

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

OAH No. 2018061240

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 25, 2018, in Lancaster.

Dana Lawrence, Fair Hearings and Administrative Procedures Manager, represented North Los Angeles County Regional Center (NLACRC 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 October 25, 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 23.

Testimony. Heike Ballmaier, Psy.D.; Chandler Beckman; claimant's mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 5-year-old boy. He lives at home with his parents, a sister, and two brothers, ages 12 and eight; claimant's mother testified that both of claimant's brothers have autism. Claimant's mother asked the Service Agency to determine claimant's eligibility for services and supports.

2. By a Notice of Proposed Action (NOPA) and letter dated June 12, 2018, Norma Aragon, B.A., Intake Service Coordinator, Clinical Services/Intake, notified claimant's mother that claimant is not eligible for regional center services. According to the NOPA letter, the Service Agency reviewed all available records, conducted a social assessment and psychological evaluation, and determined that claimant does not have a developmental disability as defined in the Lanterman Developmental Disability Services Act (Lanterman Act), which is required for eligibility. In the letter, Ms. Aragon cited Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001 regarding the definition of "developmental disability." (Ex. 1.)

3. On June 20, 2018, claimant's mother filed a fair hearing request to appeal the Service Agency's eligibility determination, writing that claimant "was diagnosed in Oct. 2016 w/ autism. Now all of a sudden no autism." She requested a correct diagnosis, and services and supports. (Ex. 1.)

4. On July 5, 2018, claimant's mother and Dana Lawrence, NLACRC Contract Officer, participated in an informal meeting to discuss claimant's possible eligibility. By letter dated July 16, 2018, Ms. Lawrence memorialized the meeting and the parties' agreement "to defer an informal decision in order to gather further records and assessment information." (Ex. 23.)

5. By letter dated October 18, 2018, after the Service Agency had obtained and reviewed additional records and its staff psychologist, Dr. Ballmaier, had conducted a school observation of claimant, Ms. Lawrence affirmed the Service Agency's determination that claimant is not eligible for regional center services. (Ex. 18.)

- a. Ms. Lawrence cited the Lanterman Act, at 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, 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. She wrote that the disability must be substantial, originate before age 18, and be expected to continue indefinitely. She also cited California Code of Regulations, title 17, section 54000, which excludes from eligibility disabilities that are solely due to a psychiatric disorder, learning disability, or physical disability.
- b. Ms. Lawrence referred to Dr. Ballmaier's diagnoses of borderline intellectual functioning, language disorder, and speech sound disorder and her recommendation claimant "[r]eturn in one to two years to monitor cognitive skills." (Ex. 18.)

CLAIMANT'S HISTORY AND RECORDS PRE-DATING THE JUNE 2018 FAIR HEARING

REQUEST

6. In May 2016, when claimant was three years, one month old, claimant's school district assessed him and determined he was qualified for special education services, with primary eligibility under Other Health Impairment (OHI) and secondary eligibility under Speech and Language Impairment.²

7. Pediatric notes of Fariborz Satey, M.D., for claimant from September 22, 2016, when claimant was three years, five months old, reveal concerns about claimant reaching some developmental milestones, speech delays, and "strong concerns about Autism." (Ex. 3, p. 3.) Dr. Satey referred claimant to Care 1st Health Plan (Care 1st), claimant's insurer, for an Autism Spectrum Disorder (ASD) evaluation.

8. One month later, on October 27, 2016, Ani G. Nikolova, Ph.D., a licensed psychologist with the California Psychcare Diagnostic Department, received the referral and performed a psychological evaluation of claimant. She noted that Care 1st had referred claimant for "a psychodiagnostic assessment to rule out Autism Spectrum Disorder." (Ex. 4, p. 2.) Dr. Nikolova reported reviewing claimant's May 27, 2016, Individualized Education Plan (IEP), conducting a clinical interview of claimant's mother, directly observing claimant interacting with her and with his mother and at play, and administering the following tests: the Childhood Autism Rating Scale, Second Edition, Standard Version (CARS2-ST); the Autism Spectrum Rating Scales, (ASRS); and the Adaptive Behavior Assessment System, Third Edition (ABAS-3).

² Dr. Ballmaier testified that OHI eligibility may be associated with autism, attention deficit hyperactivity disorder, depression, anxiety, and other diagnoses. The school district did not specify the basis for the OHI eligibility.

