BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT vs. GOLDEN GATE REGIONAL CENTER, Service Agency.	OAH No. 2016030241

DECISION

This matter was heard before Karen Reichmann, Administrative Law Judge, State of California, Office of Administrative Hearings, on September 6 and 7, 2015, in San Mateo California.

Rufus Cole and Penelope Pahl, Attorneys at Law, represented Golden Gate Regional Center, the service agency.

Claimant was represented by his mother.

The record closed, and the matter was submitted for decision on September 7, 2016.

ISSUE

Is claimant eligible for regional center services because he has autism?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant was born on April 18, 2011. Claimant lives with his parents, who are devoted to helping claimant maximize his potential. Claimant's mother believes strongly that claimant is autistic. She became concerned because claimant would not respond consistently to his name, talked excessively, behaved intrusively, appeared to have no fear, and was delayed in toilet training. In addition, claimant's mother has an autistic cousin who is very low-functioning. Claimant tends to play alone and does not have friends. He is overly comfortable and affectionate with strangers. He intrudes on the personal space of others. He whines rather than speaking. He frequently spins. He engages in obsessive behaviors such as lining up objects and becomes very upset if he is not allowed to finish. He licks and mouths things and wears a special "chewie" around his neck to direct this behavior.

Claimant was asked to leave two different preschools because of behavior issues. At a third preschool, his mother was required to be present throughout the day to assist in controlling his behavior.

2. On September 11, 2015, claimant's mother submitted an application for regional center services to the Golden Gate Regional Center (GGRC).

DIAGNOSTIC CRITERIA FOR AUTISM DISORDER

3. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-V), section 299.00, sets forth the diagnostic criteria for Autism Spectrum Disorder (ASD) as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative not exhaustive):

(1) Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back–and–forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

(2) Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

(3) Deficits in developing, maintaining, and understanding relationships, ranging for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive):

(1) Stereotyped and repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies lining up toys or flipping objects, echolalia, idiosyncratic phrases).

(2) Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal and nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

(3) Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to a preoccupation with unusual objects, excessively circumscribed or pervasive interests).

(4) Hyper- or hypoactivity to sensory input or unusual interest in sensory aspects of the environment (e.g. apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

C. Symptoms must be present in the early development. (They may not become fully manifested until social demands exceed limited capabilities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co–occur; to make co-morbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

KAISER DIAGNOSIS AND TREATMENT

4. Claimant was evaluated by psychologists Samuel Sweet, Ph.D., and Heidi Brunette, Psy.D., at the Kaiser Autism Spectrum Disorders Center (Kaiser) on August 13, September 4, and September 18, 2015. They authored a report dated September 18, 2015 (Kaiser report). Dr. Sweet and Dr. Brunette administered a number of diagnostic tests, including the Autism Diagnostic Observation Schedule-2 (ADOS-2), Module #3; the Adaptive Behavior Assessment System, Second Edition (ABAS-II); the Differential Ability Scales, second edition (DAS-II); the Achenbach Child Behavior Checklist (Parent report); the Ages and Stages Questionnaire (ASQ); and the Social Communication Questionnaire (Parent report). Additionally, they reviewed claimant's records, observed claimant's behaviors, and interviewed his parents.

Dr. Sweet and Dr. Brunette diagnosed claimant with Autism Spectrum Disorder and Attention-Deficit/Hyperactivity Disorder (ADHD) – Combined Presentation (Rule-Out). They referred claimant to the Child & Adolescent Psychiatry Clinic at Kaiser in Redwood City for supportive services and encouraged claimant's parents to explore options with a child psychiatrist for treatment of claimant's impulsivity, hyperactivity, and inattention.

5. Claimant was referred by Dr. Sweet for a consultation with developmental pediatrician Jean Sakimura, M.D. Dr. Sakimura prepared a report dated September 21, 2015. She concluded:

> He meets DSM-5 criteria for a provisional diagnosis of attention deficit/hyperactivity disorder (ADHD), combined type. The diagnosis is provisional because of his young age. He also shows behaviors consistent with autism spectrum disorder, including decreased eye contact/gesture, loud speech, repetitive speech, repetitive movements, visual self-stimulatory behavior, intense/narrow interests, and awkward social interaction.

