

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

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL POMONA REGIONAL CENTER, Service Agency

OAH No. 2019100442

DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on March 4, 2020, in Pomona, California.

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

Victoria Baca, M.Ed., Authorized Representative, represented claimant who was not present.¹

¹ Titles are used to protect claimant and her family's privacy.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 4, 2020.

ISSUE

Whether claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² under the category of Autism Spectrum Disorder (ASD).

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 14.

Testimony: Deborah Langenbacher, Ph.D.; Chris Davidson, LEP, BCBA; mother.

Jurisdictional Matters

1. Claimant is a 14-year-old girl who resides with her parents and brother. Claimant is eligible for services under the Lanterman Act based on a diagnosis of Mild Intellectual Disability (ID). (§ 4512, subd. (a).) Claimant has been a Service Agency consumer for approximately four years.

² Statutory references are to the Welfare and Institutions Code, unless otherwise designated.

2. In February 2019, claimant requested Service Agency find her eligible for services under the category of ASD.³ Service Agency provided claimant a psychological evaluation referral scheduled for May 2, 2019, so Service Agency could assess claimant for the requested category of eligibility. At mother's request, the evaluation was rescheduled to June 11, 2019. On June 10, 2019, mother canceled the appointment. On August 15, 2019, mother and claimant's representative, Ms. Baca, met with Jessica Garibay, claimant's service coordinator, and requested Service Agency issue a Notice of Proposed Action (NOPA) documenting its denial of claimant's request to be found eligible for Lanterman Act services under the category of ASD.

3. In a NOPA dated August 29, 2019, Service Agency denied claimant's request to be found eligible for Lanterman Act services under the category of ASD.

4. Mother filed a Fair Hearing Request on September 27, 2019.

Claimant's Individualized Program Plan Services

5. Claimant's January 14, 2019, Individualized Program Plan (IPP) Annual Progress Report, based on her intellectual disability, includes the following outcome goals: 1) claimant will remain in good health by receiving medical and dental check-ups; 2) claimant will be independent with bathing and her personal hygiene; 3) claimant will increase her eye contact and attention span; 4) claimant will improve her vision coordination when reading and writing; 5) claimant will expand her cognitive

³ Claimant has been eligible for special education services since 2008. Since approximately April 2018, claimant has been eligible for special education services under the category of intellectual disability, orthopedic impairment, speech and language impairment, and autism.

ability; and 6) claimant will learn to fold her clothes independently. The IPP does not identify services Service Agency will provide to claimant to reach these goals, and does not identify outcome goals or services to address claimant's socialization deficits. (Ex. 3, p. 4.)

Evidence of ASD

6. Deborah Langenbacher, Ph.D., Service Agency Staff Psychologist, reviewed the following evaluations of claimant: March 30, 2007 Step-by-Step Pediatric Developmental Evaluation Report; November 25, 2008 Psychological Evaluation, Edward G Frey, Ph.D.; January 14, 2009 Bonita Unified School District (BUSD) Multi-Disciplinary Psycho-Educational Report; December 2014 BUSD East San Gabriel Valley Special Education Local Plan Area Confidential Psycho-Educational Report Triennial Evaluation; December 2017 BUSD Psycho-Educational Report Triennial Evaluation; April and May 2018 Psycho-Educational Report, Chris Davidson, Licensed Educational Psychologist (LEP), Board Certified Behavior Analyst (BCBA); January 14, 2019 IPP Annual Progress Report; and September 19, 2019 History and Neurology Evaluation, Habib Ismail, M.D.

7. At hearing, Dr. Langenbacher testified that after review of the evaluations, she could not conclude claimant was eligible for Lanterman Act services under the category of ASD for three reasons: 1) Service Agency was not provided an opportunity to assess claimant; and, based on her review of other available assessments and evaluations, 2) Dr. Langenbacher did not find evidence that claimant had symptoms of ASD during her formative years (zero to five years of age); and 3) to the extent behavior rating scales used to evaluate claimant identified symptoms of ASD, there were discrepancies in the assessment results of claimant's social abilities and adaptive skills, e.g., parents reported a score of 8 (average) in academics, though

claimant's skills fall in the delayed range based on objective testing, and historically claimant has demonstrated with relatively strong social abilities despite Dr. Davidson's conclusion that claimant's social abilities are delayed.

