

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2019010383

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on April 29, 2019, in Culver City.

Lisa Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency).

Claimant's mother represented claimant, who was present.¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on April 29, 2019.

ISSUE

Is claimant 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 11.

Testimony. Kaely Shilakes, Psy.D.; claimant's mother; claimant's aunt.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is three years and five months old. He lives at home with his parents and his five-year-old brother, who is a WRC consumer with a diagnosis of mild intellectual disability. Claimant's mother asked the Service Agency to determine claimant's eligibility for services and supports, having been referred by claimant's pediatrician due to claimant's mother's concerns with his speech and language delays and the possibility of Autism Spectrum Disorder (ASD).

2. By a Notice of Proposed Action (NOPA) and letter dated November 29, 2018, WRC notified claimant's mother that claimant, who was about to transition out of the Early Start Program,² is not eligible for regional center services under the Lanterman Act because he does not have a developmental disability. Only the following conditions qualify as developmental disabilities under the Lanterman Act: cerebral palsy, epilepsy, ASD, intellectual disability (ID), or a condition similar to intellectual disability or one that

² The "Early Start Program" is the common name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), which implements the federal Early Intervention Program for Infants and Toddlers with Disabilities. The Early Start Program applies only to infants and toddlers under the age of three. (Cal. Code Regs., tit. 17, § 52100 et seq.)

requires treatment similar to that required by a person with intellectual disability (fifth category).

3. After receiving the NOPA, on a date not reflected in the record, claimant's mother filed a fair hearing request to appeal the Service Agency's eligibility determination.

4. A fair hearing was set for February 4, 2019. On January 30, 2019, on the parties' joint motion and execution of a time waiver, the hearing was continued to April 29, 2019, in order to allow further assessments to be completed.

CLAIMANT'S HISTORY AND RECORDS BEFORE JANUARY 2019

5. In May 2018, when claimant was two years and five months old, WRC referred him to Keany Associates (Keany) for an assessment for behavior intervention (BI) services. The BI Assessor and Keany's clinical director noted that claimant's parents reported no medical or health issues. They assessed claimant and recommended BI services to achieve objectives related to claimant's behaviors, including tantrums when frustrated, aggression, isolative behaviors, and lack of functional communication, which "reduce his independence and safety, hinder the expression of his wants and needs, and adversely affect his relationships with others." (Ex. 10.)

6. According to claimant's August 27, 2018, Individualized Family Service Plan (IFSP),³ prepared when claimant was two years and eight months old, WRC funded 45 hours per month of individual behavior therapy services. WRC also funded one hour of

³ Regional centers develop an IFSP for each consumer of Early Start Program services, defining the developmental status of the consumer and services the regional center will fund to address the consumer's developmental needs.

speech therapy (ST) twice weekly, one hour of occupational therapy (OT) weekly, three hours per day of a center-based group program, and a one-hour developmental evaluation. The IFSP notes that claimant “has no medical conditions.” (Ex. 9., p. 3.) He showed some delays in cognitive, communication, social or emotional, adaptive/self-help, and physical development. One outcome for claimant was his successful transition out of the Early Start program after a transition meeting between claimant’s family and his school district. On August 24, 2018, WRC and claimant’s parents participated in an Early Start transition conference. Claimant’s mother discussed her concern that claimant was “not able to express his wants and needs”; a priority was for her to continue to work with a speech therapist to increase claimant’s vocabulary. WRC informed the parents of various transition resources, such as the Westside Family Resource & Empowerment Center, Individualized Education Program (IEP) support groups, Head Start, and the Family Behavioral Services mentor program.

7. In the fall of 2018, Jessica Quevedo, Psy.D., a licensed psychologist, performed a psychological evaluation of claimant at WRC’s request, for the “purpose of diagnostic clarification to address the issue of Regional Center eligibility and for program planning.” (Ex. 3.) Dr. Quevedo interviewed claimant’s mother, reviewed records, observed claimant in the testing room and in a park, and administered the following tests: Autism Diagnostic Observation Schedule (ADOS), Module 1, Pre-Verbal/Single Words; Wechsler Preschool and Primary Scales of Intelligence–Fourth Edition (WPPSI-IV); and Vineland Adaptive Behavior Scales–Third Edition (VABS-III), with claimant’s mother serving as the informant.

a. About her document review, Dr. Quevedo noted that claimant’s IEP took place on October 4, 2018, and that he was “made eligible for special education services under Speech/Language Impairment.” (Ex. 3, p. 2.) She reviewed previous

testing results from an OT evaluation, speech and language assessments, and a preschool team assessment conducted in 2017 and 2018.

b. Claimant's mother reported that claimant would line up toy cars, focus on spinning objects, and pace back and forth and in circles.

