

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2016050315

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 22, 2016, in Pomona, California.

Daniela Santana, Fair Hearings Program Manager, represented San Gabriel/Pomona Regional Center (SGPRC or Service Agency).

Claimant's father represented claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 22, 2016.

ISSUE

Whether claimant is eligible to receive services and supports from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1-11; claimant's exhibits A-B.

Testimony. Daniela Santana; claimant's mother; claimant's father.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is an eight-year-old boy who lives at home with his mother and father. Claimant's parents asked the Service Agency to determine whether he is eligible for regional center services based on a claim of autism spectrum disorder.

2. By a Notice of Proposed Action (NOPA) and letter dated April 12, 2016, the Service Agency notified claimant that he is not eligible for regional center services. The Service Agency's interdisciplinary team had determined that claimant does not meet the eligibility criteria set forth in the Lanterman Act.

3. On April 28, 2016, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding claimant's eligibility. In her fair hearing request, claimant's mother stated, "[Claimant] was denied services even though he has a medical diagnosis of autism." (Ex. 2.) This hearing ensued.

CLAIMANT'S EVALUATIONS IN 2011

4. On June 20, 2011, Dr. Marvin Lloyd Tan, a pediatrician at Kaiser Permanente, performed an evaluation of claimant for autism. Based on reporting from claimant's mother, Dr. Tan found that claimant had inappropriate social reciprocity. Claimant became angry when other people, especially younger children, laughed. Around children of his own age, claimant tended to parallel play or play on his own. In the realm of language development, claimant experienced delays. Claimant had difficulty holding a conversation and spoke in random phrases. He exhibited echolalia and referred to himself in the third person. With respect to atypical behavior, Dr. Tan noted that claimant lined up his toys in a particular manner. If they are moved, claimant became upset. Claimant was rigid about certain routines, such as having his food served in a particular type of container, although he did not exhibit any motor mannerisms.

There was no evidence that Dr. Tan administered any standardized tests for autism, such as the Gilliam Autism Rating Scale or the Autism Diagnostic Observation Schedule. Dr. Tan diagnosed claimant with autism because claimant had “significant issues with social interaction, speech and language and atypical behaviors that would not be solely due to language delay or developmental delay.” (Ex. 11, at p. 2.) Although Dr. Tan referred to the Diagnostic and Statistical Manual of Mental Disorders (DSM) in his evaluation, it did not contain an analysis regarding the specific version of the DSM or the DSM criteria on which Dr. Tan had relied to reach his diagnosis.

5. A. Between May 31, 2011 and June 23, 2011, the psychologist at claimant’s school evaluated claimant for cognitive functioning, academic achievement, and eligibility for special education services. Over several evaluation dates, the school psychologist administered a battery of six tests, which focused on claimant’s cognitive ability, adaptive behavior, and social-emotional skills. The school psychologist set forth her findings in a multi-disciplinary team report, dated July 8, 2011.

B. The school psychologist administered the Leiter-Revised (Leiter-R) test, which is designed to assess cognitive function in children and adolescents from the age of two to 21. On the Leiter-R, claimant’s intelligence quotient (IQ) score was 92, which ranked him in the average range.

C. Of the remaining tests administered by the school psychologist, the most significant were the Gilliam Autism Rating Scale, Second Edition (GARS-2), and Gilliam Asperger’s Disorder Scale (GADS). Claimant’s score on GARS-2, based on his teacher’s rating, was 100, which suggested that a diagnosis of autism was “very likely.” However, claimant’s GARS-2 score, based on his mother’s rating, was 64, which suggested that a diagnosis of autism was “unlikely.” On GADS, claimant’s score, based on his teacher’s rating, was 88, which suggested that a diagnosis of Asperger’s disorder was “highly

probable.” However, claimant’s GADS score, based on his mother’s rating, was 42, which suggested that a diagnosis of Asperger’s disorder was “low/not probable.”

D. The school psychologist concluded that claimant demonstrated “an educational disability, specifically, significantly Autistic-Like Behaviors-Mild.” In light of this diagnosis, the multidisciplinary team at claimant’s school district determined that claimant was eligible for special education services. (Ex. 9, at p. 14.)

