

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2018040673

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 4, 2018, in Los Angeles.

Karmell Walker, Fair Hearings Coordinator, represented South Central Los Angeles Regional Center (SCLARC or Service Agency). Claimant's mother represented claimant, who was not present.¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 4, 2018.

ISSUE

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

¹ Family and party titles are used to protect the privacy of claimant and his family.

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1 through 9; claimant's exhibit A.

Testimony. Sandra Watson, Ph.D.; claimant's mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 15-year-old boy. He lives with his adoptive mother. Tad Traina, M.D., one of claimant's primary care physicians at Kaiser Permanente, referred claimant to the Service Agency to determine his eligibility for services and supports.

2. By a Notice of Proposed Action (NOPA) letter dated March 8, 2018, Shirley Cardenas, M.S.W., Service Coordinator, Intake Unit, and Gricelda F. James, M.A., Program Manager, Intake Unit, notified claimant's mother that claimant is not eligible for regional center services. According to the NOPA letter, the Service Agency reviewed assessments and claimant's school records and determined that claimant:

Does not meet the definition of a developmental disability².

... [Claimant] is diagnosed with Attention-Deficit

Hyperactivity Disorder, Combined presentation (by history)

and with Rule Out Language Disorder. [Claimant] does not

have intellectual disability. [Claimant] does not have seizures

so he does not have epilepsy. His motor skills show no

² For that definition, the NOPA letter cited, among other things, Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54010. (See Factual Finding 4.)

evidence of cerebral palsy and he was not diagnosed with having autism.

The interdisciplinary team determined that [claimant] does not have a substantial disability found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. [Claimant] is therefore ineligible for SCLARC services. (Ex. 2.)

3. On March 28, 2018, claimant's mother filed a fair hearing request to appeal the Service Agency's eligibility determination, writing "My child has a diagnosis of Autism by a Kaiser M.D.," and that she wants her child to receive regional center services. (Ex. 2.)

4. On April 30, 2018, claimant, his mother, and Karmell Walker, as the Executive Director's designee, participated in an informal meeting to discuss claimant's possible eligibility. By letter dated May 3, 2018, Ms. Walker memorialized the meeting and affirmed the Service Agency's determination that claimant is not eligible for regional center services.

- a. In the letter, Ms. Walker quoted Welfare and Institutions Code section 4512, subdivision (a), which states that, to be eligible, a person must have one of the following five categories of developmental disability: cerebral palsy, epilepsy, autism, or intellectual disability, or a fifth category defined as a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability.

- b. Ms. Walker wrote that, while claimant “is exhibiting behaviors that have you reasonably concerned, the assessments performed were carefully reviewed by our interdisciplinary team and it was found that [claimant] does not have” one of the five eligible conditions. (Ex. 5, p. 2.) Claimant “was diagnosed with Attention-Deficit Hyperactivity Disorder, Combined presentation (by history) and with Rule Out Language Disorder. These deficits do not meet [e]ligibility requirements for receiving services through the Regional Center.” (*Ibid.*)

CLAIMANT’S SCHOOL-RELATED AND KAISER PERMANENTE EVALUATIONS

5. Claimant is in 10th grade at his high school, and attends special education classes. Claimant’s initial IEP meeting was on May 12, 2009.

6. On June 14 and 28, 2013, when claimant was 10 years old, Maureen Saunders, M.D., a child psychiatrist at Kaiser Permanente (Kaiser), performed a psychiatric examination of claimant “to provide additional information for [claimant’s] school.” (Ex. A.)

- c. At claimant’s initial medication evaluation on June 14, claimant’s mother reported to Dr. Saunders that claimant’s birth mother used drugs during the pregnancy. Dr. Saunders could not assess claimant’s mental health, because “he slept during the entire interview.” (Ex. A.) More than half the visit was “spent on counseling.” (*Ibid.*) Claimant’s mother asked whether claimant had bipolar disorder; Dr. Saunders eliminated that diagnosis after reviewing claimant’s symptoms with his mother, who reported deficits in claimant’s social interactions. As for communication, she reported that claimant had difficulty starting conversations and engaged in restricted stereotyped play, but showed no stereotyped or repetitive language or idiosyncratic language, and no perseveration. As for repetitive and restricted stereotypic behaviors,

claimant's mother reported he had a narrow range of interests and played with a limited number of toys, but did not often repeat behaviors, had no sensory sensitivity, and did not engage in spinning, flapping, or rocking. Dr. Saunders diagnosed claimant with Attention-Deficit/Hyperactivity Disorder (ADHD) and Rule Out Autism Spectrum Disorder (ASD).

