

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

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2020060792

DECISION

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 2, 2020 via videoconference.

Daniel Ibarra, Fair Hearings Specialist, represented the San Gabriel/Pomona Regional Center (SGPRC or Regional Center). Claimant was represented by his mother (Mother),¹ who is also his authorized representative. Claimant was present at the hearing and testified on his own behalf. Salvador Barrientos, certified court interpreter,

¹ To protect their privacy, Claimant and Claimant's family members are not identified by name.

provided Spanish to English and English to Spanish interpretation services during the hearing.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision at the conclusion of the hearing day.

ISSUE

Is Claimant eligible for services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

BACKGROUND

1. Claimant was born on January 3, 1995. By Mother's report, he had a normal birth but was slow to reach developmental milestones such as walking and talking. There was no evidence of cerebral palsy or epilepsy.

2. As a young child, Claimant spent two years living in Mexico with his father. When he returned to the United States at the age of seven, Claimant started school as a kindergartner.

Education

3. In kindergarten, Claimant exhibited learning deficits. A May 2002 report from the Individualized Education Program (IEP) team at his school district, Pomona Unified School District (Pomona School District), states that Claimant exhibited

learning and speech disorders in the areas of articulation, reduced intelligibility, morphology, and semantics during this time and was admitted to special education classes based on these deficits. (Exh A, p. 2.) During the same period, Claimant exhibited math skills in the basic, proficient, and even advanced ranges. (*Ibid.*)

4. A. The IEP team prepared assessment reports periodically until Claimant graduated high school in 2015. The 2009 report, the earliest made available for the administrative hearing, incorporated findings from a 2006 report of “a specific learning disability in that a severe discrepancy exists between intellectual ability and achievement in math calculation, basic reading skills, reading comprehension, and written expression as a result of psychological processes [,] auditory processing and attention.” (Exh. 3, p. 2.) Behavioral observations in the 2009 report include some deficits in eye contact (2-3 out of 4) but also describe Claimant as friendly toward the examiner, alert, motivated, engaged with “good” eye contact and normal affect. (*Id.*)

B. The 2009 report reflected the results of tests administered by the IEP team: the Comprehensive Test of Nonverbal Intelligence (CTONI), the Woodcock Johnson-III Test of Cognitive Abilities, and the Children’s Memory Scale (CSM) to test functioning in the processing domain. Claimant received scores corresponding to low average to average cognitive ability and borderline to low average memory processing skills. Tests for academic functioning as established by the Woodcock-Johnson Tests of Achievement III administered to Claimant revealed well below average reading skills and average to high average math skills.

C. Testing related to adaptive skills were undertaken because Claimant’s teachers had witnessed “autism-like” behavior. Claimant’s scores for social skills and leadership were in the bottom one percent of the tested universe. Overall adaptive skills were in the bottom three percent. Mother and teacher were asked to complete

the Gilliam Asperger's Disorder Scale, which is a standardized assessment for measuring probability of Asperger's Disorder, a form of autism. Claimant's score based on Mother's answers was 62, indicating low or not probable likelihood of the condition, and 72 based on teacher's answers, indicating borderline (i.e., higher) likelihood of it. (Exh. 3, p. 13.) The authors of the report deemed these scores "not significant." (*Id.*)

5. A. In Claimant's 2012 report, the IEP team found that Claimant continued to need special education services. Regarding behavior, the report reflected that both family and teacher saw signs suggesting a tendency to Asperger's Disorder. Other teachers commented on Claimant's inability to interact with them or his peers. Claimant's physical education teacher offered the following observation: "[Claimant's] area of weakness is communication. His communication is very low and other students must start the conversation. He had a problem with his shorts being ripped and it took me having to ask him why he was not dressing instead of telling me he needed shorts while his where (sic) being fixed" (Exh. 5, p. 3 of 9.)

B. As part of the 2012 evaluation, the IEP team repeated the same cognitive tests that had been administered to Claimant in 2009. Claimant's scores in 2012 were very similar to those of 2009, reflecting low average to average cognitive ability and borderline to low average memory processing skills. Behavior assessments completed in response to teachers' reports of autism-like behaviors were all within the "clinically significant" range, particularly in the areas of social skills, leadership, adaptive skills, and shyness.