6. In August 2011, claimant requested a determination of eligibility for regional center services.

A. On September 6, 2011, Edward G. Frey, Ph.D., performed a psychological evaluation of claimant to determine claimant’s eligibility for SPGRC’s services. To conduct his evaluation, Dr. Frey reviewed the evaluations of Dr. Tan and the school psychologist. Dr. Frey administered three tests to assess the possibility of autism and claimant’s adaptive functioning. Dr. Frey did not administer any direct cognitive testing, as he relied on the school psychologist’s findings that claimant’s cognitive abilities were in the average range, as set forth in Factual Finding 5B.

B. Dr. Frey applied the Vineland Adaptive Behaviors Scales, Second Edition (VABS-2), with claimant’s father as the informant. The VABS-2 measures claimant’s adaptive ability in communication, daily living, motor skills, and socialization. Dr. Frey found that claimant’s overall adaptive functioning, as reflected in his adaptive behavior composite of 75, was in the borderline range. Interestingly, one of the strongest adaptive areas for claimant was in communication, with a score of 81, which is considered “high borderline approaching low average.” Claimant was slightly weaker in daily living skills, with a score of 73, and in socialization, with a score of 77. However, claimant’s scores in both of those domains were still within the borderline range. Claimant’s motor skills overall were strongest, with a score of 84.

C. Dr. Frey completed GARS-2, with claimant's father as the informant. Claimant's score on GARS-2 was 57, which suggested that a diagnosis of autism was "unlikely." Dr. Frey noted that on the school psychologist's evaluation, parental report of claimant's behavior was also not within a significant range for either autism or Asperger's disorder.

D. Dr. Frey also applied Autism Diagnostic Observation Schedule, Module II, Second Edition (ADOS-2) to assess for the presence autism. In his interaction with claimant, Dr. Frey did not observe any significant issues suggesting marked deficits in the area of reciprocal social interaction. Claimant's eye contact with Dr. Frey was well sustained and appropriate, and claimant's facial expression was directed appropriately as well. Dr. Frey did hear two or three brief instances of partial echolalia. However, these instances were minimal and did not interfere with claimant's verbal abilities. Dr. Frey did not find any qualitative impairment in claimant's communication skills. With respect to restrictive, repetitive, and stereotyped patterns of behavior, Dr. Frey found that claimant had some inflexible adherence to specific routines.

E. When Dr. Frey evaluated claimant in 2011, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) was the standard for diagnosis and classification. 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.

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.

F. Applying the DSM-IV-TR criteria to claimant's results on the GARS-2 and the ADOS-2, Dr. Frey concluded that claimant "[did] not present marked impairment in six or more of the criteria thus he does not meet the diagnosis for autistic disorder. There may be some slight or minimal autistic like characteristics as evidenced in the school report and the Kaiser evaluation although significant features of autism were not observed during this evaluation." (Ex. 4, at p. 6.)

7. On October 7, 2011, after a review of Dr. Frey's evaluation report, the multi-disciplinary team at SGPRC determined that claimant was not eligible for regional center services and closed his case.

CLAIMANT'S SCHOOL EVALUATION IN 2013

8. A. In 2013, the school psychologist conducted a triennial evaluation of claimant to determine claimant's continued eligibility for special education services and his current levels of performance. Over the course of several days, the school

psychologist administered a battery of ten tests, which focused on claimant's cognitive ability, nonverbal ability, auditory processing, visual perceptual skills, visual-motor skills, and academic achievement. She also reviewed claimant's medical and school records and observed him in his first grade class over four separate dates. The school psychologist set forth her findings in a multidisciplinary team evaluation report, dated December 16, 2013.

B. In her report, the school psychologist found that claimant scored in the average range on two tests of cognitive abilities. Claimant's total academic achievement, based on the Woodcock-Johnson Tests of Achievement, Fourth Edition, fell in the average range. Specifically, claimant performed in the low average range in the areas of oral language and listening comprehension and performed in the high average range in broad math and math calculation skills. On broad reading, oral expression, broad written language and written expression, claimant performed in the average range.

