

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2022060482

DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings (OAH), State of California, heard this matter on August 9, 2022, by videoconference.

Claimant's mother (Mother) appeared by videoconference and represented Claimant, who was not present. (Titles are used to protect the family's privacy.)

Fair Hearing Coordinator Jacob Romero appeared by videoconference and represented Eastern Los Angeles Regional Center (Service Agency).

Testimony and documentary evidence was received. The record closed and the matter was submitted for decision on August 9, 2022.

ISSUES

1. Whether Claimant has a developmental disability as defined by the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.). (Statutory references are to the Welfare and Institutions Code unless otherwise designated.)
2. Whether Claimant is eligible for regional center services.

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1 through 11.

Testimony: Affidavit Testimony, Randi E. Bienstock, Psy.D.; Mother.

SUMMARY

Claimant seeks a finding of eligibility for regional center services under the category of Autism Spectrum Disorder (ASD). Claimant is seven years old and has multiple challenges in home and school, including difficulty staying put, eloping, refusing to participate in classroom activities, and screaming without provocation. Claimant has low reading skills and below average writing skills, and also has educational strengths in math and social strengths in evaluating nonverbal cues and understanding others' emotions. He has appropriate social and communicative language.

Claimant's school district is addressing Claimant's educational needs through special education services based on its determination Claimant has Other Health

Impairment (OHI) consistent with Attention-Deficit/Hyperactivity Disorder (ADHD). Other than assessments by the Service Agency and school district, Mother has not yet had Claimant assessed for mental health or other related services though she plans to do so.

Based on the evidence presented, Claimant failed to establish he has ASD as defined by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5) and failed to establish he is otherwise eligible for services under the Lanterman Act. Though Claimant did not request a finding of eligibility under other statutory categories of developmental disability, such as Intellectual Disability (ID), this decision addresses all possible areas of eligibility to address Dr. Bienstock's discussion of ID and to provide a more comprehensive presentation and analysis of the categories of developmental disabilities eligible for services under the Lanterman Act.

Jurisdiction

1. Claimant is a seven-year-old boy who resides with his mother, father, nine-year-old brother, five-year-old brother, and his 20-year-old-sister when she is home from college. Claimant's father has schizophrenia though is not currently presenting with symptoms.

2. On October 25, 2021, Mother requested Service Agency evaluate Claimant for eligibility for regional center services. Between December 2021 and March 2022, Service Agency's Intake and Assessment Unit conducted a psychological evaluation of Claimant and reviewed relevant educational and behavioral assessments.

3. On March 10, 2022, Service Agency issued a Notice of Proposed Action (NOPA) informing Claimant it had determined he was not eligible for services under the Lanterman Act. Service Agency suggested Claimant consider a referral for a mental

health assessment through the Department of Mental Health, participation in physical sports, and receipt of special education services addressing reading and writing delays.

4. On June 2, 2022, Claimant submitted a Request for Fair Hearing.

5. Jurisdictional requirements have been met.

Claimant's Evidence in Support of His Request for a Finding of Eligibility

6. Though introduced in the Service Agency's exhibits, Claimant presented evidence in support of his request in the form of an email exchange with Service Agency, a letter from Farah Ferrer, M.D., and Mother's testimony.

7. On October 25, 2021, Mother emailed Service Agency's Intake and Assessment Unit and informed Service Agency about Claimant's struggles with behaviors and academics. Mother explained Claimant struggled with his behavior in preschool and transitional kindergarten (TK) to such an extent the TK program reduced Claimant's school hours to two hours per day and disallowed him from attending the after-school program. Claimant attended kindergarten remotely and first grade in-person. Mother explained Claimant continues to have good and bad days in both the home and school settings, and on bad days he runs away when asked to do something, he cannot sit for long periods of time, and he makes sounds that are high pitched and irritating. Finally, Mother stated Claimant cannot read and can barely write and he needs to sit still and focus to have a successful career as a student. At the time of the email, Claimant's school was developing an Individualized Education Program (IEP) for Claimant.

