

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**KERN REGIONAL CENTER, Service Agency.**

**OAH No. 2022110536**

**DECISION**

Glynda B. Gomez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 5, 2023 by videoconference.

Jimmy Alamillo, Fair Hearing Officer, represented Kern Regional Center (KRC or Service Agency).

Claimant's Mother (Mother) represented Claimant who was not present.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 5, 2023.

## **ISSUE**

Is Claimant eligible for regional center services under the category of Autism?

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On October 27, 2022, KRC issued a Notice of Proposed Action (NOPA) informing Claimant that he did not qualify for its services because he did not have an eligible developmental disability. Claimant filed a timely request for hearing appealing the determination. All jurisdictional requirements have been met.

### **Claimant's Background**

2. Claimant is a five-year-old boy who lives with his mother and his sibling. Claimant also has an older half-sibling who has been diagnosed with Autism. The half-sibling does not live with Claimant at this time. Claimant's father who was not living in the home at the time, died of a narcotic overdose in March of 2021. Due to domestic violence concerns, Claimant and his sibling were briefly removed from the home in March of 2021, before his father moved from the residence. Mother reports that Claimant has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Asthma. Claimant had been taking Adderall for his ADHD, but due to a shortage impacting the availability of the medication, Mother has weaned Claimant off of the medication. He receives special education services from his local school district under the eligibility category of Autism. Prior to receiving special education eligibility, Claimant was asked to leave multiple day-care and pre-school programs because of his behavior.

## **Mother's Testimony**

3. Mother provided credible and informative testimony about Claimant's deficits and needs. According to Mother, Claimant does not make eye contact with others and has extreme reactions to noise. He also displays maladaptive and aggressive behaviors such as hitting Mother, his teachers and his sibling. He is anxious and does not tolerate group activities. He also has an extreme interest in superheroes. Mother opined Claimant has vocabulary and seems to want to talk, but he is frustrated by his inability to communicate. Claimant does not have friends, does not play with others, but sometimes can play side by side with others. Mother believes that KRC did not take enough time to assess Claimant and that he should have been assessed in multiple settings. She estimates that the entire KRC assessment was less than one hour.

## **Witness-Carmen Natalie Leon**

4. Carmen Natalie Leon (Leon) is a friend of Claimant and his mother. She is a Sunday school teacher at Valley Bible Fellowship where she conducts a one hour Sunday-school session for children with special needs while their families attend church services. Leon holds a Bachelor of Arts degree in Psychology. She has one year of experience working as a special education teacher with an emergency credential and 14 years of experience as a paraprofessional with the Kern County Office of Education where she worked with special needs students. Leon also worked for one year at KRC as a service coordinator. Leon has received training in behavior and de-escalation techniques. She has served as the Sunday-school teacher for special needs students for approximately 10 years.

5. Claimant is currently one of her students and has attended her class for one year. She opined that Claimant had a difficult time initially adjusting to her Sunday-school classroom and had behavior outbursts. He has improved over time. However, he continues to hit the teacher and other students, scratched others and attempted to elope. He does not play with others and prefers to play alone with superhero toys. She has seen Claimant display extreme sensory regulation issues when dealing with noise or touch. To help him with these issues, she has used interventions including a weighted blanket, given him a hug with a tight squeeze and used her behavior training to help him decompress.

## **KRC's Process**

### **INTAKE**

6. Mother first contacted KRC on May 20, 2021 to have him evaluated for services based upon suspected Autism. The intake coordinator, Alejandra Murguia, documented her contacts with Mother and administered the Modified Checklist for Autism in Toddlers (M-CHAT), a screening tool which utilizes parent-reported behavior and symptoms, to screen for Autism. (Autism as used in this decision also refers to Autism Spectrum Disorder as referenced in the DSM-5-TR.) After review of the M-CHAT results, KRC staff conducted an initial interview of Mother and referred Claimant to Joshua Lefler, Psy.D., (Lefler) for a psychological assessment.

### **KRC'S PSYCHOLOGICAL ASSESSMENT**

7. Lefler is a licensed psychologist and a consultant for KRC. He holds a Bachelor of Science degree from Union University, and a Master of Arts and Doctorate in Psychology from Wheaton College. Lefler has more than a decade of experience as a licensed psychologist. He has worked for Kern Psychological Services, Trinity

Ministries, the Lefler Psychological Corporation and as a contractor for both KRC and Encompass Health. Lefler conducted an assessment of Claimant for purposes of determining eligibility for KRC's services under the Lanterman Act and served as a member of the KRC interdisciplinary team.

