

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

CLAIMANT

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2018020380

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on January 7, 2019, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by his parents.¹

San Gabriel/Pomona Regional Center (service agency) was represented by Daniela Santana, Manager of Fair Hearings and Autism.

ISSUE

Is claimant eligible for services under the categories of autism and/or cerebral palsy pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

¹ Names are omitted to protect the privacy of claimant and his family.

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon service agency exhibits 1-22 and claimant's exhibits A-E, as well as the testimony of Deborah Langenbacher, Ph.D., and claimant's mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. The service agency determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Act, among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)²

2. Claimant is a 16-year-old male who was referred to the service agency for an eligibility determination in October 2017 on the basis of suspected autism.

3. On January 3, 2018, the service agency issued a Notice of Proposed Action, in which claimant's parents were advised that service agency staff concluded claimant was not eligible for regional center services because he did not have autism or any other qualifying developmental disability. (Ex. 1.)

4. On January 30, 2018, a Fair Hearing Request was submitted to the service agency by claimant's mother, which requested a hearing to appeal the service agency's denial of services. (Ex. 2.)

5. In connection with several continuances of the hearing initially scheduled for March 27, 2018, claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

² Undesignated statutory references are to the Welfare and Institutions Code.

CLAIMANT'S BACKGROUND INFORMATION

6. Claimant lives with his parents and one sibling. He attends a public high school, where he is an honors student.

7. Claimant was a service agency consumer under the Early Start program before he was age three due to concerns related to his extremely premature birth.

8. When he turned three, however, claimant was not accepted as a regional center consumer under the Lanterman Act because Dr. Victor Sanchez, who conducted a psychological evaluation, only diagnosed claimant with an Expressive Language Disorder but no developmental disability. Claimant's case was closed. (Exs. 3-5.)

9. A. Claimant's school district initially denied him special education services because he did so well academically. However, the school district later gave claimant accommodations mostly for test-taking. In 2016 the school district specifically concluded claimant "did not meet the educational eligibility of Autism." (Ex. 10, p. 13.)

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B. However, by February 2018, the school district deemed claimant eligible for special education services, under the primary category of "Other Health Impairment" and the secondary category of "Speech or Language Impairment." (Ex. 13, p. 1.) Testing and evaluation of claimant showed overall that he did well academically, had average cognition, and adaptive skills generally in the average range. (Exs. 11-15.)

C. Although the school district documents in evidence contain some discussion of claimant having "a diagnosis of autism" (see, e.g., ex. 15, p. 23), in 2018 claimant still was not deemed eligible for special education services under the category of "characteristics often associated with autism" (*ibid*). (See Cal. Code Regs., tit. 5, § 3030, subd. (b)(1)). As discussed in more detail below, that seeming contradiction may be explained by confusion exhibited by school district staff reviewing documents from

UCLA Health, claimant's primary healthcare provider, concerning whether claimant had autism spectrum disorder (or ASD).

10. In or around October 2017, claimant's healthcare providers at UCLA Health advised claimant's parents to request the service agency to provide their son with regional center services. At that time, claimant's parents voiced concerns that claimant was clumsy, overly-focused on academics, too anxious, took too long to complete tasks, and worried excessively about things. (Ex. 7, p. 6.)

SERVICE AGENCY'S EVALUATION OF CLAIMANT

11. On October 10, 2017, claimant and his mother met with service agency Intake Service Coordinator Virginia Rodriguez-Wintz for a social assessment. Ms. Rodriguez-Wintz wrote a report from that assessment. (Ex. 7.) At that time, claimant's mother only mentioned a concern about ASD. She did not mention that anyone at UCLA Health suspected claimant had cerebral palsy.

12. A. The service agency referred claimant to be assessed by Franklin Carvajal, Ph.D., LCP, who is a clinical psychologist. Dr. Carvajal administered to claimant a series of tests, interviewed claimant and his mother, observed claimant's behavior during the assessment, and wrote a report. (Ex. 8.)

