

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2019030401

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 23, 2019, in Pomona, California.

Daniel Ibarra, Fair Hearing Representative, represented San Gabriel/Pomona Regional Center (SGPRC or Service Agency).

Claimant's mother represented claimant, who was not present.¹ Ana Castro, Court Certified Interpreter, provided language interpretation services in Spanish.

¹ Claimant's and family members' names are omitted in order to protect their privacy.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 23, 2019.

ISSUE

Whether claimant is eligible to receive services and supports from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on the claim of autism spectrum disorder.

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1 to 3, and 5 to 13; claimant's exhibit A.

Testimony. Deborah Langenbacher, Ph.D. and claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is an 18-year-old male who lives at home with his mother. Claimant's mother asked the Service Agency to determine whether he is eligible for regional center services.

2. By a Notice of Proposed Action and letter dated February 6, 2019, the Service Agency notified claimant that he is not eligible for regional center services. The Service Agency's interdisciplinary team had determined that claimant does not meet the eligibility criteria set forth in the Lanterman Act.

3. On March 4, 2019, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding claimant's eligibility. This hearing ensued.

Background

4. Claimant moved with his mother from Mexico to California in October 2018. According to claimant's mother, her son was diagnosed with Asperger's Disorder when he was three years old, although no documentation of this diagnosis was submitted. From 2011 to 2016, claimant was under the care of a psychiatrist in Mexico. Claimant's primary language is Spanish, and he is currently enrolled in high school.

5. At the hearing, claimant's mother clarified that claimant was seeking regional center services on the grounds that he suffers from autism spectrum disorder. Therefore, the hearing focused on whether claimant was eligible for SGPRC's services under the category of autism spectrum disorder

Claimant's School Evaluation

6. On January 31, 2019, the school psychologist conducted a psycho-educational evaluation of claimant to determine his eligibility for special education services and his current level of performance. The school psychologist administered a battery of tests, which focused on claimant's cognitive ability, nonverbal ability, auditory processing, visual perceptual skills, visual-motor skills, and academic achievement.

7. In a report dated January 31, 2019, the school psychologist found that on the Kaufman Brief Intelligence Test, Second Edition (KBIT-II), claimant obtained a total intelligence quotient (IQ) of 100, suggesting that his cognitive abilities were in the

average range. Specifically, claimant performed in the average range (with a score of 89) on the verbal subtest and performed in the high average range in the nonverbal subtest (with a score of 111). The school psychologist wrote, "[Claimant's] performance on the KBIT-II indicates that his problem solving and reasoning skills should not limit his access to the curriculum in the general education setting." (Ex. 9, p. 4.)

8. Claimant's total academic achievement, based on the Woodcock Munoz Bateria III, Fourth Edition, demonstrates that his academic skills fell far below his age level in all areas except word reading. In particular, claimant performed in the ten-year-old range in the area of reading fluency; in the nine-year-old range in the area of reading comprehension; in the nine-year-old range in the area of understanding directions; in the 11-year-old range in math; in the seven-year-old range in writing; and in the 14-year-old range in spelling.

9. With claimant's first grade teacher and claimant's mother serving as informants, the school psychologist administered the Behavioral Assessment for Children System, Third Edition (BASC III) to assess claimant's emotional and behavioral functioning. On the BASC III, claimant's mother reported significantly elevated concerns in the areas of withdrawal and functional communication, and mildly elevated concerns in the areas of anxiety, depression, and leadership. Claimant's teacher indicated significantly elevated concerns in the areas of withdrawal and learning problems, and mildly elevated concerns in the areas of adaptability, social skills, leadership, study skills, and functional communication.

10. Additionally, the Autism Spectrum Rating Scales (ASRS) were used to assess for the presence of autism. On the ASRS, claimant's mother indicated the following areas of concern that fell within the very elevated range: Unusual Behaviors, Peer Socialization, Atypical Language, Behavioral Rigidity, and Sensory Sensitivity. She

reported that claimant's behavior fell within the elevated range of concern in the area of Attention. Claimant's mother rated claimant's behavior as falling in the slightly elevated range of concern in the following areas: Social Communication, Self-Regulation, Adult Socialization, Social Emotional Reciprocity, and Stereotypy. Claimant's teacher rated the following areas as falling within the very elevated range of concern: Social Communication, Social Emotional Reciprocity, and Sensory Sensitivity. He reported that claimant's behavior fell within the elevated range of concern in the following areas: Unusual Behaviors, Peer Socialization, and Atypical Language. Claimant's teacher rated claimant's behavior as falling in the slightly elevated range of concern in the area of Behavioral Rigidity. He rated claimant's behavior as falling in the average range of concern in the following areas: Self-Regulation, Adult Socialization, Stereotypy, and Attention. According to the school psychologist, the results of these reports from claimant's mother and teacher "are highly indicative of behaviors associated with autism spectrum disorder." (Ex. 9, p. 7.)

