

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2016031415

DECISION

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter in Campbell, California, on April 26, 2016.

Claimant¹ was represented by his parents, who appeared telephonically.

James F. Elliott, Fair Hearing Designee, represented service agency San Andreas Regional Center.

The record closed and the matter was submitted on April 26, 2016.

ISSUE

Is Claimant eligible for regional center services because he has an intellectual disability, autism, or a condition closely related to or requires treatment similar to that required for individuals with an intellectual disability?

¹Claimant's name is not used to protect his privacy.

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy. His parents applied to San Andreas Regional Center (SARC) for services. In particular, Claimant's mother sought services for speech and language, occupational therapy, and help for motor skills, memory skills, assertiveness skills, peer interaction skills, and guidance services similar to a big brothers program. In a Notice of Proposed Action, dated February 25, 2016, Claimant was found ineligible for services. On March 22, 2016, Claimant's parents filed a Fair Hearing Request appealing the decision.

2. Claimant's parents contend that he qualifies for regional center services under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act), for an intellectual disability, autism or under the "fifth category" because he has a condition closely related to an intellectual disability, or that requires treatment similar to that required for individuals with an intellectual disability.

3. SARC contends that Claimant does not meet the requirements for regional center services because he has a learning disability rather than an intellectual disability.

EARLY DEVELOPMENT AND FAMILY HISTORY

4. Claimant resides with his mother, father, and two older brothers who are consumers of SARC services.

5. Claimant was born premature via C-section with a heart murmur. During the pregnancy, his mother drank alcohol and took medications to help with depression. Claimant's developmental milestones were within normal limits, in that he sat alone at eight months, crawled at six months, and walked at 14 months. His speech and language milestones were delayed, as he was difficult to understand and did not use complete sentences.

EARLY ASSESSMENTS

6. In February 2014, Brian Tang, M.D., of Lucile Packard Children's Hospital, assessed Claimant. In his report, Dr. Tang noted that Claimant had been previously diagnosed with pervasive developmental disorder (PDD) by Behavioral Health in Hollister and had received speech and language therapy. Dr. Tang determined that Claimant's differences in development and behavior did not appear consistent with Autism Spectrum Disorder. However, his performance on the testing "that looked at nonverbal visual motor skills strongly indicates a high risk for a learning or intellectual disability. Having several family members, including two siblings with or at high risk for a developmental disability furthermore increases [his] risk." Dr. Tang concluded that "at this point a cognitive communication disorder is the most appropriate provisional diagnosis until further testing is completed."

7. In April 2014, an evaluation of Claimant was conducted by the Hollister School District, when Claimant was six years and two months old. Claimant was given the Wechsler Pre-School and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV).² On the WPPSI-IV, Claimant scored an IQ of 69 which indicated that his overall cognitive ability was in the extremely low range. The examiner for the school district concluded the following:

- Claimant did not meet the criteria for an Intellectual Disability at the time because the examiner believed that the low score on the cognitive assessment may be more related to behavior than to a true intellectual disability, and should be looked at again in the future when he had consistently attended

² The school district's evaluation also mentioned that prior to January 2013, Claimant had an earlier diagnosis of PDD, as the primary and Expressive Language disorder as the secondary.

school and more behaviors were in place to promote a more accurate assessment.

- Claimant did not meet the criteria for a specific learning disability. There was evidence of an auditory processing deficit and a language processing deficit. But it could not be determined by the assessment that the learning problems were not primarily the result of limited school experience or poor school attendance at the time.
- Claimant did not appear to meet the criteria for autism.

The examiner for the school district determined that Claimant qualified for special education services under the category of speech and language impairment, and was placed in a Special Day First Grade classroom.

8. In September 2014, Maria Elena De Anda, M.D., of Lucile Packard Children's Hospital, assessed Claimant's cognitive and adaptive skills. Dr. De Anda used the Wechsler Preschool and Primary Scale of Intelligence IV and the Vineland Adaptive Behavior Scales, Second Edition. On the WPPSI IV, Claimant scored a full scale IQ of 69, indicating that his cognitive abilities are in the deficient range, but his working memory was in the average range. On the Vineland test, which was completed by his father, adaptive abilities were quite delayed and relatively lower than his cognitive scores. Dr. De Anda diagnosed Claimant with 319.00 Intellectual Disability under the DSM-V.³ She recommended that Claimant's parents contact SARC to undergo an evaluation for eligibility under the category of intellectual disability.

³ DSM V refers to Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (2013).

DR. SANCHEZ'S EVALUATION

9. SARC conducted an intake interview with Claimant and his mother. On February 6, 2015, Clinical Psychologist Ubaldo Sanchez, Ph.D., a vendor of SARC for over 25 years, conducted a psychological evaluation of Claimant. Dr. Sanchez was evaluating Claimant's eligibility under the categories of intellectual disability or a condition requiring treatment similar to a person with an intellectual disability. Dr. Sanchez reviewed the evaluation of Claimant conducted by the Hollister School District. Dr. Sanchez used the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) and the Adaptive Behavior Assessment System – Second Edition (ABAS-II) – Parent Form.

