

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022080480

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 22, 2022, by videoconference.

Claimant was represented by her mother, referred to as Mother hereafter; neither shall be named to protect their privacy. Westside Regional Center, the Service Agency (WRC or Service Agency), was represented by Candace Hein, Fair Hearings Specialist.

Oral and documentary evidence was received. The record closed and the matter submitted for decision on September 22, 2022.

ISSUE PRESENTED

The issue in this case is whether Claimant is eligible for services from the Service Agency because she suffers from Autism Spectrum Disorder. The case turns on whether or not she is substantially disabled on three of seven disability criteria, those criteria being set out in a statute and in a regulation.

EVIDENCE RELIED UPON

Service Agency exhibits 1 through 13, and Claimant's exhibits 1 through 5, and the testimony of Kaely Shilakes, Psy.D., and Mother. Because both parties identified their exhibits with numbers, Service Agency's exhibits will be designated in this decision as exhibits SA 1 through SA 13, while Claimant's exhibits will be designated as exhibits CL 1 through CL 5.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a five-year-old girl who lives in the Service Agency's catchment area with her parents and younger sister. She seeks services from WRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act or the Act), California Welfare and Institutions Code section 4500 et seq. (All further statutory citations are to the Welfare and Institutions Code unless otherwise noted.) Claimant is pursuing the services on the basis that she suffers from Autism Spectrum Disorder (ASD). She sought services in 2021, was denied, and reapplied for services in 2022.

2. On July 20, 2022, WRC issued a Notice of Proposed Action (NOPA) which stated that Claimant was not found eligible for regional center services. (Ex. SA 2, p. A11.)

3. On that same day, WRC sent a letter to Claimant that somewhat expanded on the position set out in the NOPA. In essence, the letter, hereafter "the NOPA letter," stated the Service Agency's position that Claimant was not eligible for services because not substantially disabled. The NOPA letter stated that WRC had received a re-application and documents for intake but they did not have sufficient information to start the intake process again. (Ex. SA 2, p. A12.) The NOPA letter went on to state that information had been reviewed in 2021 by the eligibility team, Claimant had a psychological evaluation and had undergone a multi-disciplinary observation and was not deemed substantially disabled in three or more areas of major life activity. (*Id.*)

4. On July 28, 2022, Mother submitted a Fair Hearing Request (FHR) on Claimant's behalf, disputing the Service Agency's findings, and seeking a determination that Claimant was eligible for services. (Ex. SA 2, p. A10.)

5. All jurisdictional requirements have been met.

Claimant's Background

6. In late March 2021, Jennifer Morales, a WRC Intake Counselor, conducted a psychosocial assessment of Claimant, who was then four years and three months old. In the course of the assessment, Ms. Morales obtained substantial information about Claimant and her first few years of life. (Ex. SA 12.)

7. Claimant was born after an uncomplicated 36-week gestation. She was healthy at birth. She maintained head control at three months, crawled at seven months, sat independently at eight months, walked at 15 months, and spoke her first word—apple—at 18 months. She combined two words together at 24 months and was toilet trained at three and one-half years. (Ex. SA 12, p. A123.)

8. During the assessment Mother reported Claimant walked on her tiptoes, but no other motor issues were presented. Claimant presented to Ms. Morales as a social and outgoing child, though Mother stated Claimant tends to parallel play with other children, and that Claimant was more comfortable with talking to adults than other children. Claimant demonstrated sensitivity to loud noises, had a lot of energy, and was distractable. She was reliant on routine and didn't like it to be disrupted. (*Ibid*, p. A 125.)

10. Claimant could dress herself, but would easily be distracted from the task. She had difficulty with large buttons, snaps, shoelaces and zippers, but could use Velcro. She could wash her face and hands without assistance, though Mother was bathing her. She could feed herself with utensils with minimal spillage, and she could drink from a cup with minimal spillage. (*Ibid*, p. A126.) Of some concern for Mother was the fact that Claimant would not sleep through the night, instead getting up two or three times, and coming into her parents' room. (*Ibid*, p. A127.)

11. Ms. Morales explored and documented other areas, such as Claimant's overall health, cognitive issues, and family structure. In her clinical impression she recommended that Claimant undergo a psychological evaluation to rule out ASD and/or Intellectual Disability. (*Ibid*, p. 127.)