c. Dr. Quevedo observed claimant responding to her appropriately, being cooperative, and engaging in good eye contact. He "jabbered with intent and vocalized one to two word phrases with poor articulation," incorporating nonverbal gestures into his communications. He engaged in appropriate play with items in the room, and demonstrated appropriate joint attention with the examiner. Dr. Quevedo wrote that "throughout the session [claimant] was not noted to engage in any repetitive or stereotyped verbal or physical mannerisms and no fixed interests or preoccupations were elicited to suggest an autism spectrum diagnosis." (Ex. 3, p. 4.) At the park, claimant smiled and waved to another boy who had waved to him, "jabbered," and played by himself. He exclaimed that the playground rides were fun and told his mother he wanted to go on the slide. He had difficulty sharing rides with other children.

d. On the ADOS, in the area of communication, claimant used one- or two-word phrases and a mixture of jargon, pointed to objects in the distance, and coordinated his eye contact with the examiner as he pointed. In the domain of reciprocal social interaction, claimant used eye contact and vocalizations to make social overtures, directed his facial expressions to communicate emotions, demonstrated responsivity to social smiling, and responded to the examiner's use of a gaze shift to redirect his attention. In the domain of imagination, claimant demonstrated strength in play, used objects appropriately, and played using his imagination, e.g., pretending to blow candles out during a birthday party. In the domain of stereotyped and repetitive behaviors, claimant demonstrated none.

e. On the WPPSI-IV index measuring verbal comprehension, claimant performed within the borderline range on the receptive vocabulary subtest, and in the average range on the information subtest. On the WPPSI-IV index measuring visual spatial abilities, claimant performed within the average range on both the block design subtest and the object assembly subtest. On the WPPSI-IV index measuring working memory, claimant performed within the average range on both the picture memory subtest and the zoo location subtest. Claimant obtained a Full Scale IQ within the low average range, with his visual spatial index and working memory index within the average range and his verbal comprehension index within the borderline range.

f. The VABS-III results, with claimant's mother reporting, placed claimant in the moderately delayed range overall, and in the moderately delayed range for functioning in communication, daily living skills, and socialization abilities, and in the mildly delayed range in motor skills, all in comparison to chronological age peers.

8. Dr. Quevedo diagnosed claimant with Language Disorder. She summarized her results, finding that claimant was "performing in the low average range of cognitive development ... consistent with previous testing records," and that he "continues to demonstrate difficulty with expressive and comprehension skills." (Ex. 3, p. 10.) She also found:

With regards to Autism, [claimant] was not observed exhibiting any obvious self-stimulatory or ritualistic behaviors. He is able to share his interests/excitement with others; demonstrates interest in peers; and has not developed unusual attachments to objects [Claimant] does not meet criteria for Autism at this time. Behaviors

should be monitored and if concerns persist consider re-evaluation in 2 to 3 years.

(Ibid.)

9. WRC referred claimant to his school district for a preschool assessment as part of his transition from the Early Start program. In September 2018, when claimant was two years and nine months old, claimant's school district assessed him for language and speech and OT services. The OT assessor found that claimant did "not present with any areas of need requiring the expertise of a school-based occupational therapist," and recommended that the IEP team discuss claimant's needs and determine eligibility for special education services. (Ex. 5., pp. 6-7.) The speech and language assessor found that claimant demonstrated strengths in the areas of pre-communication, joint attention, intentional communication, goal-directed behavior, and pragmatic language. Though he demonstrated some strengths in receptive and expressive language, the assessor found delays in claimant's ability to communicate with others; as to receptive language, claimant did not consistently follow directions, and as to expressive language, his vocabulary was limited. The assessor concluded that claimant's "delays in the area of communication may prevent him from accessing the general education curriculum as effectively as his peers." (Ex. 6, p. 6.) She found that claimant met the eligibility criteria for Speech and Language Impairment for his chronological age or developmental level under California Code of Regulations sections 3030 and 3031 "and may need special education and related services support," which would be the responsibility of the IEP team to decide. (Ex. 6, p. 7.)

10. Claimant's IEP, dated October 4, 2018, reflects that the school district found claimant eligible for special education services because he met the criteria for Speech or Language Impairment (SLI). (Ex. 7, p. 8.) The IEP team found that claimant's

general ability/cognition, social emotional skills, self-help/adaptive skills, motor skills, and fine and visual motor skills and sensory processing skills would not affect his ability to access the educational program and that he needed no accommodation. With respect to claimant's health and development, the IEP records that claimant "has no history of hospitalization, surgery, or major illness." (Ex. 7, p. 6.) The IEP team assigned claimant to the general education curriculum at the district's early education center, with the accommodations of "small group instruction, visual and verbal cues, additional practice, clear and concise modeling, redirection," and speech and language services. (Ex. 7, pp. 19-20.)