8. Lefler evaluated Claimant on September 14, 2022. Lefler assessed Claimant using a mental status examination, the Autism Mental Status Examination, Autism Diagnostic Observation Schedule, Second Edition (ADOS-2)- Module 2, Developmental Assessment of Young Children, Second Edition (DAYC-2) and Vineland Adaptive Behavior Scales-Third Edition (Vineland). Lefler attempted to administer the Primary Test of Nonverbal Intelligence (PTONI), but Claimant was uncooperative and refused to complete the necessary tasks.

9. On the DAYC-2, a rating scale for cognitive abilities, Claimant received a standard score of 85, in the below average range. Lefler noted that the scores may be affected by Claimant's behavioral problems and underestimate his true cognitive abilities. Claimant received a standard score of 58 within the low range on the Vineland, a rating scale for measuring adaptive function.

10. Regarding the mental status examination, Lefler found:

[T]he client appeared his stated age and was adequately groomed in clean, age-appropriate clothing. He made normal eye contact with the examiner, and revealed a normal affect. The client presented with an adequate fund of general knowledge. His working memory and processing abilities were intact. He was able to communicate verbally with an articulation deficit. He was able to interact with the

examiner, but also seemed content to play alone. He was observed to be easily distracted with a short attention span.

(Ex. 4.)

11. With respect to the Autism Mental Status Examination, an informal screening tool, Claimant received a score of 3, which fell below the minimum threshold score of 5 for Autism. Lefler reported:

The client only passively responded to the examiner. The client pointed/gestured to an object. The client spoke about another time or place. The client revealed unvaried or odd intonation. The client revealed no repetitive behaviors. The client revealed no unusual or encompassing preoccupations. The client revealed no unusual sensitivities.

(Ex. 4.)

12. The ADOS-2 is a standardized, semi-structured observation assessment tool that allows the examiner to observe and gather information regarding an individual's social behavior and communication in a variety of social situations. Assessors are required to undertake special training to qualify to administer the ADOS-2. Lefler administered Module 2 of the ADOS-2 which is designed for young children and for lower level communication abilities. Lefler's administration of the ADOS-2 resulted in an overall score of 5, below the minimum threshold score of 7 for Autism Spectrum Disorder. Lefler reported the following:

Regarding communication, the client revealed no observable concerns.

Regarding reciprocal social interactions, the client revealed diminished facial expressions directed toward others. The client revealed diminished shared enjoyment in interaction. The client revealed diminished social overtures. The client revealed diminished overall quality of rapport.

Regarding restrictive and repetitive behaviors, the client revealed some stereotyped/idiosyncratic use of words or phrases.

Overall, the client revealed minimal to no evidence of autism spectrum related symptoms and fell in the "Non-Spectrum" classification, per ADOS-2 scoring criteria.

(Ex. 4.)

13. Lefler concluded that Claimant's ADHD diagnosis best accounted for his deficits in executive functioning including being easily distracted and having a short attention span. Lefler opined that Claimant does not have Autism.

14. Lefler utilized the Diagnostic and Statistical Manual of Mental Disorders-Fifth edition, Text revision (DSM-5-TR) to determine whether Claimant is afflicted with Autism Spectrum Disorder.

15. The DSM-5-TR criteria for a diagnosis of Autism Spectrum Disorder are summarized as Criteria A through E, in pertinent part, as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the

following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotyped or

repetitive stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g. extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).

4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g. apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling of objects, visual fascination with lights or movement).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies later in life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual developmental disorder (intellectual disability) or global developmental delay. Intellectual developmental disorder and autism spectrum disorder frequently co-occur, to make co-morbid diagnosis of autism spectrum disorder and intellectual developmental disorder, social communication should be below that expected for general development level.

(Ex. 13.)