6. School records from the 2013-2014 school year, when Complainant was a sophomore, reflect that he successfully passed the California High School Exit Exams in both English Language Arts and Math. (Exh. 7, p. 047.) Based on observed behavioral

anomalies, the school psychologist and language and speech specialist recommended that Claimant be assessed for autism and referred him to SGPRC. (Exh. 7, p. 063.)

7. The 2015 IEP report indicates Claimant's primary disability for special education purposes to be autism and the secondary diagnosis to be "specific learning disability." (Exh. C, p. 2.) Areas of need listed in the report list "pragmatics," i.e., communication skills necessary for social interaction and relationship-building. The report goes on to state that Claimant is polite and seems happier in this reporting period than previous ones, but "he does not always seem to know the effects his comments [and] attitude have on others." (*Ibid.* at p. 9.)

Post-High School Developments and Application to Regional Center

8. In 2015, Claimant graduated high school. The next year, he completed a one-year community college program to become a medical assistant. He has not been able to secure employment in his field or any other and his only work experience has been in a government-sponsored job training program.

9. Mother has become increasingly concerned about Claimant and, on her initiative, he applied for regional center services. Both Mother and Claimant testified at the administrative hearing. Mother's concerns are that her son does not drive, has poor hygiene, and is unable to find gainful employment. In his testimony at the administrative hearing, Claimant described feelings of despair and confusion about his situation. He is as concerned about his condition's effects on Mother as on himself.

10. Claimant originally applied for services at SGPRC in 1999. At the time, only the assessment from 2012 was available. Dr. Deborah Langenbacher, SGPRC staff psychologist, reviewed it, including the statement that results assessing the probability of Asperger's Disorder were "not significant." That, combined with Claimant's relatively

low average to average scores in at least some cognitive areas and no evidence of cerebral palsy or epilepsy, indicated to Dr. Langenbacher that Claimant was ineligible for services and his application was denied.

11. A. Claimant reapplied for services in March 2020, this time providing more school records, including the 2002 and 2009 IEP assessments. An SGPRC report following Claimant's intake assessment states that Claimant was referred to SGPRC by Mother to rule out intellectual disability. (Exh. 8, p. 1.) It is not clear from the record whether the 2015 IEP assessment (Exh. C.) was provided to SGPRC at the time of this second application.

B. Noting that the additional school reports established that Claimant had been in special education classes since his earliest school years, Dr. Langenbacher determined that a reevaluation consisting of an IQ exam and an evaluation of adaptive skills would be necessary before deciding on Claimant's second application for regional center services. SGPRC referred Claimant to psychologist Yadira Vazquez for the evaluation.

12. A. Dr. Vazquez assessed Claimant by administering the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) and the Adaptive Behavior Assessment System, Third Edition (ABAS-3), interviewing Mother, and observing Claimant.

B. The results of the WAIS-IV reflected extremely low range of cognitive ability which indicates moderate intellectual disability. Dr. Vasquez concluded that, because the results of the assessment she administered were much lower than cognition tests scores Claimant achieved in 2009, "[c]urrent results appear to be an underestimate of his abilities due [to] lack of effort. Therefore, results should be interpreted with caution." (Exh. 12, p. 091.)

C. The ABAS-3 is designed to assess adaptive skills necessary to communicate with others and manage tasks, the social skills to establish relationships, act with responsibility toward society, and use leisure time and practical skills to independently care for oneself. Claimant's results on this test, as administered by Dr. Vazquez, were in the extremely low range across all three areas of adaptive skills. Dr. Vazquez's analysis of the adaptive skills score is as follows: "Current results are believed to be an underestimate of his cognitive abilities. There is no evidence of previous diagnosis of Intellectual Disability. In fact, previous cognitive scores have been Average or Low Average."

D. Regarding her clinical observations, Dr. Vazquez noted that Claimant "looked frequently for his mother's approval, but he answered most of the questions . . . [he] described himself as very shy, reserved, and distracted. However, he did not appear to be distracted or shy." (Exh. 12, p. 090.)

E. In her overall evaluation, Dr. Vazquez concluded that Claimant's scores from the tests she administered were not valid because Claimant did not appear to be putting in a sincere effort and that scores from his school years were too high to support a finding of intellectual disability.

13. Dr. Lagenbacher testified at the hearing. In addition to accepting Dr. Vazquez's conclusions, she noted that Claimant's completion of a community college program alone confirms that he is not intellectually disabled. Based on her training and experience, she opined that education at this level is out of the reach of intellectually disabled individuals.