6. In a letter dated March 15, 2016, Dr. Sweet explained that after consulting with Dr. Sakimura, they both felt that claimant's "social difficulties are not exclusively due to ADHD and he also meets criteria for a DSM-5 diagnosis of ASD."

7. In a letter dated April 6, 2016, Kaiser psychiatrist Whitney Landa, M.D., and psychologist Kylie Billingsley, Ph.D., claimant's treating team at Kaiser, write that they have worked with claimant since June 2015 and have observed many of the social, behavioral, and adaptive deficits identified in the Kaiser report and by Dr. Sakimura. They have found his presentation to be consistent with the diagnosis of ASD.

8. Kaiser provides 12 hours a week of Applied Behavior Analysis (ABA) services, which is administered by Easter Seals. Claimant's family pays a co-payment and claimant's mother explained that it amounts to hundreds of dollars a month and is a hardship for the family. Claimant's mother also attends a support group for families with autistic children to learn parenting strategies.

9. Dr. Landa has been treating claimant with Ritalin and Risperdal for approximately three months. These medications are commonly used to treat ADHD and aggression. Claimant's mother noted that the medications have been helpful in "slowing him down," but asserted that he still demonstrates prevalent symptoms of autism.

SAN MATEO-FOSTER CITY SCHOOL DISTRICT ASSESSMENT AND SPECIAL EDUCATION SERVICES

10. Claimant was evaluated for special education services by the San Mateo-Foster City School District in November 2015. Reports were prepared by special education teacher Cristina Blanco, M.Ed., school psychologist Sarah Swenson, Ph.D., Speech/Language pathologist Kirsten Park, M.S., and occupational therapist Catherine Buckman, M.A.

The school district concluded that claimant met the criteria for autism as set forth in the Individuals with Disabilities Education Act and noted that:

> [Claimant] exhibits a combination of deficits in verbal and nonverbal communication and significant deficits in social interaction. [Claimant] also presents with other characteristics often associated with autism including engagement in repetitive activities, repetitive and stereotyped movements, and unusual responses to sensory experiences.

The school district is providing claimant with services based on autism as his primary disability and speech or language impairment as his secondary disability. Claimant attends a special day class and receives language and speech services, occupational therapy and behavior intervention for physical aggression. Claimant has a one-on-one aide assisting him throughout the school day.

11. In a letter dated August 25, 2016, Molly Maxwell, M.A., supervisor for claimant's ABA school support, writes

> We are currently working with [claimant] on social, adaptive, and behavioral goals within his kindergarten Special Day Class. [Claimant] requires additional support in areas such as cooperative play with others, engaging in conversation appropriately, and utilizing coping strategies in place of maladaptive behaviors.

ELIGIBILITY DETERMINATION

12. After claimant applied for regional center services, he was assessed by an interdisciplinary eligibility team, comprised of GGRC staff members John Michael, M.D., Bernice Joo, Ph.D., and Michelle Kaye, L.C.S.W.

13. Social Worker Kaye met with claimant and his family at their home on September 11, 2015. Kaye took a history from the parents and memorialized her own observations of his behavior in a Social Assessment Report dated December 23, 2015. She observed that his eye contact was poor, he greeted the social workers but his articulation was poor, and that he appeared to be happy and energetic.

14. The GGRC team met with claimant and his mother at the GGRC offices on January 25, 2016, for an eligibility determination meeting. The team observed claimant

for about 45 minutes then privately discussed their recommendation. Dr. Joo completed a written report at this time.