16. At the administrative hearing, Lefler provided testimony detailing the training that is required for administration of the ADOS-2. Lefler was also asked to review the psychoeducational report prepared by the school psychologist (Ex. 5) which is discussed in more detail below. Lefler acknowledged that the school psychologist's ADOS-2 results were very different from the results he obtained. Lefler noted that the school psychologist had used Module 3 of the ADOS-2 which is appropriate for a higher level of language than Module 2 that he had used. The psychoeducational assessment was conducted, and the report issued, after Lefler's assessment had concluded. He had not seen the psychoeducational assessment report until the administrative hearing and had not had the benefit of reviewing the report or the documented observations contained in the report prior to completing his own assessment.

17. Lefler agreed that his results were significantly different. He attributed the differences to the divergent approaches of the psychological disciplines of the respective assessors and inter-rater differences. There was no evidence that the difference in the modules used by the two assessors was the cause of the disparities in

scoring. Lefler did not have access to the multiple observations that the school psychologist conducted and the psychoeducational assessment report had not been generated at the time of his assessment. He was given an opportunity to review the psychoeducational assessment at the administrative hearing, but his review of the psychoeducational assessment report did not change his opinion. Lefler also acknowledged that an individual may have co-morbid Autism and ADHD and the two diagnoses are not mutually exclusive. Lefler estimated that his assessment lasted approximately an hour or less.

### **KRC'S DETERMINATION**

18. The KRC Interdisciplinary Team consisting of Medical Director Fidel Huerta, Lefler, Program Manager Omelia Trigueroa and Assistant Director of Client Services Kristine Khuu (Khuu) met on October 27, 2022. Khuu testified at the administrative hearing. She has worked for KRC for 30 years. She holds a Bachelor of Arts degree in Psychology and a Master of Arts degree in Social Work. According to Khuu, the Interdisciplinary Team reviewed Claimant's assessments and unanimously determined that he was not eligible for KRC services because they determined he did not have a qualifying developmental disability. The same day, a NOPA was issued with the determination of Claimant's ineligibility.

## **Special Education**

### **PSYCHOEDUCATIONAL ASSESSMENT**

19. The School District conducted an assessment of Claimant to determine his eligibility for special education services. The results of the assessment are contained in an October 19, 2022 psychoeducational assessment report prepared by school psychologist Graciela Digilio (Digilio). Digilio's educational background and

training are not in evidence and she did not testify at the administrative hearing. All evidence of her findings is derived from her Psychoeducational Assessment (Ex. 5) and Claimant's Individualized Education Program (IEP) (Ex. 6). Digilio's report lists the following sources: Record Review, Parent Report, Teacher report, Observation, ADOS-2 Module 3, Brigance Inventory of Early Development III (IED III), Gilliam Autism Rating Scale, Third Edition (GARS-3), Kaufman Brief Intelligence Test, Second Edition (KBIT-II), and the Vineland.

20. Digilio conducted her assessment and observation over several days and included observations in the classroom, her office, the cafeteria and the playground. On the KBIT-II, a measure of verbal and non-verbal intelligence, Claimant scored within the average range receiving a composite Intelligence Quotient (IQ) score of 96 (Verbal: 95; Nonverbal: 98). On the Vineland, Claimant received a composite score of 88 within the average range. On the GARS-III, an Autism screening tool, Claimant received a standard score of 112 on the teacher rating and 96 on the parent rating within the category of "very likely" to have Autism.

21. Digilio also administered the ADOS-2, Module 3 based upon her judgment of Claimant's language ability level. Module 3 is intended for children and adolescents who fall with the range of later preschool years up to 15 years of age and who have fluent language skills estimated at a 4 year old level in functional expressive language or above. Claimant received a 19 in the Social Affect Domain. Digilio found Claimant's communication to be "minimal." She reported that "he did use words, but was unintelligible at times." She found his eyes to shift back and forth when directed to look at the assessor and that he was not able to sustain attention for more than two minutes even with multiple redirections. She also reported that he did not initiate or respond to joint attention. He looked at the assessor when his name was called, but

then looked away. He did not join with the assessor in creating a story, instead he grabbed toys and played alone. He did not direct any facial reactions to the assessor.

22. Claimant received a score of 6 on the measure of Restrictive and Repetitive Behaviors. The assessor found that he often put his hands in his mouth and would pulled his bottom lip down, pulled on his fingers and repeatedly asked for super hero toys. Overall Claimant received a score of 25 on the ADOS-2. The Autism minimum threshold for the instrument is 9 and the Autism Spectrum minimum threshold for the instrument is 7. Claimant's score indicated to her that there was a high level of Autism-related symptoms since it was substantially above the minimum thresholds.