8. Mother further informed Service Agency that Claimant's doctor suggested Claimant be evaluated for ADHD. At a subsequent appointment with a psychologist, the psychologist informed Mother "she is certain [Claimant] has a mix of ADHD and mild Autism" (Exh. 10, p. A107), and that the high-pitched sounds and screaming are a characteristic of Autism.

9. In response, on October 26, 2021, Service Agency requested Mother obtain a letter from the psychologist. The following day Mother responded the school psychologist was not comfortable writing a letter since Claimant has not been diagnosed yet, and the psychologist who stated Claimant has a mix of ADHD and mild Autism only spent an hour with Claimant and did not formally diagnose Claimant with Autism.

10. At hearing, Claimant also presented a March 23, 2022, letter from Dr. Ferrer, Claimant's physician (Exh. 2, p. A3). Dr. Ferrer wrote:

As requested per patient, this letter is to certify that [Claimant] has been seen in my office as of 03/19/2022 and was diagnosed with Attention-Deficit Hyperactivity Disorder, Austic [*sic*], Posttraumatic Stress Disorder, Major Depressive Disorder, Intermittent Explosive Disorder. My patient will need an IEP and Therapeutic services as part of his treatment to better serve him.

11. At hearing, Mother affirmed Claimant's behavioral and academic challenges which she had described in her October 2021 email. Mother added Claimant met all milestones and functioned normally and typically until he entered school, at which time she experienced problems managing his behaviors. Mother

explained she is seeking services to help Claimant focus on and succeed in school and to help her learn how to better meet Claimant's needs at home, but she has had difficulty obtaining any services.

12. Mother has not been able to obtain a private assessment of Claimant, either a more comprehensive private ASD assessment or a behavioral assessment, because of costs. She is frustrated with what she understands are the costs of these assessments, upwards of \$3,000, and was informed by Claimant's treatment providers that if Claimant's health insurance was through Medi-Cal these assessments would be free or at a considerably lower cost. She feels that her employment, which provides her health benefits, is working to her disadvantage because were she not employed and instead received Medi-Cal benefits she would be able to better provide for Claimant's academic and behavioral needs. Mother is further reluctant to pursue a costly private assessment because medical providers have stated Claimant might not be able to sit through the administration of the tests. Despite Service Agency's encouragement to do so, Mother has not yet followed up on a mental health assessment for Claimant with the Department of Mental Health.

Claimant's Assessments and Records

13. Service Agency considered the following assessments and records to determine Claimant's eligibility for regional center services: Psychosocial Assessment (November 23, 2021) conducted by Service Agency's Assessment Coordinator Karla Garcia; Remote Psychological Evaluation (January 10, 2022) conducted by Larry E. Gaines, Ph.D., on behalf of Service Agency; Report of Academic Assessment (December 14, 2021) conducted by Elizabeth Deaux, Specialized Academic Instruction Teacher with the Alhambra Unified School District; Psychoeducational Evaluation (January 13, 2022) conducted by Rachel Fall, M.S., school psychologist with the Alhambra

Department of Educational Services; Psychologist Record Review (March 4, 2022) completed by Heike Ballmaier, clinical psychologist with Service Agency; IEP (December 14, 2021); and Affidavit of Testimony of Randi E. Bienstock, Psy.D., clinical psychologist with Service Agency. These assessments and records consistently identified Claimant's educational and behavioral challenges and his diagnostic results described below.

CEREBRAL PALSY AND EPILEPSY

14. No evidence was presented that Claimant had been diagnosed with or has cerebral palsy (CP) or epilepsy.

EDUCATIONAL CHALLENGES

15. During December 2021, Ms. Deaux administered Claimant the Kaufman Test of Educational Achievement – Third Edition (KTEA-III). Claimant has good language and excellent learning and math skills. Claimant performed low on Reading Composite (letter and word recognition and reading comprehension) and Written Language Composite; below average on the Sound-Symbol Composite; and average on the Math Composite.