- d. The June 28 appointment lasted 60 minutes; again, more than half that time was spent on counseling. Dr. Saunders administered the Gilliam Autism Rating Scale–Second Edition (GARS-2), a screening instrument. She noted a marked impairment in social interaction, including making eye contact, using facial expressions and gestures, failure to develop friends, and lack of social or emotional reciprocity. Claimant's verbal communication skills were delayed; Dr. Saunders wrote that claimant had obtained speech therapy "through Regional Center, combined 2 words by age 3." (Ex. A.) He showed aggression at school. He did not engage in stereotyped and repetitive use of language or idiosyncratic language. He was preoccupied with video games and with dismantling and spinning objects. Changes in his daily routine did not greatly upset him, nor did he display stereotyped repetitive motor mannerisms. He was taking one tablet of Concerta every morning, as prescribed. Dr. Saunders found claimant avoided eye contact throughout the appointment, responded to questions with one-word answers, and had a flat affect. She diagnosed claimant with ADHD and ASD. Her treatment plan was to refer claimant for speech and language therapy, and follow-up visits with Dr. Traina and Nick Fox, MSW.

7. Nearly two months later, on August 15, 2013, Christina M. Smith, SLP, a Kaiser speech-language pathologist, conducted a speech and language evaluation of claimant. Ms. Smith noted Dr. Saunders' diagnosis of ASD and Dr. Saunders' finding of a

speech and language delay. Ms. Smith reported that claimant made inconsistent eye contact but participated in all activities asked of him and followed multi-step directives. Ms. Smith administered the Comprehensive Assessment of Spoken Language (CASL). She found that claimant presented with weaknesses in the areas of syntax construction and social pragmatics, and had lower than average skills in understanding non-literal language. He required additional processing time to formulate answers, answered mostly in short phrases, and demonstrated difficulty initiating and maintaining a conversation. Ms. Smith found that claimant qualified for speech therapy services “under guidelines for children with types of developmental delays including speech or language delays.” (Ex. A.) She referred claimant to Easter Seals for speech and language therapy once per week for six months, and identified goals for claimant to work on in therapy. She advised claimant’s mother that she could have claimant evaluated by his school district in addition to Kaiser’s speech therapy services.

8. Claimant’s IEP from an annual review on February 2017, more than three years later, reflects that claimant continued to be eligible for special education services with a diagnosis of “Specific Learning Disability” (SLD). (Ex. 8, p. 4.) Claimant’s SLD impeded his ability to read fluently, process direction, write using good sentence structure, and solve math problems. The IEP team continued claimant’s placement in a special day program at a general education site, noting that he was to transition to high school for the 2017-2018 school year.

9. A year later, on March 8, 2018, T.P. Nguyen, a school psychologist, performed a triennial psychoeducational assessment of claimant “to identify and describe the significant elements in [claimant’s] unique learning style and the psychological processes and social-emotional factors that affect his availability for learning,” and to consider what “accommodations are necessary, if any, in the current

instructional program.” (Ex. 6.) Noting that the assessment would “guide and assist” the IEP team, Dr. Nguyen wrote that “[t]he special education eligibility being considered is Specific Learning Disability (SLD), Autism (AUT), and Other Health Impairment (OHI).” (Ex. 6, p. 1.)

10. Dr. Nguyen observed claimant in the testing room and in a classroom, reviewed records, interviewed claimant’s mother, and administered the following instruments and assessments, among others: Cognitive Assessment System–2nd Edition (CAS-2), Comprehensive Test of Phonological Processing–2nd Edition (CTOPP-2), Attention-Deficit/Hyperactivity Disorder Test 2 (ADHDT-2), Behavior Assessment System for Children–3rd Edition (BASC-3), and Gilliam Asperger Disorder Scale (GADS-2), Teacher and Parent.

