local school district.

27. At hearing, Dr. Benaron acknowledged the concerns of claimant's mother. She agreed that there were "clear issues with socialness and speech." She recommended completing the IEP process with the school district, enrolling claimant in preschool and watching her socialization skills as they develop. Because she does not meet criteria for a developmental disability under the Lanterman Act at this time, does not preclude claimant from presenting new information for FNRC's consideration as claimant develops.

Dr. Benaron explained that she was "not comfortable saying that claimant currently has an ASD that is substantially handicapping and expected to continue indefinitely."

28. There was no evidence that claimant has intellectual disability, cerebral palsy, a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability, or epilepsy. The parties agreed that a seizure disorder was not at issue.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

"Developmental disability" means 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 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 intellectual disability [commonly known as the “fifth category”], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. Claimant bears the burden of establishing that she meets the eligibility requirements for services under the Lanterman Act.⁴ She has not met that burden. The evidence presented did not prove that claimant is currently substantially disabled by a qualifying condition that is expected to continue indefinitely. Claimant does not meet the diagnostic criteria for an ASD and there was no evidence to show that she has epilepsy, cerebral palsy, intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. Accordingly, claimant does not have a developmental disability as defined by the Lanterman Act and she is not eligible for regional center services.

ORDER

Claimant’s appeal from the Far Northern Regional Center’s denial of eligibility for services is DENIED. Claimant is not eligible for regional center services under the Lanterman Act at this time.

⁴ California Evidence Code section 500 states that “[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”

DATED: August 29, 2014

SUSAN H. HOLLINGSHEAD
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).)