11. Based on these test results, the school psychologist concluded that claimant met the eligibility requirement for special education services due to autism.² However, the school psychologist's evaluation did not contain an analysis regarding the criteria under the Diagnostic Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) on which he had relied to reach this diagnosis.

² Pursuant to California Code of Regulations, title 5, section 3030, subdivision (b)(1), autism is defined as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident at age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."

12. Following the school psychologist's evaluation, claimant's school district developed an Individualized Education Program (IEP), dated January 31, 2019. The IEP identified "autism" as claimant's primary disability. (Ex. 10, p. 1.) Under the IEP, claimant was to spend one percent of his time in special education classes and 99 percent of his time in regular classes. (*Id.* at p. 16.)

SGPRC's Evaluation of Claimant

13. On January 23, 2019, Cynthia Bautista, Psy.D., conducted a psychological evaluation of claimant to determine his eligibility for SGPRC's services. Dr. Bautista reviewed claimant's prior evaluations, interviewed claimant's mother, and administered several tests to complete the evaluation.

14. Dr. Bautista made the following clinical observation of claimant's demeanor during the evaluation:

When [claimant] was greeted in the waiting room, he made eye contact, got up from his seat, acknowledged it was him and shook examiner's hand. [Claimant] seemed a bit shy and nervous. When entering the exam room, [claimant] sat next to the examiner and displayed anxious behaviors, such as looking down, touching his hands, and talking softly. As the evaluation continued, [claimant] began to feel more comfortable, was engaging, provided appropriate eye contact, made some jokes, and completed all tasks.

(Ex. 11, p. 2.)

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15. Regarding her interview with claimant's mother, Dr. Batista wrote:

Mother reported when [claimant] was younger, he was very social. He was reported as very creative, loved drawing, played with Legos, and has great imaginative and age appropriate pretend play skills. She believes all his difficulties began in 3rd grade when he noticed that he was the oldest in his class and academically behind compared to his peers. Mother reported he became depressed and anxious about school. Mother indicated that when [claimant] feels comfortable, he is able to socialize and opens up with no social problems.

(Ex. 11, p. 3.)

16. Claimant's mother was administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3), to assess his level of daily functioning. On the ABAS-3, claimant's mother rated claimant's adaptive behavior in the extremely low range. His General Adaptive Composite score was 68, which reflected skills in the second percentile rank when compared to his same-aged peers. Claimant's Conceptual score of 69 was in the extremely low range and reflected skills in the second percentile rank when compared to his same-aged peers. Claimant's Social score was 73, which was in the low range and reflected skills in the fourth percentile rank when compared to his same-aged peers. The Practical score attained by claimant was in the low range, with a standard score of 72, which was in the third percentile rank.

17. Dr. Bautista also applied Autism Diagnostic Observation Schedule, Module 4, Second Edition (ADOS-2) to assess for the presence of autism spectrum

disorder. On the ADOS-2, claimant earned a score of 1 in the area of Communication and a score of 3 in the area of Social Interaction. His overall score of 4 did not reach the cutoff for a diagnosis of autism spectrum disorder. Specifically, Dr. Bautista observed that claimant's spontaneous and expressive language consisted of complex speech and varying intonation, without any echolalia or stereotyped speech. Claimant evidenced spontaneous communication of emotions several times during the ADOS-2 administration and was able to identify which activities make him feel certain emotions. Claimant used spontaneous gestures. Claimant was also able to create very detailed stories involving imagination and creativity. Furthermore, "[claimant] effectively used nonverbal and verbal means to make clear social overtures and made some attempts to get, maintain or direct [Dr. Bautista's] attention throughout the ADOS-2 administration." (Ex. 11, p. 6.) With regard to stereotyped and restricted interests, none were observed by Dr. Bautista during the evaluation.

18. Based on the test data and her clinical observations, Dr. Bautista concluded that in claimant's case, a diagnosis of autism spectrum disorder was not indicated under the DSM-5 criteria. However, Dr. Bautista diagnosed claimant with unspecified anxiety disorder and recommended that claimant undergo mental health therapy to develop skills to reduce and manage symptoms of this condition.

Testimony of Deborah Langenbacher, Ph.D.

19. Deborah Langenbacher, Ph.D., staff psychologist for SGPRC, testified on behalf of the Service Agency. Dr. Langenbacher has been a staff psychologist for SGPRC for over 20 years. She is a member of the eligibility team, and Dr. Langenbacher personally conducts 15 to 20 psychological evaluations every month for the purpose of assessing an individual's eligibility for regional center services.

20. Prior to the hearing, Dr. Langenbacher had reviewed all documents relating to claimant's case, including the January 31, 2019 psycho-educational report from claimant's school psychologist and the January 23, 2019 psychological evaluation from Dr. Bautista.