- a. In his overall assessment summary, Dr. Nguyen reported, among other things, that claimant was functioning in the low average range of cognitive abilities, in the low average range in attention and successive processing, and in the below average range in planning on the CAS-2, and was at risk or had clinically significant findings in attention problems and adaptive skills on the BASC-3. On the GADS-2 parent ratings, claimant scored highly probable for Asperger’s Disorder; on the GADS-2 teacher ratings, however, claimant scored low/not probable for Asperger’s Disorder. On the ADHDT-2 parent ratings, claimant scored very likely, and on the teacher ratings, likely, in the probability of ADHD.
- b. Dr. Nguyen considered whether claimant qualified for special education services with a diagnosis of SLD, as defined in the California Code of Regulations, title 5, section 3030(10). Scores showed claimant in the low average range in attention and below average in auditory processing, average

in visual processing and sensory-motor skills, and low average in association, conceptualization, and expression. Claimant was low average in mathematics and written language and below average in reading. "Based on the above criteria, [claimant] does not display a severe discrepancy between his cognitive ability and academic achievement, despite having psychological deficit[s] in attention and auditory processing. Therefore, [claimant] does not meet eligibility criteria as a student with a Specific Learning Disability (SLD). The IEP team may wish to consider the eligibility of Autism and Other Health Impairment." (Ex. 6, p. 13.)

- c. Dr. Nguyen next considered whether claimant qualified for special education services with a diagnosis of Autism, as defined in the California Code of Regulations, title 5, section 3030(1). That section defines autism as:

a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before 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.

- i. Dr. Nguyen discussed claimant's teacher's rating on the GADS-2, which appear somewhat self-contradictory. The teacher rated claimant as low/not probable for Asperger's Disorder, and "reported [claimant] does not engage in Asperger or Autistic like characteristics." On the other hand, the teacher also reported that claimant sometimes seems unaware of social conventions,

- lacks empathy, requires specific instructions to begin tasks, and is abnormally intensely preoccupied with certain subjects or objects. (Ex. 6, p. 11.) Claimant's mother reported that claimant has difficulty playing with peers, becomes frustrated easily, lacks empathy, and requires specific, short, one-step instructions.
- ii. Dr. Nguyen, found that claimant "meets the eligibility criteria for Autism and requires special education services. However, the IEP may wish to consider OHI eligibility as these characteristics appear to impact his educational performance most." (Ex. 6, p. 13.) Dr. Nguyen did not discuss the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) diagnostic criteria for Autism Spectrum Disorder.
 - d. Dr. Nguyen finally considered whether claimant qualified for special education services with a diagnosis of Other Health Impairment, which the California Code of Regulations, title 5, section 3030(f) defines "as when a pupil has limited ... alertness, due to chronic or acute health problems, which adversely affects a pupil's educational performance." (Ex. 6, p. 13.) Noting the ADHDT-2 results, in which claimant's mother and teacher indicated that claimant is very likely in probability of ADHD, as well as claimant's March 2016 medical diagnosis of ADHD and autism by Kaiser, claimant's taking Abilify to address his ADD/ADHD, and his mother's report that claimant exhibits attention deficit disorder rather than hyperactivity, Dr. Nguyen concluded that claimant "does appear to meet eligibility of Other Health Impairment. At this time *the eligibility of OHI appears to impact [claimant's] educational performance most.*" (*Id.* at pp. 13-14, italics added.) Dr. Nguyen recommended referring claimant to the "IEP team for appropriate eligibility and program placement options for every identified area of need." (Ex. 6, p. 14.)

11. On the same date, March 8, 2018, the school district's IEP team met to perform its three-year review of claimant. The team changed claimant's diagnosis to "Other Health Impairment" (OHI) based, in part, on Dr. Nguyen's assessment. (Ex. 7, pp. 4-7.) The IEP states that claimant functions within the low average range of cognitive ability, and has deficits in attention, auditory memory, and phonological skills. He "for the most part is well behaved, respectful, and cooperative." (*Id.* at p. 4.) His "OHI eligibility (ADD) impacts his ability to meet grade level standards and participate in the general education curriculum." (*Ibid.*) The IEP team recommended a special day program for claimant, on a general education site, as the appropriate placement. (*Id.* at p. 15.)