16. Generally, Claimant was nice to all students, accepted responsibilities in the classroom, and was capable and smart. However, at the same time, during class Claimant was resistant, uncooperative, easily distracted and impulsive, and touched everything around him. During his IEP assessment Claimant demonstrated limited strength, vitality, or alertness with response to educational environment due to heightened ADHD like behaviors adversely affecting his educational performance. Based on the IEP team's determination Claimant is eligible for special education services under the category of OHI, consistent with ADHD, Claimant's IEP offers

Claimant 370 minutes daily of Specialized Academic Instruction and 240 minutes monthly of Behavioral Services.

COMMUNICATION, SOCIAL RELATIONSHIPS, AND BEHAVIORS

17. During his remote psychological evaluation with Dr. Gaines, Claimant maintained conversation and spoke in sentences. He transitioned easily to a new activity but could not stay focused on a task. Behaviorally, Claimant rolled on the floor, blurted out various sounds and noises, bounced on the bed, and acted impulsively. When asked why he was making screeching noises (which could be symptomatic of ASD), Claimant stated he did it to annoy Dr. Gaines, demonstrating the sounds were volitional and not indicative of ASD. In review of Claimant's educational assessments, Dr. Gaines found Claimant had similarly been making screeching noises, but Claimant had set a New Year's resolution to stop making these sounds and he was successful in decreasing the screeching noises. Dr. Gaines concluded the screeching noises were not symptomatic of ASD.

INTELLECTUAL FUNCTIONING, SELF-CARE, SENSORY ISSUES, AND REPETITIVE AND RESTRICTIVE BEHAVIORS

18. Claimant was administered the Verbal Comprehension Cluster of the Wechsler Intelligence Scale for Children – V. Claimant functioned within the average range of intellectual ability and did not demonstrate any discrepancy amongst subtest scores. Dr. Gaines suspected Claimant's performance may actually be an underestimate of his capabilities, as he tended to give up on some of the later tasks.

19. Claimant's results on the Vineland-3 did not show deficiencies in adaptive skills, but rather borderline range. Claimant can feed, dress, and toilet himself and he helps his family with domestic chores. Claimant's scores on the Vineland-3

social functioning were borderline. Claimant presented as happy and content and sensitive to others' emotions, though he does not understand how his behaviors affect others. Claimant demonstrated excellent social intent, engages with others, and has good imaginative and reciprocal play.

20. Dr Gaines also considered Claimant's scores on the Gilliam Autism Rating Scale – GARS-3, as provided by the assessments of his teacher and mother, who both rated claimant with behaviors that would indicate a high likelihood of ASD. However, Dr. Gaines concluded that these ratings were based primarily on the high-pitched noises and Claimant's constant motion which were, in consideration of all the information reviewed, consistent with ADHD and not ASD.

21. During the psychological evaluation Dr. Gaines did not observe Claimant to demonstrate idiosyncratic, repetitive or restrictive, or sensory behaviors that would suggest ASD.

DIAGNOSTIC ASSESSMENTS AND DIAGNOSIS

22. In his Psychological Addendum (Exh. 4, p. A15), Dr. Gaines summarized the results of his assessment of Claimant, review of documents, and Claimant's test scores:

Testing found that [Claimant] presented with average to high average cognitive abilities, and that his language skills were within normal limits. [Claimant] has a history of disciplinary problems with questionnaires elevated for an Attention Deficit/Hyperactivity Disorder. Questionnaires were also elevated for autism, but [Claimant] was described as having good pragmatic language and nonverbal

communication abilities. He was reported to understand others' emotions and to have good social communication abilities although he may not always demonstrate them. [Claimant] was not described as having sensory problems or difficulties with changes in his routines. Reports of his early developmental were not consistent with autism.