The Psychological Assessment

12. Beth Levy-Wright, Ph.D., a licensed clinical psychologist, conducted an assessment of Claimant on April 6, 2021, which was augmented with a school observation on April 18, 2021. The assessment report is Exhibit SA 4.

13. Dr. Levy-Wright used test instruments, including the Wechsler Preschool and Primary Scale of Intelligence-IV (WPPSI), the Vineland Adaptive Behavior Scales 3 (Vineland), the Gilliam Autism Rating Scale-3 (GARS), and the Autism Diagnostic Observation Schedule 2 (ADOS), Module 2. She reviewed records and a teacher report, and she conducted interviews with the parents.

14. Mother reported concerns with Claimant's problems with transitions, and violent tantrums at school, and she expressed concerns with her daughter's ability to communicate. Claimant was described as jumping from topic to topic. Parents' concerns with her communications were discussed as well. (Ex. SA 4, pp. A15-A16.)

15. One behavior that ran through the personal assessment and the school observation was that reciprocal interactions with others were a challenge for Claimant. She lacked spatial awareness around other students, though her teacher stated that she showed interest in other students. Teachers noted she asked the same questions over and over.

16. The WPPSI results show that Claimant is intelligent. Her Full-Scale IQ score was 131, in the Very Superior Range. Her Fluid Reasoning Score was 127, and her Processing Speed was 121, in the superior range. (Ex. SA 4, pp. A22-A23.)

17. The Vineland was administered with Mother providing the information on the Parent/Caregiver form. Claimant's Adaptive Behavior Composite score was 92,

near the mean of 100; she placed in the 30th percentile. On the Communication domain Claimant was in the 63rd percentile, with a score of 105. Claimant's score for the Daily Living Skills domain was 90, in the 25th percentile. The results from the Socialization domain were the lowest of the three domains, at 88, in the 21st percentile. (Ex. SA 4, pp. A24-A25.)

18. The results of the GARS indicated it was "very likely" that Claimant suffered from autism. (Ex. SA 4, p. A33.) Administration of the ADOS indicated that Claimant suffers from ASD. (*Id.*, p. A36.)

19. Dr. Levy-Wright diagnosed Claimant with ASD without accompanying cognitive impairment, with significantly impaired social/pragmatic language impairment; severity of social communication difficulties level 2. Further, Claimant's diagnosis showed that the severity of restricted, repetitive behaviors was also level 2. That meant Claimant would require substantial support in each of those areas. Dr. Levy-Wright also diagnosed "Rule out ADHD [Attention Deficit Hyperactivity Disorder] and Sensory Regulation/Processing Disorder." (Ex. SA p. A40.)

The WRC Observation of Claimant

20. On July 9, 2021, a multidisciplinary observation of Claimant was conducted by WRC staff, via an online video platform. The observation and the report generated about it form the basis of the Service Agency's denial of eligibility. The report is Service Agency Exhibit 5. The report speaks to each of the seven areas of major life activity addressed by the Act and attendant regulation.

21. The WRC team consisted of Kaely Shilakes, Psy.D., Mayra Mendez, Ph.D., LMFT, and Jessica Haro, BCBA. During the observation, Claimant was in her home with Mother and Claimant's infant sister.

22. Claimant was described as “extremely engaging, animated, talkative, loud, and active throughout the session. She used gestures, facial expressions, asked questions, and responded to questions.” (Ex. SA 5, p. A48.) According to the report, she did not demonstrate significant repetitive restricted interests or behaviors. (*Id.*) The report gives examples of Claimant engaging with the assessors, and of Claimant being rather talkative and hyperactive.

23. The report noted that in the major life activity of Learning, Claimant demonstrated age-appropriate cognitive functioning, and it was noted she was reading above grade level. As to Self-Direction, which the report showed to encompass social behavior, attention, and self-regulation, Claimant was described as displaying overall positive social interactions and good rapport during the observation. Mother reported that Claimant loves people and has friends, but that conversations can be a challenge. Mother noted that peers that Claimant meets at the park just look at Claimant and then walk away, and that Claimant prefers to be around adults, and she tries to chit chat with the mothers at the park. Finally, “[Claimant] presents with distractibility and hyperactivity, as well as difficulty in regulating her high energy level, which can impede her social functioning.” (Ex. SA 4, p. A49.)