B. Dr. Carvajal concluded claimant did not have intellectual disability (or ID) because his cognitive levels are in the average range, as well as most of his adaptive functioning. (Ex. 8.)

C. Dr. Carvajal also concluded claimant did not meet the criteria for a diagnosis of ASD pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM 5). (Ex. 8.) Specifically, Dr. Carvajal opined that claimant's test scores did not exceed the minimum cut-off for autism and that he observed in claimant no significant social deficits or restrictive, repetitive behaviors, activities, or interests. (*Id.*, p. 5.) "In general, [claimant] engaged in culturally appropriate use of eye contact, engaged

in joint attention, shared enjoyment, engaged in attempts at back and forth communication, seemed interested in others, played symbolically and cooperatively, and was easy to interact with socially." (*Ibid.*)

D. Dr. Carvajal made no diagnosis for claimant, but did recommend ruling out Attention Deficit Hyperactivity Disorder (ADHD) in the future. (Ex. 8, p. 6.)

13. A. Service agency staff psychologist Deborah Langenbacher, Ph.D., reviewed claimant's file, including records from his school and UCLA Health.

B. Because claimant has done well in school, and has average-range cognitive and adaptive skills, Dr. Langenbacher concluded he did not have ID. (Ex. 6.) She also noted that at least three raters had previously considered whether claimant has ASD, but the results of their autism screening assessments fell below the cut-off levels; they reported claimant had only a few traits associated with autism; and none diagnosed claimant with ASD. (*Id.*) Therefore, Dr. Langenbacher opined claimant does not have ASD. She concluded that claimant has done "remarkably well given his history of extreme prematurity," but that he does not have a developmental disability making him eligible for regional center services. (*Id.*)

C. During the hearing, Dr. Langenbacher amplified her findings in her testimony. She noted her conclusions were consistent with those of Dr. Carvajal, that claimant's school district has never formally deemed him eligible for services under the category of "characteristics often associated with autism," and that nobody who has evaluated claimant had formally diagnosed him with ASD. She also observed that recently claimant has spent 98 percent of his time at school in general education classes, which is inconsistent with his having ASD. She opined that his superior academic performance and average-range cognitive skills rule out ID. Dr. Langenbacher's testimony was consistent with the documents in evidence and overall was credible.

CLAIMANT'S EVIDENCE

14. On December 15, 2016, claimant was seen by Dr. Jessica K. Jeffrey of UCLA Health. The reason for the visit was to "help with school stress." (Ex. 16, p. 1.) Dr. Jeffrey took a full history from claimant's parents and interviewed claimant. Dr. Jeffrey listed her DSM 5 impressions as "Unspecified anxiety disorder, rule out ASD." (*Id.* at p. 6.) For that reason, Dr. Jeffrey concluded that claimant should be further evaluated for ASD, including by the service agency. (*Ibid.*) Dr. Jeffrey did not diagnose claimant with ASD.

15. On January 3, 2017, claimant was seen by Neurodevelopmental Pediatrician Pantea Sharifi, also of UCLA Health. The reason for this visit was to evaluate claimant for "autism." (Ex. 17, p. 1.) In her report, Dr. Sharifi recited claimant's developmental history based on unknown sources, and recounted her medical examination of claimant. No screening tests for ASD were noted. Dr. Sharifi did not make a diagnosis for claimant, but noted that it "is currently very difficult to ascertain if he is on the spectrum of Autism or not due to his significant anxiety;" and "[h]e does have significant social anxiety symptoms which often can mimic social deficits in Autism." (*Id.* at p. 4.) Dr. Sharifi did not diagnose claimant with ASD.

