

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

In the Matter of:

CLAIMANT

v.

REGIONAL CENTER OF THE EAST BAY, Service Agency,

OAH No. 2019100375

DECISION

Administrative Law Judge Barbara O'Hearn, State of California, Office of Administrative Hearings, heard this matter on February 10, 2020, in San Leandro, California.

Aaron Abramowitz, Attorney at Law, Enright & Ocheltree, LLP, appeared and represented the service agency, Regional Center of East Bay.

Claimant was represented by her mother. Claimant was not present.

The record was closed and the matter was submitted for decision on February 10, 2020.

On February 12, 2020, claimant submitted a document. As it was submitted after the record was closed, it is not considered.

ISSUE

Whether the Regional Center of East Bay (regional center) must review claimant's records to determine if she would have been eligible for regional center services effective November 24, 2007.

Introduction

1. Claimant is a 15-year-old young woman receiving regional center services on the basis of autism spectrum disorder.

2. Prior to July 18, 2019, claimant requested the regional center to review her records to determine her eligibility for regional center services at age three. On July 25, 2019, the regional center sent a notice of proposed action denying the request. The notice provided appeal rights and the regional center's availability to assist in the fair hearing process.

3. On September 20, 2019, the regional center sent a second notice of proposed action again denying the request. The denial also provided appeal rights, including by formal hearing.

4. On October 3, 2019, claimant submitted a fair hearing request appealing the notice of proposed action and requesting the regional center to review claimant's records to determine whether claimant "would have or would have not been eligible" for regional center services (at age three).

5. On February 5, 2020, the regional center filed a motion to dismiss claimant's fair hearing request. A ruling was deferred to the hearing judge. Oral and

documentary evidence was received for both the motion, taken under submission, and the merits of the underlying case.

Facts

6. Claimant was born on November 24, 2004, and placed in foster care after about two months of hospitalization due to premature birth. Claimant's biological mother was a teenage runaway in foster care when she gave birth to claimant. In 2005, after the birth of her second child, Alameda County referred claimant's mother to the regional center. Claimant's mother was found eligible for regional center services, but the county did not refer claimant for an eligibility assessment.

7. On February 25, 2005, claimant was placed with her current parents who adopted her on November 17, 2007. Claimant did not display classic symptoms of autism as a child. She was diagnosed with an anxiety disorder at that time.

8. At age 12, claimant was referred to the regional center for assessment and was determined eligible for regional center services due to autism, effective October 31, 2017. Claimant had not previously been referred to the regional center and was not a regional center client under the Early Intervention Services Act. (Gov. Code, § 95000 et seq.)

9. Monthly adoption assistant benefits paid by the county to adoptive parents are greater if the adopted child is a regional center client. Claimant wants the county to pay the greater rate retroactive to her third birthday. She therefore requests the regional center to confirm that had she applied, the regional center would have made her eligible for services at age three.

10. On June 13, 2018, claimant's representative filed a request for hearing before the California Department of Social Services (CDSS), Hearing No. 2018170167, to request the county to pay the greater adoption assistance benefits rate beginning with the adoption of claimant (November 2007).

11. On November 1, 2018, Faith Tanner, Psy.D., a psychologist for the regional center who assessed claimant in October 2017, wrote a letter to explain the nature of claimant's disability. Dr. Tanner reported and testified how it is sometimes difficult to diagnose autism spectrum disorder, especially in children who do not exhibit the classic symptoms. Dr. Tanner could not say whether claimant would have been found to have the disorder in 2007.

12. The CDSS decision was issued on April 17, 2019. It concluded that even if the county had referred claimant to the regional center earlier, "it can only be speculated whether [claimant] would have been determined" by the regional center to be eligible for regional center services at any time prior to the date the regional center determination was made. The decision denied the claim for retroactive rate benefits at the higher level.

13. On July 18, 2019, claimant requested the regional center to make her eligible for regional center services retroactive to November 24, 2007, her third birthday. The regional center denied the request by letter and notice of proposed action dated July 25, 2019. The reason for denial was that assessments are done for the purpose of determining eligibility in the present tense and cannot be completed retroactively.

14. On September 18, 2019, claimant again requested the regional center to make her eligible for regional center services retroactive to November 24, 2007. The

regional center again denied the request by letter and notice of proposed action dated September 20, 2019. The letter explained that a clinician does not have the ability to make that determination retroactively.