- a. Claimant's mother reported that claimant made poor eye contact, engaged in pretend play by lining up toys, had problems with social skills, had language delays, became upset during transitions, had severe tantrums when denied access to what he wants, repetitively turned lights on and off, took many showers each day, and was sensitive to touch and noise. Dr. Nikolova observed claimant make brief and inconsistent eye contact, engage in play with toys offered to him, and share enjoyment with his mother. She did not observe as many formal characteristics of ASD as claimant's mother reported.
- b. On the CARS2-ST, an autism screening instrument, claimant scored 31.5, the lower end of the mild autism range, where the autism cutoff is 30. On the ASRS, a parent-report-based test, claimant was reported to demonstrate ASD characteristics in the very elevated range. The results of the ABAS-III, obtained by interviewing claimant's mother, resulted in extremely low scores in adaptive behaviors. Claimant's mother reported claimant laughing only rarely and being unable to keep a stable group of friends.

9. Dr. Nikolova diagnosed claimant with mild Autism Spectrum Disorder. She recommended that claimant receive Applied Behavior Analysis (ABA) treatment, that claimant's mother ask his school district to evaluate him to determine whether additional special education services would benefit him, that claimant's pediatrician prescribe a speech evaluation, and that claimant's mother ask NLACRC whether claimant is eligible for regional center services

10. Seven months later, claimant's IEP from an annual review on May 25, 2017, reflects that the school district was aware of Dr. Nikolova's ASD diagnosis and that claimant was receiving ABA services through his private insurer. The school district continued to find claimant eligible for special education services under the diagnoses of

OHI and speech and language impairment. The school district offered claimant speech and language services and individual and small group instruction at the preschool level.

11. On November 6, 2017, NLACRC prepared an Intake Application for claimant, whose mother had requested regional center services. Claimant's mother reported that claimant exhibited limited speech, tantrums, self-isolation, and poor eye contact, and that he hit himself and others. She reported that Dr. Nikolova had diagnosed claimant with autism. Dr. Ballmaier testified that the reported concerns could indicate autism and were sufficient grounds for NLACRC to open a file for claimant.

12. In a Care 1st Progress Report, claimant's evaluators, Quang Tran, MA, BCBA, and Chandler Beckmann, B.A., reported in January 2018 that, in 2017, ABA services were provided to address claimant's language skills, adaptive living and health and safety skills, and behaviors. The evaluators reported that claimant was able to use verbal communication, made socialization attempts with siblings and adults, engaged in independent play, and was able to remain on task. They wrote that claimant "demonstrates significant deficits when attempting to communicate his needs and wants as his speech not clear or distinct and cannot be easily understood . . ." (Ex. 8, p. 27.) They recommended 52 hours per month of direct ABA therapy and 12 hours per month of parent training.

13. Veronica Salinas, a vendor with NLACRC, performed a social assessment of claimant on March 7, 2018, to rule out ASD and intellectual disability (ID), following up on the November 2017 intake application. Ms. Salinas was aware of Dr. Nikolova's diagnosis. Ms. Salinas interviewed claimant. She wrote that his eye contact improved as he warmed to her, that he displayed expressive language difficulties, smiled at her, and used a "three-point gaze," i.e., he tapped her to get her attention, waited for her to look at him, and then pointed to a picture of a dinosaur on his shirt. Dr. Ballmaier testified

that this and other matters caused her to question Dr. Nikolova's ASD diagnosis. Claimant's mother reported possible delays in claimant's cognitive abilities, tantrums at home, and self-care issues. Ms. Salinas recommended that claimant receive a psychological evaluation to enable NLACRC to determine eligibility for regional center services.

14. On March 12, 2018, Dr. Carlo de Antonio, NLACRC's Clinical Director, who sits on the eligibility committee that evaluated claimant's application, ordered a psychological evaluation and reviewed claimant's medical records. He found no indication of substantially handicapping cerebral palsy, or epilepsy.

15. On April 10, 2018, Erica Lockshin, M.S., CCC-SLP, a speech and language pathologist, prepared a speech and language assessment report for claimant's school district, to help determine what speech and language services the district should provide claimant. Ms. Lockshin reported that claimant was very cooperative and patient, maintained attention, and demonstrated good effort during the evaluation. She applied various testing instruments and found that claimant "presents with a moderate receptive language disorder and severe expressive language disorder, as well as a severe articulation and phonological disorder. At this time [claimant's] pragmatic language, oral motor, fluency, and voice skills appeared to be within functional limits for his chronological age." (Ex. 11, p. 7.) Pragmatics Testing results reflected eye contact, turn taking, topic maintenance, understanding humor, initiation skills, joint attention, and ability to answer questions appropriately all with normal limits. Dr. Ballmaier testified that these results are not consistent with an ASD diagnosis; these areas should be affected or impaired by ASD. Ms. Lockshin determined that claimant would benefit from direct speech and language services.