On the WISC-IV, Claimant earned a full scale composite score of 84, which is in the low average range of measured intelligence. He had a low average score in verbal comprehension, an average score in perceptual reasoning, a borderline score in working memory, and a low average score in processing speed.

According to the ABAS-II, which was completed by Claimant's mother, the results indicated significant impairment in his communications, community use, functional academics, home living, health and safety, self-care, self-direction, and social skills. However, based on Claimant's presentation during the evaluation, Dr. Sanchez believed that these results appeared to "be an underestimate of his functional abilities."

Dr. Sanchez diagnosed Claimant with Language Disorder 315.39 (F80.9) under the DSM-V. Dr. Sanchez issued his report on March 4, 2015. Overall, Dr. Sanchez concluded the following:

[Claimant's] ability to understand and respond to increasingly complex requests is mildly impaired. His ability to communicate by understanding, initiating, and using language is moderately impaired.

His ability to socially integrate with his peers and adults in an age appropriate manner is mildly to moderately impaired.

His ability to engage in and sustain an activity for a period of time is mildly impaired.

Overall, there is no evidence to indicate a developmental disability.

10. The eligibility team recommended that Claimant receive additional assessments specific to Autism Spectrum Disorder. Claimant missed three appointments that were scheduled with Dr. Sanchez.

11. On May 19, 2015, Carrie Molho, Ph.D., Psy.D., a SARC employee, sent a letter to Claimant's mother denying his eligibility for regional center services, indicating that the eligibility team had reviewed the intake interview, information that the mother had provided, and diagnostic evaluations including the reports of Dr. Tang, Dr. De Anda, and Dr. Sanchez. SARC determined that Claimant that did not meet the criteria for Autism Spectrum Disorder or for Intellectual Disability. Claimant met the criteria for special education services under the designation of Speech and Language Impairment and he had some behavioral challenges. These challenges were not considered similar to intellectual disability and did not require treatment similar to that required by individuals with intellectual disability.

12. Claimant's parents disagreed with SARC's determination because of Dr. De Anda's diagnosis of mild Intellectual Disability and Dr. Sanchez's recommendation that additional assessment was needed.

13. On December 15, 2015, Joshua Heitzmann, Ph.D., conducted diagnostic testing on Claimant to determine if autism was present. Dr. Heitzmann used the Autism

Diagnostic Observation Schedule, Second Edition (ADOS-2). Dr. Heitzmann found “minimal to no evidence of the symptoms necessary to meet the criteria associated with a diagnosis of autism spectrum disorder.” Dr. Heitzmann issued his report on February 29, 2016.

14. On February 24, 2016, SARC informed Claimant that the denial for eligibility on May 19, 2015, was affirmed.

CLAIMANT’S EVIDENCE

15. Claimant’s parents testified at hearing regarding their opinions that Claimant is eligible for regional center services.

16. Claimant’s mother does not believe that her son has autism. However, she has two other two sons that suffer from conditions that require the services of regional center which has made her aware of the significant delays in Claimant. She believes that the regional center should consider Dr. De Anda’s report to support the conclusion that Claimant is eligible for services under the category of intellectual disability or the “fifth category.” She believes that Dr. Sanchez did not perform complete testing of Claimant for eligibility under the category of intellectual disability or he would have come to the same conclusion as Dr. De Anda. Claimant’s mother testified that Claimant has undergone additional testing to support his diagnosis. However, she failed to provide this evidence at hearing.

She wants Claimant to undergo further testing at SARC’s expense because she believes that he was not given fair consideration because of the personality conflict that she had with the intake coordinator.

17. Claimant’s father testified that SARC refuses to test Claimant for an intellectual disability, and that he has only been tested for autism. They seek another evaluation by a different psychologist. They have observed the many problems that Claimant has and require the services and supports of SARC.

SARC'S EXPERT OPINIONS

18. Dr. Heitzmann is a staff psychologist with SARC. Dr. Heitzmann testified that Claimant has unusual behaviors that could be attributed to over activity. Although his scores on the testing were in the minimal range, Claimant was not suspected to have autism. Dr. Heitzmann confirmed that he only tested Claimant for autism, and not for an intellectual disability. Dr. Heitzmann disagreed with Dr. De Anda, because she did not report the correct code under the DSM-V.

According to Dr. Heitzmann, although Claimant receives services through the school district, that does not affect his conclusions about Claimant's eligibility. Although speech and language impairment is a typical cognitive development for academic achievement, it does not require the same sort of treatment that a person with an intellectual disability would need. Regional centers do not provide services for a learning disability.