24. No issues were observed regarding Claimant’s Mobility. As to Language, Claimant was observed to have conversations with the observers, but she spoke rapidly, jumping from one topic to another in an excited and hyperactive manner. According to the report, she did not present with deficits in receptive or expressive language, and Mother told the observers Claimant understands very well what is said to her. The report noted that during the psychological evaluation by Dr. Levy-Wright Claimant demonstrated adequate/average communication skills, which was deemed to include receptive and expressive language. (Ex. SA 4, pp. A49-A50.)

25. In the area of Self-Care, it was reported that Claimant was completely toilet trained, but she had had some accidents because of fear of the bathroom. That fear was apparently of loud noises, such as the toilet flushing. The observation report referenced the earlier psychological report, which found adequate/average daily living skills. (Ex. SA, p. A50.)

26. The report noted that in the major life activities of Capacity for Independent Living, and Economic Self-Sufficiency, such were not areas of concern. Claimant was then four years old, and appropriately living with, and supported by, her parents. (Ex. SA 4, p. A50.)

27. In a summary, the report stated that the participants in the observation all believed Claimant presented as a child with at least above average cognitive functioning and hyperactivity rather than a developmental disability. Further, the observation team believed that she did not present with substantial disability in three or more areas of major life activity, as required by law. (Ex. SA 4, p. A 50.)

The Report by the UCLA KidsConnect Autism Treatment Program

28. From January 19, 2022, until April 15, 2022, Claimant participated in the KidsConnect Autism Treatment Program (KidsConnect) at UCLA. A “Multidisciplinary Discharge Summary Report” (discharge report), dated April 15, 2022, was received in evidence from both parties. (Ex. SA 7, Ex. CL 4.)

29. According to the discharge report, KidsConnect is a comprehensive interdisciplinary assessment and treatment program for young children with autism and/or behavioral problems. The children receive individualized intervention five days per week, five hours per day in a structured classroom environment. Speech and language therapy is provided four days per week, and occupational therapy (OT) is

provided three times per week. Recreational therapy (RT) is provided in small groups or individually two to three times per week. A behavioral specialist meets with the families, as does the program director. (Ex. SA 7, p. A70.) The discharge report is 48 pages long, speaking to many aspects of Claimant's participation in the program, and as to her issues.

30. KidsConnect staff administered the WPPSI to Claimant in February 2022. The results of this testing showed a full-scale IQ of 114, deemed high average, but substantially lower than the score obtained by Dr. Levy-Wright. There is no explanation for the 21-point differential. Claimant's Verbal Comprehension Index score was 129, and her Visual Spatial Index score was 109. Fluid Reasoning was 94. (Ex. SA 7, p. A72.) Claimant was administered the Woodcock Johnson III Test of Achievement (WJ-III) to assess academic achievement. Claimant demonstrated average to above average performance in cognition and academic achievement. (*Id.*, p. A74.) Her lowest score, Math Fluency, was 108, and the next lowest was 114, in Applied Problems. The other scores ranged from 128 to 167, with the bulk of the age equivalents ranging from six years, one month to eight years five months. (*Id.*, p. 73.)

31. The discharge report cites the results of a test of adaptive skills, the Adaptive Behavior Assessment System, Third Edition (ABAS), that had been administered to Claimant before she entered the KidsConnect program. The score for the Conceptual Domain was 90, the Social Domain score was 81, and the Practical Domain score was 90. The General Adaptive Composite Score was 85. (Ex. SA 7, p. A75.)

32. KidsConnect made some initial observations of Claimant's behavior. She manifested noncompliance, refusing demands or directions. She misrepresented to access negative attention from therapists and peers. When prompted to change an

expectation, she became defiant. She displayed impulsivity, interrupting peers and adults. She demonstrated rigidity by an apparent need to control others around her. She also engaged in perseverative language, repetitive language about highly preferred topics or events. She also engaged in repetitive language she associated with places or people. While parents reported tantrums at home, KidsConnect staff did not observe such, but they noted that Claimant would cry when denied access to her desired items or activities. (Ex. SA 7, p. A77.)