C. With claimant's first grade teacher and claimant's mother serving as informants, the school psychologist conducted the VABS-2 to assess claimant's performance across all adaptive domains. Claimant's overall adaptive functioning was adequate for his age in all domains within the school setting. Within the home setting, claimant was in the adequate range in all domains with the exception of daily living skills, which fell in the moderately low range.

D. In addition, the school psychologist administered GARS-2 and ADOS-2 to assess claimant for the possibility of autism. Both claimant's first grade teacher and claimant's mother completed GARS-2. Claimant's teacher's score was 74, and claimant's mother's score was 72, which indicated that the probability of autism was "possible." On the ADOS-2, the school psychologist observed that in the area of language and communication, claimant maintained conversation with the examiners using complex speech and that claimant's facial and bodily gestures would appropriately coincide with

his emotions. In the area of reciprocal social interaction, claimant provided inconsistent eye contact to initiate and terminate social interactions. He effectively used verbal and nonverbal speech to convey an array of pictures or related tasks when asked to do so. However, the school psychologist observed that spontaneous reciprocal conversations with claimant were limited. Finally, the school psychologist did not observe any restrictive and repetitive behaviors in claimant, with the exception that claimant looked very closely at a spinning top for a long period of time. The results of these assessments indicated claimant exhibited "autistic-like behaviors."

E. Based on the information from her review of the documents as well as the testing data, the school psychologist concluded that claimant "continue[d] to meet the eligibility criteria for special education under the Primary category of Autistic like Behaviors." (Ex. 10, at p. 19.)

CLAIMANT'S EVALUATIONS IN 2016

9. In January 2016, claimant made another request for a determination of eligibility for regional center services.

A. On March 8, 2016, Jennie Mathess, Psy. D., conducted a psychological evaluation of claimant to determine claimant's eligibility for SPGRC's services. Dr. Mathess reviewed claimant's prior evaluations, interviewed claimant's mother, and administered four tests to complete the evaluation.

B. Dr. Mathess administered the Wechsler Intelligence Scale of Children, Fifth Edition (WISC-5), which measures an individual's cognitive functioning across verbal and nonverbal domains, including working memory and processing speed. Claimant's full scale intelligence quotient was 80, which ranked him in the low average range.

C. With claimant's mother serving as the informant, Dr. Mathess administered VABS-2 to evaluate claimant's adaptive functioning. Claimant scored in the moderately low level in communication, moderately low level in daily living skills, and moderately

low adaptive level in socialization. Overall, claimant's general adaptive functioning fell into the moderately low range.

D. Using claimant's mother as the informant, Dr. Mathess completed the Autism Diagnostic Interview-Revised (ADI-R). Claimant's mother's responses resulted in scores at or above the necessary cutoff scores in the areas of reciprocal social interaction, restricted, repetitive and stereotyped patterns of behavior, and abnormality of development prior to 36 months. Claimant's mother's responses in the area of communication, however, resulted in a score below the necessary cutoff score. Given these response patterns, Dr. Mathess concluded that a diagnosis of autism spectrum disorder is not likely.

E. Dr. Mathess administered the ADOS-2 for a further assessment of autism spectrum disorder. Claimant's overall total score on the ADOS-2 was in the non-spectrum range, below the cutoff scores for an autism spectrum disorder classification. Dr. Mathess noted that claimant's "eye contact was appropriate and he directed a range of appropriate facial expressions toward the examiner. His social overtures were generally related to his own demands and interests, but with some attempt to involve the examiner in those interests. In addition, he was able to tell the examiner about a routine event and was able to give a reasonable account without specific probes... No restricted and repetitive behaviors were observed during the ADOS-2 administration." (Ex. 7, at p. 4.)

F. Dr. Mathess used the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) to reach her diagnosis. The DSM-5 was released in May 2013. It no longer recognizes a specific diagnosis of autistic disorder. The DSM-5 establishes 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.

G. Under the DSM-5, section 299.00, to diagnose autism spectrum disorder, it must be determined that an individual has persistent deficits in social communication and social interaction (Criterion A) 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 (Criterion B), 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 hypo-reactivity 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 (Criteria C and D).