19. Dr. Molho is the clinical manager and supervising licensed psychologist for SARC. She has conducted evaluations over 15 years. She was a member of Claimant's eligibility team that reviewed Claimant's request for services and reviewed all available documentation to arrive at the decision. According to Dr. Molho, a regional center conducts standardized testing to confirm or rule out a diagnosis for eligibility.

Dr. Molho reviewed the school district report that found Claimant's full scale IQ of 69 as in the intellectual disability range. However, the school district examiner did not think the score was valid because of Claimant's behavior during the testing and concluded that he did not meet the criteria for an intellectual disability. This differed from Dr. De Anda's report with the same IQ of 69, which concluded that Claimant met the criteria for an intellectual disability. This is why she requested that Dr. Sanchez perform an evaluation because of the two different opinions of the school district and Dr. De Anda. Dr. Molho considers an assessment of a child as a snapshot in time, and many factors can influence the outcome, including whether a child is tired or hungry.

Dr. Molho agreed that Claimant has a learning disability which is excluded under the Lanterman Act. A learning disability is a disorder specific to the communication and learning domains and does not show deficits in intellectual and adaptive behavior. Claimant's condition does not appear to be "general or have broad cognitive impairments" in order to meet the definition of an intellectual disability. According to Dr. Molho, a learning disability is about academic output, not an "inability to figure the world out."

Dr. Molho addressed Claimant's mother's concerns that the intake coordinator negatively influenced the psychologists to deny Claimant's eligibility because they had a conflict of personalities. Dr. Molho testified that it is the intake coordinator's role to initially meet with the family, but the intake coordinator is not a clinician and is trained in social work. Although the intake coordinator is part of the team, she does not participate in the diagnostic evaluations and only a licensed psychologist can make a diagnosis. SARC's licensed psychologists conducted the appropriate evaluations and determined that Claimant was not eligible. However, Dr. Molho agreed that SARC will always consider any other information submitted by parents regarding a determination of eligibility for regional center services.

20. Dr. Heitzmann and Dr. Molho were credible and persuasive in their testimony. No expert testimony was offered by Claimant to rebut their opinions.

ULTIMATE FACTUAL FINDINGS

21. The intellectual testing of Claimant has shown a wide degree of variation in the subtests of the various standardized tests with scores ranging from extremely low to average levels of ability. This is not indicative of "global intellectual deficits" because his deficits are not general in nature. Claimant appears to be on the borderline of having an intellectual disability, but the significant variations in Claimant's intellectual testing preclude a finding that Claimant has a condition that is similar to an intellectual

disability. From the evaluations conducted, Claimant's cognitive abilities appear to be significantly impacted by his learning disability. And as Dr. Molho testified, Claimant's learning disability is not comparable to an intellectual disability. Claimant did not provide convincing medical testimony to rebut SARC's medical evidence.

22. When all the evidence is considered, Claimant failed to establish that he has an intellectual disability or a disabling condition that is similar to or requires treatment similar to that required for individuals with an intellectual disability. Instead, the evidence established that Claimant has a learning disability which is not covered under the Lanterman Act.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. (§ 4501.) 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. (§§ 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.) The Act defines a developmental disability as:

[A] disability that originates before an individual attains 18 years of age, continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual.

...

[A developmental disability] shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

(§ 4512, subd. (a).)

2. An intellectual disability not resulting from one of the four listed conditions is commonly referred to as a "fifth category" intellectual disability. Eligibility under this category may be found where it can be shown that an individual is in fact functioning at an adaptive and cognitive level as if he were intellectually disabled, and/or that the treatment he requires is consistent with that needed by an individual with intellectual disabilities. Thus, the "fifth category" includes individuals whose IQ scores do not fall squarely within the range of intellectual disability, but whose cognitive and/or social functioning is similar to individuals who are intellectually disabled. The regulations implementing this section of the Lanterman Act provide that conditions that are solely psychiatric in nature, or solely learning or physical disabilities are not considered intellectual disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

3. Neither the Lanterman Act nor its implementing regulations assign burdens of proof. In this case, Claimant asserts that he is eligible for regional center services. Therefore, Claimant has the burden of proving that he has a condition that renders him eligible for services. The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

4. Claimant has not met his burden of proof. As set forth in the Factual Findings, Claimant did not establish that he qualifies for services under the Lanterman Act because he is an individual with autism, or intellectual disability, or a disabling condition that is closely related to an intellectual disability or requires treatment similar to that required for individuals with an intellectual disability. Because of his serious learning disability, Claimant may qualify for services through other entities, such as his school district; however he has not established eligibility for regional center services at this time. Consequently, his appeal must be denied.

ORDER

Claimant's appeal is denied. San Andreas Regional Center's denial of services to Claimant under the Lanterman Act is sustained.

DATED: May 9, 2016

REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.