Discussion

14. Staff and consultants at SGPRC focused their assessment of Claimant's eligibility based on intellectual disability or a related condition. Cerebral palsy and epilepsy were not considered because nothing in Claimant's medical history or condition indicated he had those conditions. School reports flagged the condition of autism as a possible explanation for Claimant's deficits, particularly with respect to his social difficulties, however, SPGRC's assessments did not examine this possibility closely.

15. A. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5)*, the most widely used and relied upon text regarding the elements of mental disorders, identifies criteria for the diagnosis of Autism Spectrum Disorder, a broad array of related conditions including what is commonly referred to as autism. The diagnostic criteria include persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. "Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder." (*DSM-5*, pp. 50-51.) The fact that a school may be providing services to a student under an autism disability evaluation is not sufficient to establish eligibility for regional center services, as regional centers are governed by California Code of Regulations, title 17. Title 17

eligibility requirements for services are different than those of Title 5, which set out the eligibility criteria for special education.

B. Just as cerebral palsy and epilepsy may be ruled out based on medical history, the lack of reporting of restricted, repetitive behaviors of any kind, can be a basis to rule out a diagnosis consistent with autism, particularly because school standards for the condition are different from those used to determine eligibility under the Lanterman Act.

16. Claimant's academic strengths in discrete areas is itself evidence that Claimant does not suffer from intellectual disability or a condition similar to intellectual disability, the most likely bases for eligibility. In Dr. Lagenbacher's professional experience and knowledge, such conditions are marked by low performance in all areas and preclude successful completion of higher education programs.

LEGAL CONCLUSIONS

1. The Lantermant Act (Welf. & Inst. Code, § 4500 et seq.)² provides services and supports to individuals with developmental disabilities. Section 4512, subdivision (a) defines a developmental disability as: ". . . a disability which originates before an individual attains age 18; continues or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." The sole qualifying disabilities are: "intellectual disability, cerebral palsy, epilepsy, and autism. . . [and] disabling

² Statutory citations are to the Welfare and Institutions Code unless otherwise referenced.

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.” “‘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: [¶] (A) Self-care. [¶] (B) Receptive and expressive language. [¶] (C) Learning. [¶] (D) Mobility. [¶] (E) Self-direction. [¶] (F) Capacity for independent living. [¶] (G) Economic self-sufficiency.” (§ 4512, subd. (j)(1).)

3. California Code of Regulations, title 17 (Regulation), section 54001 defines “substantial disability”:

(a) ‘Substantial disability’ means:

(1) 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

(2) 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.

4. Regulation section 54010 provides:

(a) 'Developmental Disability' means a disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social

deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psychosocial deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

5. In determining eligibility, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and regional center professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.)

6. Individuals in disagreement with regional center determinations, such as in the instant case, appeal the determination through a fair hearing process. (Welf. & Inst. Code §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964). Because

Claimant seeks to establish his eligibility for services, he bears the burden to demonstrate eligibility, and that the regional center's decision to deny eligibility is incorrect. (See Evid. Code §§ 115.)

7. Claimant and his mother present as very sympathetic and credible. Clearly Claimant has numerous challenges as well as talents and the effort to manage life under his circumstances have taken their toll on him and his family; however, Claimant did not establish that the regional center's decision denying him eligibility is incorrect. In light of the available historical information, SGPRC acted reasonably in limiting its own assessment to whether Claimant had Intellectual Disability. Dr. Vazquez's skeptical view of Claimant seems unwarranted. Certainly, at the administrative hearing, he appeared sincere, candid, and entirely credible. Her results, to the extent they rely on historical school records, are persuasive, however. Claimant has experienced limitations at school, but these are consistent with learning disabilities, not intellectual disability. Indeed, Claimant is clearly very capable and bright. Regarding his social limitations, they are not enough to establish an autism-related condition. He will not benefit from treatment for a condition he does not have. Nothing else in the record supports a conclusion that Claimant meets the eligibility criteria of the Lanterman Act. Under these circumstances, SGPRC's decision finding him not qualified for services must be affirmed, consistent with the order below.

ORDER

1. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.

2. Claimant's appeal from SGPRC's determination that he is not eligible for regional center services and supports is denied.

DATE:

DEENA R. GHALY

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.