Claimant's Contentions

15. Claimant contends she should have been referred to the regional center at birth because she was "at risk" due to her premature birth and the status of her biological mother. Claimant contends she "slipped through the cracks" on numerous occasions of interaction with the county, its adoption agency, mental health clinicians, and schools.

16. Claimant contends the county did not do its job, and the "system is broken." She contends the regional center had a duty when claimant was born and when she was three years old to "actively look throughout the community to find people who are eligible for services." She contends her rights were violated.

Regional Center's Contentions

17. The regional center contends there is no authority to grant claimant's request for a retroactive finding of claimant's eligibility for regional center services. The request would require a multidisciplinary team of regional center professionals to speculate whether claimant would have been found to be eligible for services 12 years ago.

18. The regional center contends that the Office of Administrative Hearings lacks authority to order a team of professionals to speculate.

LEGAL CONCLUSIONS

1. Evidence Code section 500 states: "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The regional center has the burden of proof on the motion to dismiss. Claimant has the burden of proof on the merits of her request for fair hearing.

Motion to Dismiss

2. Fair hearing procedures under the Lanterman Developmental Disabilities Act (Lanterman Act) begin at Welfare and Institutions Code section 4710. Subdivision (b) of that section allows an individual to request a hearing if the agency makes a decision without the mutual consent of the recipient or the authorized representative to deny the initiation of a service or support requested for inclusion in the individual program plan.

The regional center's denial of claimant's request to review records and determine if claimant would have been eligible for services 12 years earlier is not a denial of claimant's initiation of a service or support requested for inclusion in claimant's individual program plan.

3. Welfare and Institutions Code section 4710.5, subdivision (a), provides that any applicant for or recipient of services, or authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interests, shall, upon filing a request within 30 days after notification of the decision or action complained of, be afforded an opportunity for a

fair hearing. Claimant is dissatisfied with the regional center's denial of her request that it determine whether claimant would have been eligible for services nine years earlier which she contends is not in claimant's best interest.

4. California Code of Regulations, title 17, section 50966, subdivision (b), provides that if a service agency believes that a fair hearing request raises issues that are not appropriately addressed under Welfare and Institutions Code section 4700 et seq., or for other reasons does not comply with statutory requirements, the service agency may file a request to have the matter dismissed with the agency responsible for conducting hearings. The regional center filed a motion to dismiss claimant's request for a fair hearing arguing that it raises an issue that does not comply with the Lanterman Act or any other law. The regional center also argued that claimant's request is not subject to a fair hearing because the request for retroactive review of records is not a service under the Lanterman Act and would require professionals to speculate.

5. Claimant's request for hearing falls within the broad scope of Welfare and Institutions Code section 4710.5, subdivision (a). The regional center's motion to dismiss is denied.

Claimant's Request

6. When claimant was 12 years old, the regional center found claimant eligible as an individual substantially disabled as a result of autism. Claimant requests a retroactive determination of eligibility at age three in order to receive increased adoption payments retroactively.

7. For the purpose of determining whether an individual has intellectual disability or autism, California Code of Regulations, title 17, section 54010, subdivision

(b), requires a psychological assessment by a regional center-vendored psychologist. The psychological report, along with other documents, are then reviewed by a multi-disciplinary team of regional center individuals to determine whether the individual has a developmental disability as defined by the Lanterman act and relevant regulations. Claimant's request for a retroactive determination of eligibility would require the psychologist and multidisciplinary team to speculate as to claimant's eligibility more than 12 years ago.

8. Claimant provided no authority in the Lanterman Act or related laws to support her contention that the regional center must convene a multi-disciplinary team to review claimant's past records to determine whether in 2007, claimant had a developmental disability as defined by the Lanterman Act.

9. Claimant's representative is commended for her advocacy and persistence on behalf of her daughter. However, claimant has not met her burden of establishing that the regional center must review claimant's past records to determine possible eligibility for retroactive regional services beginning November 24, 2007.

ORDER

1. The regional center's motion to dismiss is denied.

2. Claimant's request for the regional center to review claimant's records to determine whether claimant would have been eligible for regional center services beginning November 24, 2007, is denied.

DATE:

BARBARA O'HEARN

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.