

**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. 2020030732

DECISION

Brian H. Krikorian, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 28, 2020, in Los Angeles, via video conference.

Claimant was present represented by her guardian and maternal great aunt (Aunt).¹

¹ Claimant and her great aunt are identified by titles to protect their privacy.

Dana Lawrence, Fair Hearing and Administrative Procedures Manager, represented the North Los Angeles County Regional Center (Service Agency or NLARC).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on October 28, 2020.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 2 through 20.

Testimonial: Khanh Ngan Hoang, Ph.D., Staff Psychologist; and Aunt.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a six-year-old girl. On November 6, 2019, Aunt requested regional center services to aid Claimant with behavior concerns, and academic and social delays. On January 30, 2020, Service Agency issued a Notice of Proposed Action, denying eligibility for NLARC services.

2. On March 2, 2020, Aunt filed a fair hearing request, on Claimant's behalf, to appeal Service Agency's decision. Aunt is the legal guardian and holder of Claimant's educational rights.

Claimant's Background

3. Claimant lives with Aunt and Aunt's eight-year-old son, 20-year-old daughter and 21-year-old son. Claimant has lived with Aunt since she was 10 days old. Claimant views Aunt and her current partner as mother and father.

4. Claimant's father had a history of schizophrenia, and her mother was reported to have schizophrenia and bipolar disorder. Both of Claimant's maternal grandparents were reported to have been drug users or have died of drug use. Claimant's mother was reported to have engaged in substance abuse during the first eight months of her pregnancy, and then was incarcerated during her final month. Claimant was diagnosed with jaundice at birth and then placed in Aunt's care. Claimant has had occasional contact with her biological mother and father, and her father's family, in recent months.

5. On October 28, 2019, Claimant was examined by Madelyn M. Laboriel, M.D. Dr. Laboriel noted that Claimant developed well until two years of age, and then began to seriously regress in terms of language and general knowledge, as well as in behavior. Claimant was reported to have serious ongoing difficulties with behavior at home and school, including bullying and aggressiveness.

6. Dr. Laboriel concluded that Claimant could be tentatively diagnosed with Fetal Alcohol Spectrum Disorders (FAS). Dr. Laboriel found there were some "indicators" that Claimant might be within the autistic spectrum but did not diagnose autism. She recommended further testing to rule out autism.

December 10, 2019 Social Assessment

7. On December 10, 2019, NLARC Intake Coordinator Maile Asenbauer, M.A., conducted an intake interview with Aunt. Ms. Asenbauer prepared a Social Assessment report that summarized the information provided during the interview and her recommendations. (Exh. 7.)

8. Aunt reported in her interview that Claimant may hit herself but overall her self-injurious behaviors have significantly decreased. She was also aggressive and noncompliant.

9. Claimant requires some assistance with her self-care needs. She is capable of getting dressed on her own, but her shoes may be on backwards or her shirt is on inside out. Claimant was reported as being a very picky eater, but she was able to feed herself with a fork and spoon.

10. Claimant had tantrums two or three times a week, but it sometimes occurs multiple times in a day. Her outbursts consisted of crying, screaming, pounding her feet, and noncompliance, with occasional hitting and kicking. She does not like change and any change in Claimant's schedule made it more difficult as she exhibits more maladaptive behaviors. She also had difficulty with transitions and did not "go with the flow."

11. Claimant's eye contact was fleeting. She will look at someone briefly and then "looks all over the place." She does not have safety awareness and runs off. She does not look for cars when crossing the street or in parking lots and has to have her hand held. Aunt described her as careless.

12. Claimant had good communication skills and spoke in sentences. Claimant remembered things she was interested in, such as lyrics of songs, but did not retain information such as her letters, numbers, or colors. At school, a couple of Claimant's outbursts have been bad enough where they "evacuated" the other children from the classroom. Claimant was disruptive in class and roamed around the classroom. She did not follow directions and needed constant redirection.

13. Based on the intake interview, Ms. Asenbauer recommended that Claimant complete a psychological evaluation (discussed below), and that Service Agency review medical and school records and determine eligibility upon completion.