CLAIMANT'S EVALUATION AND HISTORY SINCE JANUARY 2019

11. Wilhelmina Hernandez, M.D., a developmental behavioral pediatrician, performed a multidisciplinary examination of claimant on February 21, 2019, to:

ascertain [claimant's] diagnostic clarification and address the issue of Westside Regional Center eligibility. ... The Westside Regional Center eligibility team determined that [claimant] was not eligible for regional center services after a recent evaluation. His performance did not reflect a substantial impairment consistent with a developmental disability.

(Ex. 4, p. 1.) Dr. Hernandez was part of a multidisciplinary team, comprising Kaely Shilakes, Psy.D., WRC's staff psychologist, Soryl Markowitz, LCSW, WRC's autism and behavior specialist, and others, all of whom observed Dr. Hernandez conduct the examination.

12. Dr. Hernandez wrote that claimant's mother, noting significant improvement in claimant's language and social development during his participation in

the Early Start program, was still concerned about "his limited ability to focus and stay on task. He reportedly also lines up toys and obsess[es] over toy cars. He continually walks tip-toeing, lines up toys and is a picky eater and sensitive to certain tags in clothing." (*Ibid.*)

13. Dr. Hernandez reviewed and summarized Dr. Quevedo's assessment, and assessed claimant for ASD through interview and observation. Claimant engaged in play with Dr. Hernandez, checking in frequently with his mother and pointing to pictures in a book. He displayed a short attention span, articulated his words poorly, though he used words appropriately in context and engaged in no echolalia or scripted speech. He jumped in place when excited and was unable to maintain focus in conversation. He made eye contact and responded to social smiling. He "did not present with any stereotypical, repetitive forms of play and unusual restricted interests. He did however demonstrate significant issues with self-regulation. He wanted to collect all the vehicles in the play area." (Ex. 4, p. 2.)

14. Dr. Hernandez diagnosed claimant with Language Disorder. She found that claimant's "level of intensity and difficulties in socializing may be related to his inability to self-regulate. He demonstrates slight impulsivity and difficulty modulating his mood and emotions. Therefore, it was recommended that he continue to pursue Occupational Therapy via his Individualized Education Program (IEP) to help support him in this area." (Ex. 4, p. 2.)

15. Dr. Shilakes testified that, based on all documentation, the evidence does not support a finding of ASD, ID, or fifth category, or any other eligible condition. As did Dr. Hernandez, Dr. Shilakes concurred with Dr. Quevedo's diagnosis of Language Disorder, based on testing results and observations of claimant in different settings. Dr. Shilakes observed claimant demonstrate good play skills and social interaction, poor

articulation and some communication issues, and no restricted repetitive behaviors. She testified that claimant's difficulty maintaining focus does not indicate ASD, but is probably attributable to his language issues, as are his behaviors when frustrated, such as tantruming. Nor did she see any indication of cognitive or global delays or disabilities.

OTHER EVIDENCE

16. Claimant's mother testified that she agrees some of claimant's behaviors are related to frustration at his speech impairment, but she remains concerned about his repetitive behaviors, such as pacing and lining things up, about his failure to play with other children, about his falling and his hyperactivity. She and her husband have not yet started claimant at preschool; they are awaiting assurance that he will be supervised so he does not hurt himself. She would like the school district to offer OT for claimant, in addition to the ST the district has agreed to provide.

17. Claimant's aunt testified that claimant has engaged in repetitive behaviors, such as pacing back and forth in a straight line more than 60 times before she stops him; he also has tantrums, and runs without attention to danger.

SUMMARY OF EVIDENTIARY FINDINGS

18. There is no indication that claimant has ever had or been diagnosed with seizures or cerebral palsy. Nor does the evidence support a finding of eligibility based on a diagnosis of ASD, intellectual disability, or a condition similar to intellectual disability or one that requires treatment similar to that required by an individual with intellectual disability.

19. The evidence on the whole persuasively demonstrate that no eligible diagnosis can be confirmed at this time. Although claimant's family reported some

repetitive behaviors and some tantruming, the observations of Dr. Quevedo in different settings, and of Drs. Hernandez and Shilakes, testing results, and observations by school district assessors, as well as their explanations that some of claimant's behaviors can be attributed to Language Disorder, not ASD, support WRC's determination of ineligibility. Claimant demonstrates low average intellectual functioning, with a borderline score in only one subcategory, and a full scale IQ score of 90; these scores were likely affected by claimant's language and speech disorder, and do not meet the criteria for ID. 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.

20. Dr. Quevedo suggested reassessing claimant in two or three years if his behaviors persist. In the meantime, claimant may submit to WRC the results of any additional assessments performed by claimant's school district or by any medical or mental health professionals for WRC'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 20 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. (Factual Findings 5-20.) 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 and the nature of his deficits, claimant’s family may wish to have claimant reassessed for regional center eligibility in two or three years. 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, WRC 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.