H. Based upon claimant's mother's report, the test data and her own observations, Dr. Mathess concluded that under the DSM-5, a diagnosis of autism spectrum disorder was not indicated. Moreover, based upon claimant's level of cognitive and adaptive functioning, a diagnosis of intellectual disability was also not indicated. However, Dr. Mathess recommended that claimant undergo a mental health evaluation in order to rule out the possibility of attention-deficit-hyperactivity disorder.

10. A. On May 20, 2016, the school psychologist conducted a triennial evaluation to determine claimant's continued eligibility for special education services and his current levels of performance. The school psychologist administered tests to

assess claimant's cognitive ability, academic achievement, processing skills, social-emotional development, and speech and language skills.

B. The WISC-5 was administered to assess claimant's intellectual ability.

Claimant's full scale intelligence quotient was 91, which ranked him in the average range. On the Woodcock-Johnson III Tests of Achievement, when compared to other children his age level, claimant's standard score was in the low average range in basic reading skills, reading comprehension, listening comprehension and written expression. Claimant scored in the low range in the areas of math calculation skills, math reasoning, and oral language.

C. During this evaluation, the school psychologist did not administer the VAB-2 to assess claimant's adaptive functioning.

D. To assess claimant for the possibility of autism, the school psychologist administered Gilliam Autism Rating Scale, Third Edition (GARS-3). Claimant's mother, father, general education teacher, and special education teacher completed GARS-3. Claimant mother's score was 92, and father's score was 83. Claimant's special education teacher's score was 89. All of these scores suggested that the probability of autism was "very likely." Claimant's general education teacher's score was 69, which suggested that the probability of autism was "probable."

E. In addition, claimant was administered ADOS-2. In social affect, claimant scored 14, and in restricted and repetitive behavior, claimant scored 1. In total, claimant scored 15, which met the autism cutoff score of 9. The psychologist noted that on a break during the examination, "claimant did not engage or initiate play. Once he began examining some of the available objects he became more focused on the pin art and putting objects in and then peering at the objects from different angles. He did do some showing of objects during this activity. Conversation during this time continued but

[claimant] frequently switched topics and did not initiate or maintain eye contact while talking.” (Ex. A, at pp. 16-17.)

F. Based on these test results, the school psychologist concluded that claimant met the eligibility requirement for special education services due to autism¹ and specific learning disability. However, the school psychologist’s evaluation did not contain an analysis regarding any DSM criteria on which he had relied to arrive at his diagnosis.

G. Following the school psychologist’s evaluation, claimant’s school district developed an Individualized Education Plan (IEP), dated May 20, 2016. The IEP identified “autism” as claimant’s primary disability, and “specific learning disability” as his secondary disability. (Ex. B, at p. 1.)

Testimony of Claimant’s Mother and Father

11. Claimant’s mother is an elementary school teacher and has experience in teaching at least one autistic student. She described claimant as a “high-functioning autistic child.” Claimant’s mother stated that her son is capable of engaging in conversations when he likes someone. She acknowledged that claimant has performed well in the evaluations conducted by Dr. Frey in 2011 and by Dr. Mathess in 2016. However, she attributed the results to “good evaluators.” Claimant’s mother recounted

¹ Pursuant to California Code of Regulations, title 5, section 3030, subdivision (b)(1), autism is defined as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident at age three, and adversely affecting a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”

that her son has difficulty in learning and is performing at the first grade level when he should be at the third grade level. Claimant's mother testified about her concerns with claimant's behaviors that she observes, such as his struggles in maintaining a conversation and having a "bizarre speech pattern." According to claimant's mother, claimant avoids eye contact with others, including his parents and grandparents. In terms of repetitive behavior, claimant has to line up his toys. If the order is disturbed, claimant becomes upset. Moreover, claimant has to follow the same routine every single day. If there is a deviation in his routine, claimant suffers from stress and will bite his fingers or chew on shirts. Claimant is also rigid about the food he consumes. He only eats chicken nuggets, smoothies, French fries, and water. He is physically repulsed by any other types of food. Claimant's mother, however, also noted that claimant is "creative and quirky" and that he is "not your typical autistic kid." When asked at the hearing if she had reported these concerns and observations to Dr. Mathess during claimant's psychological evaluation, claimant's mother confirmed that she had done so.