Psychological Evaluation

14. Kathy Khoie, Psy.D., a licensed psychologist, performed a psychological evaluation of Claimant on January 2, 2020.² Claimant was referred to Dr. Khoie for evaluation to determine her current levels of cognitive and adaptive functioning, and to assess for intellectual disability and autism. Aunt accompanied Claimant to the evaluation.

15. Dr. Khoie prepared a written report of her findings and conclusions. Dr. Khoie interviewed Aunt and Claimant, made behavioral observations, reviewed medical records, and administered the Autism Diagnostic Interview-Revised (ADI-R), the Wechsler Primary and Preschool Scale of Intelligence, Fourth Edition (WPPSI-IV), the Autism Diagnostic Observation Schedules—2nd Edition Module 3 (ADOS-II), Child

² Dr. Khoie's report is dated January 2, 2019. However, it was stipulated at hearing that the report was likely misdated due to the change in the new year.

Symptom Inventory – 4: Parent Checklist, and the Adaptive Behavior Assessment System, Third Edition (ABAS-3).

16. Dr. Khoie observed that Claimant's appearance was within normal limits. When greeted by Dr. Khoie, Claimant smiled and bashfully responded. She was able to provide functional answers to the examiner's simple questions about her age, her grade and her friends. She sat outside with her cousin before the interview. When she entered the room, she was calm and cooperative. When the tests were administered, Claimant's speech was fluent and clear. She was able to speak functionally. She smiled and made direct eye contact. She was friendly and compliant. Dr. Khoie observed no evidence of Autism Spectrum Disorder (ASD).

17. Dr. Khoie administered the WPPSI-IV to assess Claimant's cognitive functioning skills. Claimant responded to two subtests, receiving scores in the average range on information and object assembly.

18. Communication was assessed by Dr. Khoie with the ABAS-3. Based upon Aunt's responses to the questionnaire, Claimant's communication score was in the average range.

19. Dr. Khoie assessed Claimant for adaptive functioning using the ABAS-3.

(A) The General Adaptive Composite (GAC) summarizes performance across all adaptive skill areas. Claimant's current overall level of adaptive behavior was in the Low range, as high as or higher than three percent of children of the same age.

(B) The Conceptual domain standard score summarizes performance across the Communication, Functional Pre- Academics, and Self-Direction skill areas. Claimant's

Conceptual domain standard score of 78 (95 percent confidence interval of 72-84) was in the Low range, as high as or higher than seven percent of children of the same age.

(C) The Social domain standard score summarizes performance across the Leisure and Social skill areas. Claimant's Social domain standard score of 61 (95 percent confidence interval of 54-68) was in the Extremely Low range, as high as or higher than 0.5 percent of children of the same age.

(D) The Practical domain standard score summarizes performance across the Community Use, Home Living, Health and Safety, and Self-Care skill areas. Claimant's Practical domain standard score of 77 (95 percent confidence interval of 71-83) was in the Low range, as high as or higher than six percent of children of the same age.

(E) Claimant's overall adaptive behavior can be characterized as lower functioning than that of most other children her age. Her conceptual adaptive behavior can be characterized as lower functioning than that of most other children her age and her social adaptive behavior and practical adaptive behavior can be characterized as lower functioning than that of almost all children her age.

20. Dr. Khoie administered the ADI-R and ADOS-II to determine if Claimant had autism or ASD. The ADI-R is a standardized, semi-structured clinical interview for caregivers of children and adults to help diagnose whether an individual has autism. The interview focuses on behaviors in three content areas: quality of social interaction, communication and language, and repetitive, restricted, and stereotyped interests and behavior. The ADOS-II is a standardized assessment of one's communication, reciprocal social interaction, imagination, and creativity that consists of socially referenced activities that allow the assessor to observe behaviors that have been identified as necessary to the diagnosis of ASD.