16. On May 7, 2018, Brigitte Griffin, Psy.D., a clinical psychologist, conducted a psychological evaluation of claimant. In her report, Dr. Griffin noted that claimant was referred to her by NLACRC "to determine [claimant's] current level of cognitive, adaptive, and social functioning This evaluation is specifically limited to the assessment of developmental disabilities (including intellectual disability and/or autism spectrum disorder. This is not a comprehensive psychodiagnostic evaluation of mental or emotional disorder. The purpose of the assessment was explained to [claimant] and his mother" (Ex. 12.)

17. Dr. Griffin reported reviewing previous evaluations, testing, and records, including claimant's May 2017 IEP, Dr. Nikolova's October 2016, psychological evaluation, and NLACRC's social assessment and intake application. Dr. Griffin also reported performing a clinical interview of claimant's mother; and administering the following tests: the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), Module 1; the Autism Diagnostic Interview–Revised (ADI-R); the Wechsler Preschool and Primary Scale of Intelligence–Fourth Edition (WPPSI-IV); and the Adaptive Behavior Assessment System, Third Edition (ABAS-3), Parent Form.³

18. Dr. Griffin wrote that claimant was "friendly and gradually engaged," and that he expressed his needs "by briefly integrating his eye contact with a gaze, along with a range of gestures and facial expressions. He did not present with echoed speech. ... He expressed wide smiles of pride when praised." (Ex. 12, pp. 3-4.) Claimant was cooperative and responded to most one-step directions. He did not use repetitive speech or engage in excessive preoccupations or use odd, repetitive, or stereotyped

³ Dr. Ballmaier testified that these are the best tests available for diagnosing ASD and ID.

mannerisms. His speech “was quite dysfluent and often difficult for this Examiner to understand.” (Ex. 12, p. 4.) Claimant engaged in “joint attention, sharing, telling, and periodically sought the assistance and approval of the Examiner.” (*Ibid.*)

19. With respect to claimant’s cognitive and intellectual functioning, claimant’s composite and subtest scores on the WPPSI-IV ranged from low average (verbal comprehension) to borderline intellectual functioning. His Full Scale IQ was in the borderline range. Because his scores were not in the deficit range, Dr. Griffin found that “[t]he results of the WPPSI-IV indicate that claimant does not meet criteria for an Intellectual Disability.” (Ex. 12, p. 4, emphasis in original omitted.)

20. With respect to ASD, on the ADI-R, for which claimant’s mother served as respondent, none of claimant’s scores (in qualitative abnormalities in reciprocal social interactions, nonverbal communication, verbal communication, and restricted, repetitive and stereotyped patterns of behavior) met the cutoffs for ASD, other than his score for evident developmental abnormalities at or before 36 months. The ADOS-2, Module 1, results showed little to no evidence of ASD. Claimant received a rating of 1 on social affect and a rating of 0 on restricted and repetitive behaviors, for a total score of 1. The ASD cutoff is 12. Dr. Griffin found that claimant’s behaviors were not established as being consistent with ASD.

21. With respect to adaptive functioning, claimant achieved composite scores in the moderately deficient range on the ABAS-3. Dr. Ballmaier testified that claimant’s adaptive deficits are likely due to his significant deficits in receptive and expressive language.

22. Dr. Griffin diagnosed claimant with borderline intellectual functioning and speech sound disorder. (Ex. 12, p. 7.) She recommended that NLACRC continue to monitor claimant.

23. In claimant's IEP dated May 24, 2018, claimant was still diagnosed with OHI and speech and language impairment. The IEP reflects that claimant was to transition from preschool to kindergarten. He was able to take turns, play cooperatively, understand bad behaviors, and accept disappointment. He had made progress with his adaptive skills in the area of self care. His IEP goals related primarily to improving speech and language skills. His Social Pragmatic goal of initiating play with another child was met. His social and emotional functioning goals of reaching out to peers, working with a group toward a common goal, and refraining from hitting were met. Claimant's progress casts doubt on a diagnosis of ASD. Because claimant had met so many of his goals, the IEP recommended that claimant be placed in a general education setting, with a resource specialist's support, to avoid exposing claimant to children demonstrating bad behaviors.