33. The Clinical Evaluation of Language Fundamentals—Preschool Third Edition (CELF) was administered to assess receptive and expressive language skills. All of Claimant's scores were in the average range, with one score above average, the Language Content Index Score of 115. (Ex. SA 7, p. A 86.) Later, it was reported that "Direct observation of [Claimant's] language during various settings revealed receptive and expressive language skills within normal limits." (*Id.*, at p. A89.) The report went on to state that Claimant presented with pragmatic language challenges, but that her strengths included her receptive and expressive language abilities.

34. The discharge report reviewed a number of other areas of need and the interventions utilized, which had a positive effect. Numerous goals were recommended, and various treatment modalities as well.

Testimony of Dr. Shilakes

35. Dr. Shilakes oversees the Service Agency's Intake Department. As noted above, she was involved in the July 9, 2021 observation of Claimant. Dr. Shilakes explained that after the observation, Claimant was deemed not eligible for services, and that she reapplied in 2022.

36. Dr. Shilakes explained that the decision to deny eligibility was the decision of a committee, which determined that while Claimant appears to suffer from ASD, she is only substantially disabled in the area of Self Direction. Dr. Shilakes pointed out that in one of the other areas, Receptive and Expressive language, Claimant is not disabled; and she distinguished pragmatic language from receptive and expressive language. The committee did not find substantial disability in the areas of Learning, or Mobility, and for a five-year old, the areas of Capacity for Independent Living and Economic Self-Sufficiency are not relevant. Dr. Shilakes tended to attribute some of Claimant's behaviors to hyperactivity, though that condition has not been diagnosed.

Mother's Testimony

37. Mother testified about life at home with Claimant. She pointed out that Claimant engages in perseverative behavior, as noted in the KidsConnect discharge report. Mother described how Claimant toe walks approximately 80 percent of the time, and she asserted that this is a mobility issue. The child has significant behavior issues, including boundary issues; Claimant asked an instructor for a kiss, and would tell strangers that she loved them. Claimant continues to have sleep issues that disrupt her parents' sleep. During the day she jumps and bounces, and talks in a perseverative manner, about the same person or issue. The overall picture was of a very active child, who exhibits behaviors and traits associated with ASD.

LEGAL CONCLUSIONS

Jurisdiction and the Burden of proof

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 5.

2. As the party asserting eligibility, Claimant bore the burden of proving she is eligible by a preponderance of the evidence. (See Evid. Code, §§ 115 & 500.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

Legal Conclusions Pertaining to Eligibility Generally

3. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . this 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.

4A. Regulations developed by the Department of Developmental Services (DDS), pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR).¹ At CCR section 54000 a further definition of "developmental disability" is found which mirrors section 4512, subdivision (a).

4B. Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions 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 psycho-social deprivation, psychiatric disorder, or sensory loss.

¹All references to the CCR are to title 17.

(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 intellectual disability.

5. Section 4512, subdivision (f), provides:

“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:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

6. Section 54001 of the CCR is substantially similar to section 4512, subdivision (f) of the Act. It provides as follows:

(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.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The

group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

Dispositive Legal Conclusions

7. The record establishes that Claimant suffers from ASD, an eligible developmental disability under the Lanterman Act. Not only does the thorough report of Dr. Levy-Wright support such a conclusion, but the KidsConnect discharge report relies on Dr. Levy-Wright's diagnosis, and the discharge report describes behaviors associated with autism; it corroborates the original diagnosis. While the observation report tended to point to hyperactivity as the main issue, the observations are not consistent with the behaviors observed at UCLA, nor those observed by Dr. Levy-Wright.

8. However, Claimant has not shown that she is substantially disabled in three areas of major life activity, appropriate to her age. Instead, the weight of the evidence indicates that, at this time, she can show significant limitations only in the major life activity of self-direction. For example, her receptive and expressive language

was tested and found in the average range; the discharge report found it to be a relative strength. She is not cognitively impaired, has good mobility excepting her toe walking, and she has the capacity to learn, as demonstrated by both IQ tests, and her academic achievement as documented by the WJ-III test instrument. As a result, her appeal must be denied. Should there be changes as she ages, she may reapply for eligibility.

ORDER

Claimant's appeal is denied, and she shall not receive services from the Service Agency.

DATE:

JOSEPH D. MONTOYA

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.