23. The Psychological Evaluation Testing Data Sheet showed the following results from tests administered by Dr. Gaines (Exh. 4, p. A14):

Wechsler Intelligence Scale for Children - V

Verbal Comprehension = 98

Similarities = 10

Vocabulary = 9

Beery VMI 5-11 SS = 85

Autism Diagnostic Interview - Revised

Reciprocal Social Interaction Score = 4

(Cut-Off = 10)

Communication Score = 1

(Cut-Off = 8)

Stereotyped Patterns of Behaviors Score = 2

(Cut-Off=3)

Abnormality of Development Score = 0 (Cut-Off= 1)

Vineland - 3

Communication SS = 75

Daily Living Skills SS = 75

Socialization SS = 79

Adaptive Behavior Composite SS = 74.

24. Dr. Gaines concluded the clinical observations, formal testing, and review of Mother's letter did not result in a DSM-5 diagnosis of ASD or ID. Dr. Gaines recommended Claimant receive a mental health consultation for suspected ADHD and an evaluation for a possible mood or behavior disorder.

SERVICE AGENCY DETERMINATION

25. Based on their records reviews, Drs. Ballmaier and Bienstock found the records supported Dr. Gaines' conclusion Claimant does not have a diagnosis or substantially disabling condition closely related to ASD, ID, or fifth category that would warrant eligibility for services. Based on the information presented, Service Agency determined Claimant is not eligible for services under the Lanterman Act.

DSM-5 Definitions of Autism Spectrum Disorder and Intellectual Disability

26. Subdivision (a) of section 4512 of the Code provides that to be eligible for services under the Lanterman Act an individual must have at least one of five listed developmental disabilities: CP, epilepsy, ID, ASD, or fifth category of eligibility whereby

the individual has “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.”

27. While the first three eligible diagnoses (CP, epilepsy, and ID) have a more consistent definition across medical, educational, and regional center assessments, ASD can be defined differently in these environments. Pediatricians may observe characteristics of autism and diagnose the child with autism while referring the child for a more complete assessment. School districts most often define autism as follows:

(c)(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects 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.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

(34 C.F.R. § 300.8, subd. (c); Cal. Code of Regulations, tit. 5, § 3030, subd. (b)(1).)

28. Pediatricians and school districts may diagnose a child with autism or behaviors resembling autism for the purpose of referral to additional services or

assessments, or as a finding of eligibility for special education services. However, the customary basis for determining eligibility under the Lanterman Act's categories of ASD or ID is a diagnosis of ASD or ID using the definitions in the DSM-5.

AUTISM SPECTRUM DISORDER

29. The DSM-5 defines ASD as having the following four essential features. First, an individual must have persistent impairment in reciprocal social communication and social interaction (Criterion A), as manifested either currently or historically by all of the following: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. Second, the individual must have restricted, repetitive patterns of behavior, interests or activities (Criterion B), as manifested by at least two of the following: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and (4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. Third, these symptoms must be present in early childhood (Criterion C). Fourth, these symptoms must limit or impair everyday functioning. (Criterion D).

INTELLECTUAL DISABILITY

30. The DSM-5 provides that the following three diagnostic criteria must be met to be diagnosed with ID.

31. An individual must have 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 (Criterion A). Individuals with ID have Full-Scale Intelligence Quotient (IQ) scores between 65 to 75, including a five-point margin for measurement error. The DSM-5 cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. The DSM-5 explains that a person with an IQ score above 70 may have such severe challenges in adaptive behavior, such as problems with social judgment or social understanding, that the individual's actual functioning is comparable to that of individuals with a lower IQ score.

32. Individuals with ID have deficits in adaptive functioning that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility, which, without ongoing support, 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 (Criterion B). This criterion is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired such that the individual requires ongoing support to perform adequately in one or more life settings at school, at work, at home, or in the community. The levels of severity of ID are defined on the basis of adaptive functioning, and not IQ scores, because the adaptive functioning determines the level of supports required.