23. Based upon her review, observations and assessment, Digilio opined that Claimant qualified for special education under the provisions of the Education Code and California Code of Regulations title 5, section 2020, as an individual meeting the Education Code definition of Autism and needing special education and related services to access his education.

### **IEP**

24. Claimant's initial IEP was developed at a meeting on October 19, 2022. Pursuant to the IEP, Claimant was made eligible for special education under the category of Autism. The school district's offer of a Free Appropriate Public Education (FAPE) was placement in special education-intensive pre-Kindergarten/Kindergarten classroom with transportation to and from school and provision of Extended School Year (ESY) services. The IEP contains academic, social/emotional, and communication goals. The IEP also addresses Claimant's needs for breaks, sensory issues and other

strategies and supports. His disability is designated as "severe" on the IEP and a paraprofessional is to accompany Claimant at all times.

## LEGAL CONCLUSIONS

1. The 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 properly and timely requested a fair hearing, and therefore jurisdiction for this case was established.

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 preponderance of the evidence. (Evid. Code, § 115.) Thus, Claimant has the burden of proving his eligibility for services under the Lanterman Act by a preponderance of the evidence.

3. In order 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 that in determining if an individual meets the definition of developmental disability contained in Welfare and Institutions Code section 4512, subdivision (a), 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. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, learning disabilities and/or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).) If a person's condition is *solely* caused by one or more of these three "handicapping conditions," the person is not entitled to eligibility.

7. In addition to proving a "substantial disability," a person must show that his disability fits into one of the five categories of eligibility set forth 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 specified 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. The parties stipulated that the only category of potential eligibility at issue in this matter is Autism. KRC did not expressly address whether or not it considered Claimant to be substantially disabled. However, Claimant has established by a preponderance of the evidence that he is substantially disabled in social functioning, requires special services, and at a minimum has functional limitations in the areas of language, learning and self-direction. (Factual Findings 1-24.) KRC's psychological assessment was not sufficiently robust to rule out Autism and did not undermine the comprehensive psychological assessment conducted by the school district. When the KRC assessment is considered with all other available information

(i.e. observations of mother, Sunday-school teacher, rating scales from school teachers and observations and assessment results obtained by the school district evidencing deficits in communication, social reciprocity, preoccupation with superheroes, pulling on his fingers and lips, difficulties with transitions and sensory dysregulation), Claimant met his burden of establishing by a preponderance of evidence that he is afflicted with Autism, according to the DSM-V-TR criteria and that his Autism is substantially disabling to him within the meaning of the Lanterman Act. (Factual Findings 1-24.)

9. While it is true that Digilio and Lefler practice in different psychological settings and have different responsibilities, the administration of the ADOS-2 is standardized and should provide similar data to both assessors. Digilio, the school psychologist, and Lefler, KRC psychologist, utilized the ADOS-2 data for determination of whether Claimant met two different sets of criteria (i.e. Educational Code vs. Lanterman Act/DSMV-TR) for eligibility for separate entitlements. Lefler did not have the benefit of multiple observations over multiple days in multiple settings that Digilio had and was only able to observe him in his office during a relatively short period of time.

10. Lefler's testimony, while credible, did not resolve the disparity in the assessments and did not establish the superiority of his own assessment. Digilio's report which included data derived from rating scales completed by Mother and Claimant's teacher provides more than adequate support for a determination the Claimant meets the criteria for eligibility for KRC services as an individual afflicted with Autism. Additionally, the credible testimony of Leon, an individual with professional experience working with special needs children, who observed Claimant on a weekly basis for approximately one year, also supports the conclusion.

11. Claimant met his burden of proof establishing that he is eligible for KRC services as a person with Autism. KRC may choose to conduct an additional assessment with extensive observations in multiple settings within the next year to determine whether Claimant continues to meet eligibility for KRC's services.

### **ORDER**

1. Claimant's appeal is granted.
2. Claimant is eligible for regional center services as a person with substantially disabling Autism.

DATE:

GLYNDA B. GOMEZ  
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.