21. Regarding claimant's school evaluation, Dr. Langenbacher noted that based on the results of the KBIT-II, claimant's cognitive ability is in the average range, indicating that he does not suffer from intellectual disability, or a disabling condition closely related to intellectual disability, or require treatment similar to that required for individuals with intellectual disability. Dr. Langenbacher also stated that based on the results of the ASRS, the school psychologist raised significant concerns that claimant may suffer from autism. However, Dr. Langenbacher emphasized that even though claimant was found to be eligible for special education under the diagnosis of autism, the school psychologist did not make this diagnosis under the DSM-5 criteria. According to Dr. Langenbacher, eligibility standards for regional center services, as compared to eligibility for special education services, are "strict" (her term) and must be determined according to the DSM-5 criteria.

22. Regarding Dr. Bautista's evaluation of claimant, Dr. Langenbacher noted that claimant's mother reported claimant to be social and creative when he was young. Claimant's problems did not manifest until he was in the third grade. Under the DSM-5, however, symptoms of autism spectrum disorder must be present during the early developmental period, typically during the preschool years. Additionally, Dr. Langenbacher opined that claimant's overall score of 4 on the ADOS-2 was well below the cut-off for a diagnosis of autism spectrum disorder. Indeed, Dr. Bautista did not observe any stereotyped or restrictive behaviors in claimant during the administration of the ADOS-2 that was suggestive of autism spectrum disorder.

23. Based on her review of the available information, Dr. Langenbacher agreed with Dr. Bautista's conclusion that claimant does not suffer from autism spectrum disorder.

Claimant's Mother's Testimony

24. Claimant's mother testified at the hearing regarding her observations and concerns regarding her son's condition. Claimant's mother stated that even as an infant, claimant had difficulty eating and cried frequently. At the age of two, claimant was expelled from his day care because he was aggressive and bit another child on the ear. In Mexico, claimant was at one time diagnosed with Asperger's Disorder. He has seen a number of neurologists, but did not obtain any definitive diagnosis of his condition. Claimant was also in special education while he attended high school in Mexico. From 2011 to 2016, claimant was seen by a psychiatrist, but the years of therapy did not seem to alleviate claimant's problems.

25. Currently, claimant attends a high school that is approximately two blocks away from his home. However, claimant's mother reported that claimant is unable to walk to school by himself due to his poor sense of direction. Claimant's mother also reported claimant's language skills are deficient. For example, claimant says "bottle" when the object is a cup, and he says "mirror" when the object is a window. Moreover, claimant has difficulty socializing with others and does not have any friends. Claimant's mother believes that her son suffers from a condition beyond Anxiety Disorder.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

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

The Lanterman Act

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

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.... [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

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3. Welfare and Institutions Code section 4512, subdivision (l), provides:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Claimant’s Eligibility for SGPRC’s Services

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

5. According to the DSM-5, a diagnosis of autism is made “only when the characteristic deficits of social communication are accompanied by excessively

repetitive behaviors, restricted interests, and insistence on sameness.” (DSM-5, § 299.00, pp. 31-32.)³ The DSM-5, section 299.00, identifies the diagnostic criteria which must be met to provide a specific autism diagnosis, as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts;

³ Neither the Lanterman Act nor any of the Act’s implementing regulations define autism. However, the established authority for this purpose is the DSM-5, “a standard reference work containing a comprehensive classification and terminology of mental disorders.” (*Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2.)

to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. [11] . . . [11]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hypo-reactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement).

[¶] . . . [¶]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5, pp. 50-51.)

6. In 2019, the school psychologist found claimant to be eligible for special education services based on a diagnosis of "autism." Nevertheless, the fact that claimant qualified for special education at school does not establish that he has a developmental disability within the meaning of the Lanterman Act. The school psychologist's diagnosis of "autism" was not based on the DSM-5 criteria. Moreover, eligibility for special education is more inclusive than eligibility for regional center services.

7. As set forth in Legal Conclusion 5, a diagnosis of autism spectrum disorder under the DSM-5 requires a consideration of an individual's developmental history and functional impairment, in addition to demonstration of all three deficits in the area of social communication and two out of four types of patterns in restrictive and repetitive behavior. In this regard, Dr. Bautista and Dr. Langenbacher's opinions of claimant's condition were more persuasive, in that they were formed within the framework of the DSM-5.

8. According to Dr. Bautista, claimant did not exhibit any restrictive or repetitive patterns of behavior during her evaluation of claimant. On the ADOS-2, claimant obtained a score of 1 in communication and 3 in social interaction. His overall score of 4, according to Dr. Langenbacher, was well below the cutoff for a diagnosis of autism spectrum disorder. In addition, Dr. Langenbacher observed that claimant's problems arose during the third grade, which is not considered to be in the early development period. Both Dr. Bautista and Dr. Langenbacher opined that claimant does not suffer from autism spectrum disorder. Their opinions are unrefuted, consistent with the evidence, and therefor afforded significant weight.

9. Under these circumstances, while claimant clearly faces challenges and needs the additional support that he is receiving at school, he is not eligible for regional center services under the category of autism at this time.

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ORDER

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

DATE:

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.