21. Based upon her evaluation, Dr. Khoie concluded that Claimant's performance on the ADI-R and ADOS-II fell below the autism cut-off range, indicating that Claimant did not meet the diagnostic criteria for an autism spectrum disorder. In her written report, Dr. Khoie concluded that Claimant's cognitive skills are estimated in the average range. Her adaptive skills were rated by her Aunt in the low range and Claimant's "reported sensory traits (not observed), and social-emotional as well as behavioral issues (not observed)" were "better explained by her diagnosis of FAS."

22. Following review of Dr. Khoie's report and the other documentation and records, on January 29, 2020, the Interdisciplinary Eligibility Determination Committee (Committee) concluded that Claimant was ineligible for services.

Service Agency's Evidence

23. Khanh Ngan Hoang is a Staff Psychologist for NLARC and serves on NLARC's Committee. Her duties include reviewing cases for eligibility as part of the Committee. Dr. Hoang testified regarding Service Agency's decision that Claimant was not eligible for regional center services. Her testimony was consistent with and supplemented the explanations given in the evidence presented by Service Agency.

24. The DSM-5³ is a manual that lists the diagnostic criteria for various mental illnesses and developmental disabilities. Dr. Hoang testified that Service

³ DSM-5 stands for the "Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition," published by the American Psychiatric Association. Service Agency presented excerpts from the DSM-5 pertaining to autism and intellectual disability. (Exhs. 12-15.)

Agency uses the DSM-5 diagnostic criteria in determining whether a person has a qualifying diagnosis of, for example, intellectual disability or autism.

25. Under the DSM-5, the following three criteria (A, B, and C) must be met for a diagnosis of intellectual disability:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

(Exh. 13.)

26. The DSM-5 diagnostic criteria for ASD require, among other things, (1) persistent deficits in social communication and social interaction across multiple contexts, as manifested by, for example, deficiencies in social-emotional reciprocity, deficits in nonverbal communicative behaviors used for social interaction, and deficits

in developing, maintaining, and understanding relationships; (2) restricted, repetitive patterns of behavior, interests, or activities, as manifested by, for example, stereotyped or repetitive motor movements, use of objects, or speech; insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; highly restricted, fixated interests that are abnormal in intensity or focus; and hyper activity to sensory input or unusual interest in sensory aspects of the environment; and (3) these disturbances are not better explained by intellectual disability or global developmental delay. (Exh. 12.)

27. Dr. Hoang testified Claimant did not meet the DSM-5 diagnostic criteria for intellectual disability, given that her cognitive abilities fell within the average range. Dr. Hoang explained that the level of cognitive ability needed to diagnose intellectual disability is extremely low. She opined that an intellectual disability results in cognitive problems that require constant teaching and prompting. In this case, Claimant was having some cognitive problems which were more consistent with her diagnosis of FAS, not an intellectual disability. Similarly, Dr. Khoie did not see any concerns regarding Claimant's cognitive skills.

28. Dr. Hoang testified the Committee concluded that Claimant did not have a "fifth category" condition, as her condition is not similar to, nor requires the same treatment as, intellectual disability. Further, Claimant's adaptive functioning level did not establish that she had a "substantial disability."

29. Dr. Hoang testified Claimant did not meet the DSM-5 diagnostic criteria for autism. In her evaluation, Dr. Khoie did not observe Claimant having difficulties typically associated with autistic persons, such as difficulty sustaining eye contact or problems with engaging in reciprocal conversation. Dr. Khoie found Claimant fell

below the autism cut-off range, indicating that she did not meet the criteria for an autism spectrum disorder. (Exh. 9, pp. 4-7.)

30. In Claimant's individualized education program (IEP), Dr. Hoang noted that the goals were primarily academic, with one additional goal for following directions and another for "coping." (Exh. 4, pp. 8-12.) She opined that if Claimant was on the autism spectrum, you would see more goals related to behavior and social and emotional cues. With respect to an intellectual disability, you would see more "elementary goals" like matching colors, letters and symbols. None of these types of goals were present in Claimant's IEP. Based upon the school district's multi-disciplinary assessment, Claimant's special education eligibility was classified under "other health impairment."

