

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

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2022110562

DECISION

Thomas Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 16, 2023.

Jimmy Alamillo, Fair Hearings Officer, represented the Kern Regional Center (Service Agency). Mother represented Claimant. Family titles are used to protect confidentiality and privacy.

This matter is governed by the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885 (Lanterman Act).

The parties were able to review all exhibits during the fair hearing, but were unable to upload Claimant's Exhibit A to Case Center until after the hearing. As a result, Exhibit A's page numbers, Z33 to Z54, follow those of Exhibits B and C.

Documents and testimony were received in evidence. The record was closed and the matter was submitted for decision on March 16, 2023.

STATEMENT OF THE CASE

Claimant seeks services based on a diagnosis of autism or autism spectrum disorder (ASD) and the developmental delays he has experienced as a result. The Service Agency evaluated Claimant and found that he does not have ASD and therefore is not eligible for services under the Lanterman Act.

FINDINGS OF FACT

1. On September 29, 2022, the Service Agency sent Claimant a Notice of Proposed Action stating it would close Claimant's case based on a determination by the Service Agency's Multidisciplinary Eligibility Determination Team. The team found that Claimant did not have a developmental disability as defined by the Lanterman Act and is ineligible for services from the Service Agency. Claimant timely sought a hearing in his Fair Hearing Request dated October 27, 2022.

2. On December 14, 2020, Joshua Lefler, Psy.D., conducted a psychological evaluation, when Claimant was 2 years and 10 months old.

3. Dr. Lefler earned a Bachelor of Science degree in 2003, a Master of Arts in 2005, and his Doctor of Psychology degree in 2008 from Wheaton College,

Wheaton, Illinois. The Service Agency has employed Dr. Lefler for 20 years, where he is currently the Assistant Director of Client Services overseeing intake and assessment. He develops policy and provides training and guidance in case management, ensuring it is consistent with directives of the Department of Developmental Services (Department) and regulations that implement the Lanterman Act. Having worked at two other Service Agencies, Dr. Lefler has some 30 years of experience with Service Agencies.

4. Dr. Lefler's purpose in evaluating Claimant was to clarify his diagnosis and help the Service Agency determine whether he was eligible for services. Dr. Lefler noted that the COVID-19 pandemic necessitated examination by remote means and prevented a full evaluation.

5. Claimant lives with his parents and two siblings and that was true when Dr. Lefler evaluated him. Claimant was then receiving services in the Early Start program. Among concerns were Claimant's tantrums, self-injury by banging his head, aggression at times, a strong reaction to unwanted sounds, and odd behavior when reacting to other people.

6. During behavioral observation, Dr. Lefler found Claimant's affect and eye contact normal. He socialized well with his parents. Dr. Lefler observed no unusual characteristics except that Claimant was nonverbal.

7. Dr. Lefler administered the Developmental Assessment of Young Children – Second Edition (DAYC-2). The DAYC-2 evaluates a child in the cognitive domain by means of parents' responses. Claimant's score was Average.

8. Dr. Lefler also administered the Vineland Adaptive Behavior Scales – Third Edition (Vineland-3). The Vineland-3 is also based on scores from parents. After

noting several scores, Dr. Lefler summarized, Exhibit 2, page A37: “[Claimant’s] Adaptive Behavior Composite Standard Score of 85 classifies his general adaptive functioning as ‘Moderately Low’; meaning he scores higher than sixteen percent (16%) of similarly aged individuals in the Vineland-3 normative sample.”

9. Dr. Lefler diagnosed: “F80.2 Language Disorder (Provisional).” “F80.2” is a diagnostic code from the International Statistical Classification of Diseases and Related Health Problems (ICD), a widely used classification system that allows comparability and use of data relating to multiple conditions.

10. Dr. Lefler wrote that his provisional diagnosis accounted for Claimant’s persistent difficulties in acquiring and using language due to deficits in comprehension and language production. Dr. Lefler stated that the diagnosis would need confirmation by a speech language pathologist and that Claimant did not appear eligible for services from the Service Agency.

11. On January 14, 2021, the Service Agency decided Claimant was ineligible for services because it found no evidence of any of the five categories of developmental disability listed in the Lanterman Act. As more specifically set out in Welfare and Institutions Code section 4512, subdivision (a)(1): “‘Developmental disability’ means . . . intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include [the fifth category of] disabling conditions found to be closely related to intellectual disability or to require treatment” like that for intellectual disability.

12. The January 14, 2021 decision was the consensus of five of the Service Agency’s personnel, whose disciplines are psychologist, physician, program manager, service coordinator, and nurse.

13. On June 27, 2022, Mother took Claimant, then nearly four and a half years old, for another interview at the Service Agency, expressing concerns about his development and seeking an in-person evaluation. An Assessment Coordinator at the Service Agency, Cristina Blackmon, conducted the interview.