16. Dr. Langenbacher reviewed all of the UCLA Health records and concluded that none of them contained any definitive ASD diagnosis for claimant. At most, the UCLA Health providers recommended further evaluation to rule out ASD. Dr. Langenbacher's testimony was corroborated by the UCLA Health reports themselves, as well as the school district's failure to include "characteristics often associated with autism" as an eligible category in claimant's recent individualized education plan (IEP) documents, and therefore is credited.

17. A. Claimant was again seen by Dr. Sharifi to "[e]valuate for Autism" on October 26, 2018. (Ex. 22, p. 1.) Dr. Sharifi recited claimant's more recent developmental history and summarized her medical examination of him that day. While she made no

diagnosis of ASD, Dr. Sharifi did discuss other neurological deficits she noticed, such as claimant having significant low tone, bilateral inversion of his feet, bilateral pes planus, bilateral stiffness in his flexors, poor arm swing and poor running skills. Dr. Sharifi noted, "He [claimant] also does meet criteria for CP [cerebral palsy], stiffness, given his exam and his birth history." (Ex. 22, p. 2.)

B. Another UCLA Health document for this visit was generated, entitled "After Visit Summary," also written by Dr. Sharifi. (Ex. C.) It states claimant "is a 16 y/o boy with a history of Autism (based on DSM 5 criteria) . . . who has been under my care." It next states claimant "has weakness and stiffness in his legs and also qualifies for a diagnosis of Cerebral Palsy (spastic). [¶] . . . [¶] He is to be referred to Regional Center for testing for Autism and to become a client for his Cerebral Palsy and his Autism." (Ex. C, p. 1.)

18. The totality of the evidence did not establish by a preponderance that claimant has cerebral palsy. First, Dr. Sharifi's two documents discussing cerebral palsy are vague and summary; it is not entirely clear she is diagnosing claimant with cerebral palsy, as opposed to stating her suspicions of it. Second, the two documents do not contain the type of extensive evaluation and testing one would suspect before such a diagnosis is made, including a full neurological work-up of claimant and brain imaging (e.g., MRI, CT scan, etc.) Third, the fact Dr. Sharifi states in the two documents that claimant has "a history of Autism" is inconsistent with her prior evaluations when she clearly opined she could not make a diagnosis. That confusion undercuts the meaning and validity of her comments concerning cerebral palsy.

19. A. Claimant's mother provided copies of Dr. Sharifi's October 2018 report to the service agency approximately one month before the hearing. The report had apparently not been evaluated by Dr. Langenbacher or other service agency staff. This was the first time the service agency learned claimant's family was contending he is eligible for services based on both ASD and cerebral palsy.

B. Due to Dr. Sharifi's concern about further ASD evaluations until claimant's medication regimen stabilized, the service agency had agreed for Dr. Langenbacher to evaluate claimant on January 17, 2019. In late November 2018, claimant's mother requested a continuance of the hearing for further evaluation and review of medical records, presumably also to accommodate Dr. Langenbacher's evaluation. However, the continuance request was denied by ALJ Erlinda Shrenger because the matter had been pending since February 2018 and been continued four times previously. In light of the fact that the hearing went forward, the service agency cancelled Dr. Langenbacher's January 2019 evaluation.

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (§§ 4700-4716.) Claimant's mother requested a hearing to contest the service agency's proposed denial of claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-5.)

2. One is eligible for services under the Lanterman Act if it is established that he is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) The fifth category condition is specifically defined as "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (§ 4512, subd. (a).) A qualifying condition must originate before one's 18th birthday and continue indefinitely. (§ 4512.)

3. A. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].)

B. Regarding eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.* at p. 1137.)

C. In this case, claimant bears the burden of establishing he is eligible for services because he has a qualifying condition that is substantially disabling. In that regard, claimant's evidence regarding eligibility must be more persuasive than the service agency's evidence in opposition.

4. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

DOES CLAIMANT HAVE AUTISM?