CLAIMANT'S SERVICE AGENCY-RELATED EVALUATION

12. Shirley Cardenas, a service coordinator at SCLARC, performed a psycho-social assessment of claimant on September 1, 2017, after Dr. Traina referred claimant to the Service Agency to determine his eligibility for services. Ms. Cardenas found that claimant "established eye contact" and "was attentive during intake." (Ex. 4.) Claimant's mother reported that every morning he takes Concerta, an ADHD medication, that he is healthy, that he has not had any seizures, and that he does not receive mental health services. He prepares simple food without cooking, performs some chores, and eats, toilets, cleans, and clothes himself, but does not function independently in unfamiliar settings. He does not form many friendships, though he has some school friends, and is socially awkward. He may display inappropriate anger at least once per week when thwarted, but does not exhibit self-injurious behavior. He understands and uses gestures and facial expressions, has a broad vocabulary, and carries on basic conversation. He maintains focus for less than one minute and requires step-by-step directions to perform tasks. Ms. Cardenas recommended that claimant receive a psychological evaluation for the presence or absence of ASD and intellectual disability.

13. On December 11, 2017, Jennie M. Mathess, Psy.D., a clinical psychologist, conducted a psychological evaluation of claimant. In her report, Dr. Mathess noted that claimant was referred to her by SCLARC "to determine [claimant's] current level of functioning The scope of this evaluation is limited in that it assesses for diagnoses of Intellectual Disability and/or Autism Spectrum Disorder." (Ex. 3.) Dr. Mathess reported interviewing claimant's mother and administering the following tests: the Autism Diagnostic Interview–Revised (ADI-R), the Vineland Adaptive Behavior Scales–Third Edition, Comprehensive Interview Form (Vineland-3), and the Wechsler Intelligence Scale for Children–Fifth Edition (WISC-V). She also reported reviewing the following records: the February 15, 2017 IEP, reflecting eligibility for special education services under the diagnosis of Specific Learning Disability; a February 16, 2017 letter from Dr. Traina identifying diagnoses of ADHD and ASD; and a November 13, 2017 report card showing grades ranging from A to F.

14. Dr. Mathess wrote that claimant's mother reported that claimant has never experienced any major illnesses or injuries and has never experienced a seizure. Dr. Mathess noted that claimant had been diagnosed with ADHD and was prescribed Concerta. Claimant presented with "appropriate eye contact," and "was cooperative throughout the session and displayed good attention and concentration. He communicated using simple sentences, but had some difficulty expounding on his responses when they were queried. No articulation difficulties were note[d]. In addition, [claimant] did not display any echolalia or stereotyped and repetitive behaviors. Overall, results are considered a valid estimate of his current functioning." (Ex. 3.)

15. With respect to claimant's cognitive and intellectual functioning, claimant's results on the WISC-V yielded a Verbal Comprehension Index Score of 81, a Fluid Reasoning Index Score of 94, and a Full-Scale IQ Score of 84. The Verbal Comprehension

Index score is in the low average range, suggesting “that his crystallized intelligence and overall verbal abilities are underdeveloped for his age.” (Ex. 3, p. 3.) Subtest scores in the Visual Spatial Index and the Fluid Reasoning Index ranged from average to upper average. “His Full Scale IQ is in the low average range.” (*Ibid.*)

16. With respect to ASD, on the ADI-R, for which claimant’s mother served as respondent, “responses resulted in scores above the necessary cutoff scores in the areas of Reciprocal Social Interaction and Abnormality of Development prior to 36 months. Responses in all other areas, including Communication and Restricted, Repetitive and Stereotyped Patterns of Behavior, resulted in scores below the necessary cutoff scores. Such a response pattern indicates that *a diagnosis of Autism Spectrum Disorder is not likely.*” (Ex. 3, p. 3, italics added.)

17. With respect to adaptive functioning, claimant scored in the low range in communications, in the moderately low range in daily living skills, and in the low range in socialization on the Vineland-3. He cannot follow three-step directions and does not understand sarcasm; he does not know what to do in dangerous situations, does not use household products correctly, and does not consider quality and price when selecting items to purchase. He does not have a best friend or a few good friends, does not use words to show concern for others, and does not apologize for hurting someone’s feelings.