33. Individuals with ID must experience the onset of these symptoms during the developmental period (Criterion C).

Fifth Category

34. Under the fifth category of eligibility the Lanterman Act provides for assistance to individuals with “disabling conditions found to be closely related to

mental retardation or to require treatment similar to that required for mentally retarded individuals,” but does “not include other handicapping conditions that are solely physical in nature.” (Welf. & Inst. Code § 4512, subd. (a); see *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129 (*Mason*).) The fifth category is not defined in the DSM-5.

35. On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the Guidelines for Determining 5th Category Eligibility for the California Regional Centers (Guidelines). These Guidelines list the following factors to be considered when determining eligibility under the fifth category: whether the individual functions in a manner that is similar to that of a person with mental retardation (or ID); whether the individual requires treatment similar to that required by an individual who has mental retardation; whether the individual is substantially handicapped; and whether the disability originated before the individual was 18-years-old and is it likely to continue indefinitely. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval to the ARCA Guidelines and recommended their application to those individuals whose “general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)” for fifth category eligibility. (*Id.* at p. 1477.)

36. Though the relevant statutory and case law and Guidelines refer to “mental retardation,” the term intellectual disability or ID will be used in the following legal analysis.

LEGAL CONCLUSIONS

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. The party asserting a condition which would make the individual eligible for a benefit or service has the burden of proof to establish he or she has the condition. (*Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 160-161.) In this case, Claimant bears the burden of proving by a preponderance of the evidence Claimant has a developmental disability as defined by the Lanterman Act and is eligible for regional center services. (Evid. Code, § 115.)

3. 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 CP, epilepsy, ASD, ID, 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.)

4. As defined under the Lanterman Act, developmental disability does not include the following: solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of a psychiatric disorder or treatment given for such a disorder; solely learning disabilities which manifest 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 psycho-social deprivation, psychiatric disorder, or sensory loss; and disabilities that are solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

5. Claimant does not have cerebral palsy or epilepsy. (Factual Finding 14.)

6. Claimant is not eligible for Lanterman Act services under the category of ASD. The evidence did not demonstrate that claimant has a persistent impairment in reciprocal social communication and social interaction. The evidence did not demonstrate that claimant has restricted repetitive patterns of behavior, interest, or activities. (Factual Findings 6-12, 15-24, 26-29.)

7. Claimant is not eligible for Lanterman Act services under the category of intellectual disability. Claimant did not present with deficits in intellectual functions such as reasoning, problem-solving, or abstract thinking. Claimant's cognitive skills fell within the average range of performance on the Verbal Comprehension Cluster of the Wechsler Intelligence Scale for Children – V, and Claimant's adaptive behavior skills fell within the borderline range of performance on the Vineland - 3. (Factual Findings 6-12, 15-24, 30-33.)

8. Claimant is not eligible for Lanterman Act services under the fifth category. Claimant did not establish he has a disabling condition found to be closely related to ID or to require treatment similar to that required for an individual with ID. Claimant is able to perform activities of daily life and has not failed to meet developmental and socio-culture standards for personal independence and social responsibility while at home or at school. Claimant is progressing in his academics, has strong math skills and a peer group, and has always been social and adept at age-appropriate conversation and communication skills. Claimant's educational deficits are being addressed through his IEP services. (Factual Findings 6-12, 15-35.)

9. Claimant did not establish that he has a substantial disability. Claimant's most pronounced and limiting symptoms are related to attention deficits and related attention seeking behaviors. Claimant is not yet receiving treatment for ADHD and has not undergone a mental health assessment. Claimant receives special education services for his learning disability, OHI. Claimant's ADHD behaviors and eligibility for special education services under OHI do not make him eligible for services under the Lanterman Act. Though claimant demonstrates at times significant behavioral challenges, these behaviors do not pose significant functional limitations on three or more of the major life activities identified in section 4512, subdivision (f). (Factual Finding 6-12, 15-35.)

10. Claimant did not establish by a preponderance of the evidence that he has a developmental disability as defined by the Lanterman Act. Claimant is not eligible for regional center services.

ORDER

Claimant is not eligible for regional center services under the Lanterman Act. Claimant's appeal is denied.

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.