8. Despite Dr. Langenbacher's conclusion, the evidence presented did show claimant exhibited symptoms of ASD during her formative years, and that she has exhibited social delays consistently over the past 11 years.

A. In claimant's March 30, 2007 Step-by-Step Pediatric Therapy Developmental Evaluation Report, conducted when claimant was 14 months old, Anna Holley, Licensed and Registered Occupational Therapist, noted that at 13 months of age claimant enjoyed playing peek-a-boo and smiled when she sees her parents and other family members. However, Ms. Holley concluded, after conducting a series of assessments, that claimant had significant delays in all areas of development, including social skills, which at that time claimant was functioning as a 9- or 10-month-old child, a three to four-month delay.

B. In 2018, when claimant was two-years and 10-months-old, after receiving Early Start Program services based on speech and motor delays, Service Agency requested Dr. Frey evaluate claimant for Lanterman Act services. Based on mother's reports, Dr. Frey determined claimant initiated friendship seeking behavior, enjoyed playing with other children and could often play cooperatively. Dr. Frey observed claimant had a reciprocal smile and was social and friendly. Though Dr. Frey noted that claimant had strengths in socialization, Dr. Langenbacher's use of this finding to support her conclusion that claimant did not demonstrate socialization delay in her formative years is misplaced. Dr. Frey made the following assessment of claimants Vineland- II Adaptive Behavior Scales: "Adaptive functioning was borderline range. Strengths were seen in socialization and motor skills. Daily living appears to be

weakest." (Ex. 5, p. 3.) Dr. Frey did not conclude claimant showed no socialization delay, but rather that in comparison to her adaptive and daily living skills delays, claimant's strength was in socialization. Dr. Frey concluded claimant had neither ID nor ASD. However, Service Agency implicitly agrees this determination is not conclusive as it has since determined claimant is eligible under the category of ID.

C. Claimant's delays in all areas of development, but relative strength in social skills, was apparent in the other evaluations presented at hearing. The January 14, 2009 Multi-Disciplinary Psycho-Educational Report, completed when claimant was three-years-old, included a Vineland Adaptive Behavior Scales assessment on which claimant scored adequate in socialization, without deficits: "[claimant] smiles a lot and tries to speak, but her words are mostly unintelligible" (Ex. 6, p. 3.), and claimant had typical eye contact and communicative intent. However, claimant's participation on the Receptive Expressive Emergent Language Test-Third Edition showed claimant did not pause during conversations or wait for the other person to comment on what she had just said (Ex. 6, p. 6), one of claimant's continuing social communication delays which has worsened since she has grown into her teenage years and fallen more behind her peers.

D. Claimant's 2014 and 2017 IPP Triennial Evaluations, conducted when claimant was approximately 9 and 12 years old, respectively, continued to show claimant attempting to engage socially, but overtime her socialization delays worsening. In 2014, on the Adaptive Behavior Assessment System, Second Edition (ABAS-2) claimant's educational specialist noted claimant has friends, is a social butterfly, is empathetic to peers and adults, and gets along with others. However, mother reported claimant had severe problems with interpersonal skills and difficulty with the same age group. (Ex. 7, p. 7.) In 2017, Ms. Workman, the school psychologist,

observed “[claimant] presented as a social and friendly student who frequently participated.” (Ex. 9, p. 8.) Similarly, on the Behavior Assessment Scale for Children, 3rd Edition (BASC), the teacher noted claimant has one friend she eats lunch with, though she is very loving, kind and social. (Ex. 9, p. 22.) However, the conclusion of the report included that claimant’s social adaptive behavior is somewhat lower functioning than that typical for her age (Ex. 9, p. 21), and comments on the ABAS-3 section of the evaluation include the following:

A more in-depth look at [claimant’s] specific skill sets within the Social domain may be obtained by examining the adaptive skill areas. The leisure skills needed for engaging in play and planning recreational activities are in the Below Average for [claimant]. Her ability to interact socially, initiate and maintain friendships, express and recognize emotions, and assist others when needed is in the Below Average range.