5. A. The Lanterman Act and its implementing regulations contain no specific definition of the neurodevelopmental condition of "autism." However, the DSM 5, which came into effect in May 2013, provides ASD as the single diagnostic category for the various disorders previously considered when deciding whether one has autism, i.e.,

pervasive developmental disorder not otherwise specified (PDD-NOS), Asperger's Disorder, and Autistic Disorder. Therefore, a person diagnosed with ASD should be considered to be someone with the qualifying condition of "autism" pursuant to the Lanterman Act.

B. In this case, claimant has not been diagnosed with ASD by any healthcare professional. While Dr. Sharifi of UCLA Health has suspected claimant may have ASD, she has never formally made that diagnosis, but instead referred claimant to the service agency to rule out that disorder. The service agency referred claimant to Dr. Carvajal, who specifically rejected ASD as a viable diagnosis for claimant. Even though staff from claimant's school district have apparently been confused about the meaning of the UCLA Health records, claimant's IEP documents still do not reflect that he is eligible for special education services based on ASD or even "characteristics often associated with autism." Finally, service agency staff psychologist Dr. Langenbacher persuasively testified that, after her review of all the records in evidence, it is her opinion that claimant does not have ASD. In light of the evidence in the record, claimant failed to meet his burden of establishing by a preponderance of the evidence that he has autism within the meaning of the Lanterman Act. (Factual Findings 1-16.)

DOES CLAIMANT HAVE CEREBRAL PALSY?

6. Unlike the situation discussed above concerning autism, claimant presented evidence that at least one medical professional (Dr. Sharifi) has diagnosed him with cerebral palsy. However, that evidence is vague and insufficient to establish that claimant has that developmental disorder. Due to the close proximity of that diagnosis to the hearing of this matter, the service agency was deprived of an opportunity to conduct its own assessment of whether claimant has cerebral palsy. At hearing, claimant's parents argued the service agency should have done so when claimant was initially referred in October 2017. However, at that time claimant's parents

only mentioned autism as a concern and there was no medical documentation suggesting claimant had cerebral palsy. Under these circumstances, it was not established by a preponderance of the evidence, at this time, that claimant has cerebral palsy. (Factual Findings 1-18.)

7. A qualifying condition must also cause a substantial disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) A “substantial disability” is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as a condition which results in major impairment of cognitive and/or social functioning, and which causes significant functional limitations in three or more of the following areas of major life activity, as appropriate to the person’s age: (a) receptive and expressive language; (b) learning; (c) self-care; (d) mobility; (e) self-direction; (f) capacity for independent living; and (g) economic self-sufficiency.

8. In this case, even assuming, *arguendo*, that claimant has cerebral palsy, there was no evidence presented indicating such a condition is substantially disabling. For example, Dr. Sharifi’s summary report does not link cerebral palsy to any of claimant’s parents’ concerns, such as his anxiety, test-taking problems, excessive worrying, and over-fixation on school. While claimant also has been reported to be clumsy and have problems with his legs, it was not established that such has substantially impacted his mobility. Under these circumstances, it cannot be concluded that claimant has significant functional limitations in three or more of the areas set forth in California Code of Regulations, title 17, section 54001, subdivision (a). (Factual Findings 1-18.)

IS CLAIMANT ELIGIBLE FOR SERVICES?

9. Since claimant failed to establish by a preponderance of the evidence that he has a qualifying condition that is substantially disabling, he failed to establish that he is eligible for regional center services under the Lanterman Act. (Factual Findings 1-19;

Legal Conclusions 1-8.) The ALJ is cognizant of the fact that the service agency had scheduled (and cancelled) another autism assessment for claimant once his medications stabilized; so too the fact that the service agency has not had an opportunity to fully evaluate whether claimant has cerebral palsy. The parties are encouraged to take such actions at the appropriate time.

ORDER

Claimant's appeal is denied. Claimant is not eligible for regional center services pursuant to the Lanterman Developmental Disabilities Services Act.

DATED: January 17, 2019

ERIC SAWYER,
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.