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CLAIMANT'S EVALUATIONS AND HISTORY SINCE JUNE 2018

24. Heike Ballmaier, Psy.D., has served as supervisor of psychological services and intake for the Service Agency since 2011; she performs psychological evaluations, supervises nine psychologist vendors, conducts school observations, and serves on the multi-disciplinary eligibility committee. She sat with the committee to review claimant's eligibility for regional center services. The committee considered claimant's records and, on June 11, 2018, determined that claimant is not eligible for regional center services because he does not have any of the five categories of developmental disabilities defined in the Lanterman Act.

25. On October 1, 2018, after the June 5 NOPA letter and the July 5 informal meeting with claimant's mother (see Factual Findings 4 and 5), Dr. Ballmaier observed claimant at school. In class, claimant participated in circle time, raised his hand, lowered it when called on, called out words in response to the teacher, followed instructions, and engaged in joint activities with classmates. At lunch he initiated conversation with Dr. Ballmaier, who sat at his table. He smiled a lot, said he enjoyed eating his lunch, and talked about his family, but he was difficult to understand. At play after eating, he joined a group and talked, ran, and laughed with a friend. Dr. Ballmaier did not observe any ASD characteristics. She then discussed claimant with his teacher, who told her that claimant was struggling in class and was not performing at the same level as his classmates. School records showed that claimant's language skills were below his cognitive skills. Dr. Ballmaier testified that her observations and discussions with claimant and his teacher were consistent with Dr. Griffin's diagnoses of borderline intellectual functioning and speech sound disorder. Dr. Ballmaier recommended that claimant continue to receive speech and language therapy, and that he return to NLACRC in one or two years to monitor his cognitive functioning in connection with possible ID or fifth category eligibility.

26. On October 17, 2018, the interdisciplinary eligibility committee met again to consider Dr. Ballmaier's school observation. The committee again determined that claimant is not eligible, and agreed with Dr. Ballmaier's recommendation that claimant return in one to two years "to assess cognition." (Ex. 16.)

27. Dr. Ballmaier testified that, based on all documentation other than Dr. Nikolova's evaluation, there is no evidence of ASD or, at this time, of ID or fifth category.

OTHER EVIDENCE

28. Chandler Beckman, a program coordinator for claimant's ABA services provider, testified that claimant's maladaptive behaviors, including tantruming and eloping, have decreased markedly in frequency over time and that claimant is now able to communicate verbally.

29. Claimant's mother testified that the 15 hours per week of ABA services claimant receives from Care 1st, paid for by insurance, have helped claimant tremendously. Also, his cognitive abilities are improving, though they are still not where they should be.

SUMMARY OF EVIDENTIARY FINDINGS

30. There is no indication that claimant currently has an intellectual disability, or that he has ever had ASD, seizures, or cerebral palsy. Although there was some support for a diagnosis of ASD suggested by Dr. Nikolova's CARS2-ST and ASRS results, more persuasive were the results of the ADOS-2 and the ADIR-2 that Dr. Griffin administered and which did not confirm such a diagnosis. Nor is claimant eligible for services under the fifth category. Claimant demonstrates borderline intellectual functioning, with cognitive scores likely affected by a language and speech 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 address his language and speech deficits and to monitor his intellectual functioning and adaptive skills.

31. The Service Agency has suggested reassessing claimant's intellectual functioning in one to two years. In the meantime, claimant may submit to NLACRC the

results of any additional assessments performed by claimant's school district or by any medical or mental health professionals for NLACRC's consideration.

LEGAL CONCLUSIONS

1. Cause does not exist to grant claimant's request for regional center services, as set forth in Factual Findings 1 through 31 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.*)

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, including fifth category. (Factual Findings 5-31.) It is not disputed that claimant will likely benefit from speech and language therapy, and from special education services tailored to mitigate the effects of his disabilities. In view of claimant's age, his placement in kindergarten, and the nature of his deficits, the Service

Agency has suggested that claimant be reassessed for regional center eligibility in the categories of intellectual disability and fifth category in the summer of 2020, two years after the July 2018 informal meeting. But, because claimant's disabilities have been found at this time not to fall within any of the five developmental disabilities that qualify for regional center services, NLACRC is not currently 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.