(Ex 9, p. 21.)

E. In September 2019, when claimant was 13-years and nine-months old, Dr. Ismail conducted a History and Neurology Evaluation of claimant and observed claimant had a rather significant impairment in social interaction and had poor eye contact. (Ex. 14, pp. 2-3.)

F. Finally, evidence towards claimant being eligible under the category of ASD was presented in Exhibit 10, the April and May 2019 Psycho-Educational Report conducted by Dr. Davidson when claimant was 13 years old. Claimant was referred by BUSD to Dr. Davidson to determine claimant’s current

intellectual, educational, behavioral, language, emotional and social skill levels for the purpose of special education eligibility. Dr. Davidson interviewed claimant's teacher, who estimated claimant's current social skills to be at the Kindergarten level, though claimant was in seventh grade. (Ex. 10, p. 29.) Claimant's 2018 A.B.A.S.-3 results related to social skills demonstrated claimant exhibited difficulty keeping a stable group of friends, offering assistance to others, refraining from saying embarrassing comments, and congratulating others. (Ex. 10, p. 75.)

G. Dr. Davidson conducted the Autism Diagnostic Observation Scale-Second Edition (A.D.O.S.-2) and found claimant meets the educational classification of autism (Ex. 10, p. 77) noting the following observations:

. . . observed Sarah to exhibit mostly utterances of at least three words without complex language; slow and halting speech with intelligibility, odd and inappropriate pitch and stress and abnormally low volume; not spontaneously inquiring about examiner's thoughts, feelings or experiences, dependent on specific probes to provide accounts of events; little reciprocal conversation; rare or no use of descriptive gestures; poorly modulated eye contact; little or no expressed pleasure during interactions; showed some insight into one typical social relationship, though not necessarily about her own role in it; inappropriate overtures that lack context and/or social quality; making occasional attempts to get, maintain, or direct examiner's attention; definite interest in sensory elements of objects; definite,

stereotyped or unusual patterns of interest that may intrude or interfere with social communication and difficulty sitting.

(Ex. 10, p. 77.) In addition to eligibility for special education services under the category of autism, Dr. Davidson determined claimant displays the characteristics of someone with level 1 (requiring support) ASD as defined in the Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition (D.S.M.-5) with impairments in intellectual verbal intelligence and pragmatic language.

Claimant's Obstruction of the Lanterman Act Assessment Process

9. As identified in Factual Finding 2, and as required by the Lanterman Act, Service Agency provided claimant a psychological evaluation referral in response to claimant's request for an eligibility finding under the category of ASD. However, claimant refused to appear for the evaluation, depriving Service Agency of the opportunity to conduct a current and in-person assessment of claimant, and obstructing its ability to fulfill its assessment obligations under the Lanterman Act. Mother testified at hearing that, since claimant provided Service Agency with Dr. Davidson's evaluation and conclusion that claimant has ASD as defined in the D.S.M.-5, claimant should not have to undergo additional assessments.

10. It is notable that on cross-examination, Ms. Baca asked Dr. Langenbacher if she had ever met claimant, to which Dr. Langenbacher replied "no." In closing argument, claimant attempted to use Dr. Langenbacher's lack of personal knowledge of claimant as persuasive evidence to devalue Dr. Langenbacher's assessment of claimant in comparison to Dr. Davidson's assessment, which was based on at least five meetings with claimant in spring of 2019. However, based on claimant's refusal to participate in the assessment process, Service Agency had no other option but to rely

on its own 2008 psychological evaluation and the assessments of others when drawing its conclusion that claimant was not eligible under the category of ASD.

LEGAL CONCLUSIONS

Fair Hearing Requirements

1. The Lanterman Act governs this case. An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

2. Though the fair hearing need not be conducted according to the technical rules of evidence or witnesses, any relevant evidence must be admitted, and both parties must be allowed to submit documents into evidence at the beginning of the hearing. (§ 4712, subd. (i).)

3. 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 claimant is eligible for Lanterman Act services. (Evid. Code, § 115.)

4. As an applicant for regional center services, claimant and her authorized representative, dissatisfied with Service Agency’s determination that claimant is not eligible for services under the category of ASD, must be afforded an opportunity for a fair hearing on the issue in dispute. (Welf. & Inst. Code, § 4710.5.)