18. Dr. Mathess diagnosed claimant with ADHD and Rule Out Language Disorder.

- a. She wrote that claimant’s cognitive functioning is in the low average range and his adaptive functioning is in the low to moderately low range. “The diagnosis of Intellectual Disability requires significant deficits in intellectual

- functioning with concurrent deficits in adaptive functioning. ... Based upon his level of cognitive functioning, a diagnosis of Intellectual Disability is not indicated.” (Ex. 3, p. 4.)
- b. She wrote that an ASD diagnosis “requires persistent deficits in social communication and social interaction, as well as the presence of restricted, repetitive patterns of behavior, interests and activities. Based on his mother’s report, test data and the examiner’s observations, [claimant] does not meet criteria for Autism Spectrum Disorder. ... [I]t is recommended that a Language Disorder be ruled out.” (Ex. 3, p. 4.)
 - c. Dr. Mathess recommended ongoing special education services, a comprehensive speech and language evaluation to rule out a language disorder, requesting speech and language therapy through the IEP process, mental health services to address ADHD, and participation in a social skills group, among other things.

19. Sandra Watson, Psy.D., is a psychological consultant for the Service Agency; she performs assessments and serves on the eligibility team. She sat with the team to review claimant’s eligibility for regional center services. The team considered Dr. Saunders’ psychiatric evaluation of claimant, school district documents, and the reports of Dr. Mathess and Ms. Cardenas, and determined that claimant does not have any of the five categories of developmental disabilities defined in the Lanterman Act. She testified the school district’s finding of autism only reflects claimant’s eligibility for special education services under the Education Code. It is not a diagnosis under the DSM-5, required to establish Autism Spectrum Disorder for purposes of eligibility for regional center services under the Lanterman Act.³ Moreover, making an autism

³ For example, the Education Code provides, in Title 2 (Elementary and Secondary Education), Division 4 (Instruction and Services), Part 30 (Special Education Programs),

diagnosis, Dr. Saunders utilized the GARS-2, a brief screen for autistic-like behaviors, and not a thorough diagnostic tool, such as the ADI-R, which Dr. Mathess employed.

20. There is no indication that claimant has an intellectual disability, seizures, or cerebral palsy. Although there was some support for a diagnosis of ASD suggested by the GARS-2 results, more persuasive were the results of the ADIR-2, which assesses for ASD as defined in the DSM-5, and which did not confirm such a diagnosis. Nor is claimant eligible for services under the fifth category. Claimant is in the low average range for cognitive ability, with scores possibly affected by ADHD and a possible language disorder. The evidence does not establish that claimant has a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability. Claimant would instead benefit from services and supports designed to assess for a possible Language Disorder and to address his ADHD.

21. In the future, claimant may submit to SCLARC the results of any additional assessments performed by claimant's school district or by any medical or mental health professionals for SCLARC's consideration.

Chapter 7.5 (Autism Training and Information), that, "For purposes of this chapter, a 'pupil with autism' is a pupil who exhibits autistic-like behaviors" (Ed. Code, § 56846.2, subd. (a).) "The definition of 'pupil with autism' in subdivision (a) *shall not apply for purposes of the determination of eligibility for services pursuant to the Lanterman [Act].*" (Ed. Code, § 56846.2, subd. (b) (italics added).)

LEGAL CONCLUSIONS

1. Cause does not exist to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 21, and Legal Conclusions 2 through 4.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (See Evid. Code, § 115.)

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that he suffers from a developmental disability that "originate[d] before [he] attain[ed] 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a); see also Cal. Code Regs., tit. 17, §§ 54000, 54010.) There are five categories of developmental disability that may be used to establish eligibility for regional center services. (*Ibid.*; see Factual Finding 3, fn. 2.)

4. Claimant did not establish by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act based on a diagnosis of any category of eligibility. (Factual Findings 5-21.) A diagnosis of ADHD and Rule Out Language Disorder does not satisfy the requirement of an eligible diagnosis of intellectual disability or autistic spectrum disorder under section 4512, subdivision (a). Nor did claimant establish by a preponderance of the evidence that he qualifies for regional center services under the fifth category of eligibility, or any other category. (Factual Findings 5-21.) It is not disputed that claimant will likely benefit from a speech

and language assessment, speech and language therapy, and special education services tailored to mitigate the effects of his disabilities. But, because claimant's disabilities are not any of the five developmental disabilities qualified for regional center services, SLCARC is not required to provide services and supports to claimant.

ORDER

Claimant's appeal is denied.

DATE:

HOWARD W. COHEN

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.