12. Claimant's father also testified at the administrative hearing. Claimant's father agreed that his son does not have cerebral palsy, epilepsy, intellectual disability, a condition closely related to intellectual disability, or a condition that requires treatment similar to that required for individuals with intellectual disability. However, claimant's father asserted that claimant suffered from autism spectrum disorder and that the disorder has substantially limited claimant in the areas of self-care, receptive and expressive language, learning, mobility, and self-direction.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability entitling him to receive regional center services, as set forth in Factual Findings 1 through 12, and Legal Conclusions 2 through 9.

2. Because claimant is the party asserting a claim, he bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (See Evid. Code, §§ 115 and 500.) He has not met this burden.

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) Eligibility for regional center services is limited to those persons meeting the criteria for one of the five categories of developmental disabilities set forth in Welfare and Institutions Code, section 4512, subdivision (a), 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 are solely physical in nature.

4. Welfare and Institutions Code section 4512, subdivision (l), provides: “Substantial disability” means 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.

5. There was no evidence that claimant has cerebral palsy, epilepsy, intellectual disability, a condition closely related to intellectual disability, or a condition that requires treatment similar to that required for individuals with intellectual disability. With respect to the issue of autism spectrum disorder, the weight of the evidence did not support the conclusion that claimant has a qualifying condition under the Lanterman Act.

6. In 2011, Dr. Tan diagnosed claimant with autism. Although the evidence established that Dr. Tan is a pediatrician at Kaiser Permanente, there was no evidence establishing his credentials in psychology. Moreover, Dr. Tan's diagnosis was given little weight because of a lack of discussion regarding any standardized tests that he administered or the DSM criteria under which he reached his diagnosis. Dr. Frey's 2011 evaluation of claimant was given more weight because it included detailed descriptions of the tests administered and an analysis of the test results under the DSM criteria. Dr. Frey, however, found that claimant did not qualify for a diagnosis of autism under the DSM IV-TR criteria.

7. Claimant was found to be eligible for special education services at his school based on "autistic-like behaviors" in 2011 and 2013. In 2016, the school

psychologist found claimant to be eligible for special education services based on a diagnosis of "autism." Claimant's father contended during final argument that this 2016 evaluation should be determinative of claimant's eligibility for regional center services. Nevertheless, the fact that claimant is qualified for special education at school does not establish that he has a substantial disability within the meaning of the Lanterman Act. Eligibility for special education is more inclusive than eligibility for regional center services.

8. Furthermore, the school psychologist's evaluation contained raw scores from diagnostic tests but lacked an analysis of how claimant's case qualifies for a diagnosis of autism spectrum disorder under the DSM criteria. Raw test scores alone are insufficient to support a diagnosis of autism spectrum disorder under the DSM-5. As set forth in Factual Finding 9G, a diagnosis under the DSM-5 requires a consideration of an individual's developmental history and functional impairment, in addition to demonstration of all three deficits in the area of social communication and two out of four types of patterns in restrictive and repetitive behavior. In this regard, Dr. Mathess's opinions, contained in her March 8, 2016 evaluation, were more persuasive, in that they were formed within the framework of the DSM-5. Furthermore, Dr. Mathess's evaluation incorporated the more recent concerns and observations of claimant's mother. Dr. Mathess, however, concluded that claimant did not meet the diagnostic criteria for autism spectrum disorder under the DSM-5.

9. Even assuming that claimant is properly diagnosed with autism spectrum disorder, there was no evidence that claimant's condition is substantially disabling. Based on the totality of the evidence, which included test results of claimant's adaptive functioning and the testimony of claimant's parents, claimant's condition does not place significant functional limitations on his life activities as an eight-year-old child. While claimant clearly faces challenges and needs the additional support that he is receiving at

school, he does not have a developmental disability under the Lanterman Act. Thus, he is not eligible for regional center services.

ORDER

Claimant's appeal from the San Gabriel Pomona Regional Center's denial of eligibility for services is DENIED. Claimant is not eligible to receive regional center services under the Lanterman Act at this time.

DATE: July 6, 2016

JI-LAN ZANG

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.