31. The Committee also considered an IEP Amendment dated February 28, 2020. (Exh. 11.) This amendment followed the IEP team's review of Claimant's functional behavior assessment. While the IEP was amended to include additional behavior intervention supervision and increased counseling, none of Claimant's academic or other services were altered. The amendment also referenced another psychological assessment for ASD in the future. The amendment did not impact the eligibility conclusion of the Committee.

32. Dr. Hoang testified that the Committee also considered a Child/Adult Full Assessment conducted by Village Family Services on July 23, 2019. That assessment concluded that Claimant was suffering from Oppositional Defiant Disorder. This was more consistent with the FAS diagnosis, than a finding of ASD.

Claimant's Evidence

33. Aunt testified at the hearing. Aunt reported that Claimant often failed to follow directions and refused to engage in some activities. Since the implementation of "stay at home" orders, Claimant resists on-line instruction and does not like using video conference tools such as Zoom. Aunt testified that the school district was considering going to one-on-one instruction or moving Claimant into a special education classroom. Aunt testified that Claimant does not work well within a "reward" or "token economy" system.

34. Claimant has difficulty maintaining some hygiene, such as wiping herself after going to the bathroom. Claimant has told Aunt that she doesn't like the "feeling" when she wipes herself. Claimant has trouble sleeping and requires occasional sleep medication. Claimant gets up often during the night and wants to watch television or play video games.

35. Aunt testified that Claimant can recite her ABCs but has difficulty actually identifying the letters when they are visually placed in front of her. She has the same difficulty with numbers.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant timely and adequately requested a fair hearing, and therefore jurisdiction for this case was established. (Factual Findings 1-2.)

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him or her. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].) The standard of proof in this case is a preponderance of the evidence. (Evid. Code, § 115.) Thus, Claimant has the burden of proving her eligibility for services under the Lanterman Act by a preponderance of the evidence.

3. To be eligible for regional center services, a person must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability that originates before an individual attains 18 years of age; 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 an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. Welfare and Institutions Code section 4643, subdivision (b), provides: "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician,

psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources.”

5. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, the individual must show that he or she has a “substantial disability.” California Code of Regulations, title 17, section 54001 defines “substantial disability” as follows:

“Substantial disability” means:

(a) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(b) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age: (A) Receptive and expressive language; (B) Learning; (C) Self-care; (D) Mobility; (E) Self-direction; (F) Capacity for independent living; (G) Economic self-sufficiency.

6. California Code of Regulations, title 17, section 54002 defines the term “cognitive” as “the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.”

7. In addition to proving a “substantial disability,” a person must show that her disability fits into one of the five categories of eligibility outlined in Welfare and Institutions Code section 4512. The first four categories are specified as intellectual disability, cerebral palsy, epilepsy, and autism. The fifth and last category of eligibility is defined as “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability.” (Welf. & Inst. Code, § 4512, subd. (a).)

8. Claimant did not establish by a preponderance of the evidence that she has a “developmental disability” as defined under Welfare and Institutions Code section 4512. Claimant is not substantially disabled due to intellectual disability, autism, or a “fifth category” condition. She does not have significant functional limitations in major life activity, as appropriate to her age. Although she received special education services, her educational records show most of her weaknesses are academically related, and not directed at cognitive or adaptive impairment. Her cognitive functioning is in the average to low range, and her adaptive functioning is in the average to low range. While the evidence showed that Claimant did have behavioral issues that may manifest consistent with a diagnosis of ASD, her medical and health history established that the more probable cause is FAS. She does not meet the DSM-5 diagnostic criteria for either intellectual disability or autism, based on the psychological evaluation completed by Dr. Khoie, the testimony of Dr. Hoang, and the records presented in evidence.

9. Based on the foregoing, Claimant’s evidence was not sufficient to establish eligibility for regional center services. Her appeal shall be denied. (Factual Findings 1-35; Legal Conclusions 1-8.)

ORDER

Claimant's appeal is denied. Service Agency's determination that Claimant is not eligible for regional center services is affirmed. Enter the order language here.

DATE:

BRIAN H. KRIKORIAN

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.