Dr. Joo based her report on a review of the Kaiser report, a telephone interview of claimant's teacher, her observation of claimant during a visit to his school on December 17, 2015, and her observation of claimant at the GGRC offices that day. Dr. Joo rated claimant using the Childhood Autism Rating Scale, Second Edition, Standard Version (CARS2-ST), based on her observations of claimant and the interviews with claimant's mother and teacher. Claimant's score on the CARS2-ST was 29.5, which indicates minimal-to-no symptoms of ASD.

In her report, Dr. Joo noted that claimant demonstrated interest in others and initiated and engaged with adults and peers. He was eager for attention and praise and enjoyed social interactions. He was flexible with changes and compliant. However, she also noted that he sometimes misperceived other people's actions, became dysregulated easily, and was easily distracted, impulsive, and hyperactive. Claimant also exhibited some unusual behaviors such as undirected speech and spinning.

Dr. Joo concluded that claimant did not demonstrate significant social communication and social interaction impairments within the meaning of the DSM-V ASD diagnostic criteria. She concluded that claimant did demonstrate restricted, repetitive patterns of behavior, interest, or activities. Dr. Joo concluded that claimant did not satisfy the criteria for an ASD diagnosis. Dr. Joo explained:

> [Claimant] does not demonstrate significant impairments in social communication that are consistent with Autism. Though his mother and teacher reported some deficits in social-emotional reciprocity, they also stated that he is friendly and interactive with both adults and peers, and that he understands others' emotions and demonstrates empathy

for them. At school and during the eligibility meeting, he was observed to initiate and engage in reciprocal interactions spontaneously and naturally. Although he sometimes had difficulty sustaining eye gaze while interacting with others, when he was not distracted, he demonstrated good eye contact. Additionally, he was observed to utilize facial expressions, pointing, and other gestures when communicating. His teacher and mother also reported that he has difficulty with peer relationships, but stated that he seeks out and enjoys interactions with peers, and that his difficulty is usually due to misunderstanding their intentions or due to his rigidity. Though he exhibits some impairments in the area of social communication, he also demonstrates many strengths and appropriate skills. Additionally, many of his difficulties in social communication appear to be due to other reasons, such as his inattention, impulsivity, and hyperactivity. These criteria are, therefore, considered to be questionably present and better accounted for by other explanations/disorders.

In the area of restricted and repetitive behaviors, [claimant] demonstrates difficulty with transitions and changes in routine, has fixations on Polar Express trains, and exhibits tactile, proprioceptive, and vestibular sensory issues, as reported by his mother and teacher, and observed during the school observation. He appears to have significant

impairments in restricted repetitive behaviors, which require "very substantial support." Some of these behaviors are, however, also characteristic of other disorders, such as Attention-Deficit/Hyperactivity Disorder and Sensory Integration Disorder, and not necessarily indicative of Autism Spectrum Disorder.

15. The eligibility team agreed with Dr. Joo and determined that claimant did not qualify for regional center services. The team notified claimant's mother at the conclusion of the January 25 eligibility meeting and provided her with a copy of Dr. Joo's report.

16. Dr. Michael also wrote a report, dated March 23, 2016. He noted his impressions of claimant as:

1. Age-level intelligence.

2. Behaviors similar to attention deficit hyperactivity disorder.

3. Speech and language impairment, statements, and brief conversation. Mild articulation errors. He talks to "everyone" at times and often talks his thoughts out loud.

4. Probable sensory issues: history of bumping into things, not recognizing personal space, being overly friendly.

Dr. Michael concluded that claimant was not eligible for regional center services.

INFORMAL APPEAL

17. Claimant's family requested an informal appeal and an informal appeal meeting was held on February 29, 2016, at GGRC. Dominique Gallagher, L.C.S.W., manager of intake and assessment, and psychologist Telford Moore, Ph.D., attended on behalf of GGRC. They met with claimant and his mother and reviewed the Kaiser evaluation, the report of Dr. Sakimura, and the report of Dr. Joo. They concluded:

> Everyone who has evaluated [claimant] has commented upon the obvious and impossible-to-ignore vocal and behavioral hyperactivity displayed by [claimant]. More than anything else, this hyperactivity is the primary cause of his functional ineffectiveness. Assessment scores and observations demonstrate normal development of language and cognition with some difficulties in pragmatics. Reciprocal interactions are compromised by the hyperactivity and it is not clear if motor "clumsiness" is a function of developmental motor problems or hyper-motor activity. As demonstrated by his reactions to his mother's excellent behavioral skills to manage him, [claimant] does respond to behavioral interventions. [Claimant's] mother also rated [claimant's] social functioning on the ABAS-II as Low Average. Dr. Sweet and Dr. Brunette did not have the benefit of observing [claimant] in a more naturalistic setting of the school; Dr. Joo did and also had the benefit of Dr. Sweet's and Dr. Brunette's Psychological Evaluation.

> The ADHD/ASD overlap is a significant issue and complicates the diagnostic picture. If the ADHD could be controlled or better controlled, a more accurate assessment of ASD symptoms could be made.

DR. JOO'S TESTIMONY

18. Dr. Joo has been working at GGRC for five years and has diagnosed hundreds of children. Dr. Joo explained why she concluded that claimant does not have social communication and social interaction impairments consistent with ASD. She noted that claimant gets excited and shares his enjoyment with others and is eager for attention, acts in a natural and spontaneous way, uses facial expressions and non-verbal gestures and understands the gestures of others, sometimes makes good eye contact, initiates contact and engages in some reciprocal contact and engages in make-believe play. His mother describes him as friendly and empathetic to others, loving, having a good sense of humor, and misbehaving in order to get attention. These behaviors are not consistent with ASD. In Dr. Joo's opinion, the social difficulties claimant does display, such as being intrusive, having poor boundaries, and having poor eye contact at times, are typical of ADHD.

Dr. Joo also noticed that claimant was hyperactive, easily distracted, constantly moving, and had difficulty focusing and sitting still. In her opinion, these are core traits of ADHD. She also observed that he sought out vestibular and proprioceptive input, behaviors which are symptomatic of both ADHD and ASD.

Dr. Joo believes that the Kaiser ASD diagnosis is inconsistent with the descriptions of claimant's behavior contained in the Kaiser report. She noticed frequent descriptions of positive social interactions in the Kaiser report and was surprised when reading the report to discover the final diagnosis of ASD. Dr. Joo testified at length

about her analysis of the various diagnostic tests performed by the Kaiser psychologists. In her opinion, claimant did not present scores that were typical of ASD on most of these tests and she is skeptical of the validity of the tests that did suggest ASD.

Dr. Joo further explained that the criteria that school districts use to determine eligibility for special education for autism is different from the DSM-V criteria and different from the criteria used for establishing regional center eligibility. A school district finding of autism is not a clinical diagnosis and is not binding on the regional center.

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 which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." The term "developmental disability" includes autism. (Welf. & Inst. Code, § 4512, subd. (a).) 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."

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

4. Claimant's family contends that GGRC made numerous errors in its reports that cast doubt on their validity, misinterpreted the records, misapplied the DSM criteria, unfairly focused on claimant's strengths and ignored his weaknesses, and misled the family and acted unethically during the eligibility process. These contentions were carefully considered. None of claimant's contentions undermine the persuasiveness of GGRC's evidence on the issue of whether claimant is eligible for services.

5. The uncontroverted evidence established that claimant struggles socially and exhibits restricted and repetitive behaviors. The testimony of Dr. Joo that these behaviors are not caused by ASD was persuasive and compelling. She concluded, based on her own observation of claimant and her review of the medical and school reports, that claimant does not satisfy the diagnostic criteria for ASD and that his deficits are better explained as stemming from ADHD. No direct evidence was presented to contradict her credible testimony. Claimant has failed to meet his burden of establishing that he is eligible for regional center services, notwithstanding the fact that he has been diagnosed with ASD by his medical providers and is receiving treatment and special education services for autism.

ORDER

The appeal of claimant is denied. Claimant is not eligible for regional center services.

DATED: September 14, 2016

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KAREN REICHMANN

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.