Developmental Disability

5. A developmental disability is a disability that originates before an individual turns 18 years old. This disability must be expected to continue indefinitely and must constitute a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, autism, an intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for an individual with an intellectual disability. Developmental disabilities do not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a), Cal. Code Regs., tit. 17, § 54000.)

6. A substantial disability is the existence of significant functional limitations in three or more of the following areas of major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

Service Agency's Obligation to Conduct an Assessment

7. The statutory requirements of the Lanterman Act for intake and assessment fall under Division 4.5 of the Welfare and Institutions Code, Services for the Developmentally Disabled, Chapter 5, Regional Centers for Persons with Developmental Disabilities, Article 2 "Regional Center Responsibilities" (Article 2).

8. A. Service's Agency's intake and assessment responsibilities are described by the court in *Mason v. Office of Administrative Hearings* (hereafter *Mason*) (2001) 89 CalApp.4th 1119, 1124-27, where it states "The Legislature has enacted a comprehensive statutory scheme known as the [Lanterman Act] . . . to provide facilities

and services to meet the needs of those with developmental disabilities . . .” which includes assessing their needs as provided in section 4642 through 4643.

B. Section 4642, subdivision (a)(2), provides that initial intake following a request for assistance must be performed within 15 working days of request and must include a decision to provide assessment. Once claimant applied to Service Agency she was eligible for initial intake, diagnostic and counseling services, and a determination regarding her need for assessment. (Cal. Code Regs., tit. 17, § 54010, subd. (a).) Service Agency complied with section 4642, subdivision (a), and California Code of Regulations, title 17, (Regulations), section 54010, subdivision (a), by conducting an intake and referring claimant for an assessment.

C. Section 4643, subdivision (a), provides that if assessment is needed, it must be performed within 120 days following intake, and may include “provision or procurement of necessary tests and evaluations.” Service Agency may consider evaluations and tests performed by a physician, psychiatric tests, and other tests or evaluations. (§ 4643, subd. (b).) Regulations, section 54010, subdivision (b), provides that eligibility for regional center services is “contingent upon the determination, after intake and assessment, that the person has a developmental disability that constitutes a substantial disability” If the individual is deemed ineligible she may appeal the decision (see sections 4700-4716.) (*Id.* at subd. (c).)

9. The court in *Inland Counties Regional Center Inc. v Superior Court* (2017) 10 Cal.App.5th 820, (hereafter *Inland*) found that regional centers are responsible for determining eligibility after conducting a comprehensive assessment of a person who is potentially eligible, and that Regulations, section 54010, subdivision (b), provides that the assessment of whether an individual has a developmental disability is a task

reserved for regional center. (*Inland, supra*, at p. 828, citing *Mason, supra*, 89 CalApp.4th 1119, 1124-27.)

10. Claimant affirmatively prevented Service Agency from conducting the assessment as required under section 4643, subdivision (a), and Regulations, section 54010, subdivision (b), thereby preventing Service Agency from fulfilling its responsibilities under Article 2 and from having the information required to make an eligibility determination.

Analysis

11. Though section 4643, subdivision (b), provides that Service Agency can review and rely on Dr. Davidson's evaluation, it is solely in Service Agency's authority and responsibilities under the Lanterman Act to determine what evaluations must be conducted for it to properly make an eligibility determination.

12. Claimant's refusal to participate in the statutorily required assessment precluded Service Agency from complying with its statutory mandate to conduct the assessment, a statutory prerequisite for its eligibility determination, and further obstructed Service Agency's right under section 4712, subdivision (i), to present relevant evidence, such as a current evaluation conducted by its own or designated expert and supportive testimony, at the fair hearing. Dr. Davidson's evaluation, conducted nearly a year prior to the hearing and for purposes other than Lanterman Act eligibility, was not sufficient to establish claimant's eligibility. Nor did it identify how, if at all, claimant's proposed ASD is a substantial disability for claimant.

13. The evidence is insufficient to establish claimant's eligibility under the category of ASD.

ORDER

Claimant's appeal is denied without prejudice.

DATE:

CHANTAL M. SAMPOGNA
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.