14. Claimant was using one-word statements to ask for what he wanted. His language skill was noted to have regressed at 12 months of age. He stopped responding to his name, looking at others, and interacting with his brothers. His speech acquisition was slow. He did not say his first phrase till he was two and a half years old.

15. Claimant may become upset with changes in his routine. At times he is aggressive, hitting others, including Mother and Father, with full force and a closed fist. He bangs his head at times, to his own injury. He has dramatic emotional outbursts and may scream at the top of his lungs. Claimant's sensitivity is sometimes intense. He has reacted to sad scenes in a movie by running out of the room, needing to be comforted.

16. Claimant started attending a public school in 2021, where he met the criteria for an Individualized Education Plan (IEP) under autism and speech delay.

17. On August 22, 2022, Clinical Psychologist Francisco B. Ortiz, Psy.D., evaluated Claimant when he was four years and seven months old. The evaluation's purpose was diagnostic clarification to aid the Service Agency's eligibility determination.

18. Dr. Ortiz found that when Claimant is calm, he invites his brothers to play, shows interest in other children, and tolerates noisy and crowded public places well. Dr. Ortiz noted Claimant's regression in speech and eye contact when he was 12

months old, mostly observing rather than engaging with his environment. He became verbal again at two years of age, and started using phrases when he was three years old.

19. At home and in public, though not at school, Claimant when angry will scream at full volume, hit himself or bang his head on the floor, and throw or break objects. At school, however, Claimant gets along with other children and follows his teacher's instructions. Claimant has trouble communicating his feelings. He is emotional, and will look for a quiet place when he observes emotions in others or hears emotional music or sounds. He suffers separation anxiety if Mother is not nearby.

20. Dr. Ortiz reviewed records, including Dr. Lefler's report and school records showing an overall Average level of intellectual functioning. Dr. Ortiz also described several findings in Claimant's August 2022 evaluation at Children's Hospital of Los Angeles (CHLA) and noted that he was diagnosed with ASD and accompanying language impairment and disorder.

21. In addition to his behavioral observations, Dr. Ortiz administered the Autism Diagnostic Observation Schedule-2 (ADOS-2) and the two tests Dr. Lefler had, the DAYC-2 and Vineland-3. Claimant engaged with Dr. Ortiz, more as his surroundings became familiar. He made eye contact when spoken to. He was calm and showed functional and symbolic play. He enjoyed a game with Dr. Ortiz. His speech was underdeveloped and he spoke little, in incomplete sentences, though he used some phrases and Mother reported that he used five-word phrases at home. During the two-hour assessment, Claimant showed no elevated energy, frustration, uneasiness, or stress.

22. On the ADOS-2 Claimant obtained a comparison score of 2: Minimal-to-No-Evidence of ASD symptoms. His overall total score was 4, below the autism cutoff score. Results of the ADOS-2, Module 1, showed that Claimant met the Non-Spectrum classification. Dr. Ortiz noted the absence during the assessment of stereotyped behaviors or restricted interests. Dr. Ortiz had two diagnostic impressions: Unspecified Anxiety Disorder - Suspected, and Unspecified Communication Disorder – Suspected.

23. On September 26, 2022, the Service Agency’s Interdisciplinary Eligibility Determination Team found Claimant ineligible.

24. Albert Ma, M.D., Arise Psychiatric Medical Group, Inc., Bakersfield, evaluated Claimant on September 30, 2021. In Exhibit B, page Z8, Dr. Ma states Mother’s concern that there is “something different” about Claimant and her suspicion that he is on the autism spectrum. Dr. Ma notes that a medical provider, California Spectrum Services, evaluated Claimant and did not diagnose autism. On the other hand a school psychologist had diagnosed autism.

25. Dr. Ma detailed some of Claimant’s language delay and difficulties with speech and pronunciation, such as Claimant’s attempts to communicate with his brother, who is unable to understand Claimant’s speech. Dr. Ma notes that Claimant makes random noises, flaps sometimes, would wring his fingers in the past, and becomes upset easily, banging his head and injuring himself. Mother reported daily tantrums, her fear of setting Claimant off, and his lack of friends. Dr. Ma’s diagnosis is (F84.0) Autistic Disorder. F84.0 is the ICD code used for an ASD diagnosis in the DSM-5. DSM-5 is the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, the standard classification of mental disorders used by mental health professionals nationwide.

26. The report of Claimant's assessment by the Multi-disciplinary Team of the Pupil Services Department, Rosedale Union School District, Bakersfield, is dated May 19, 2021. The report notes concerns with Claimant's communication, social skills, and behavior. It had three objectives: to identify school readiness skills relating to reading, mathematics, and written expression; to determine performance levels in social and emotional behavior, adaptive skills, health, and oral communication; and to evaluate Claimant's qualification and need for special education under federal and state education guidelines.

27. The May 19, 2021 report notes that there had been a previous assessment in January 2021, when Claimant was three years old, including a psychological evaluation by Nick Garcia, Ph.D. Dr. Garcia found that Claimant met diagnostic criteria for Language Disorder. He considered an ASD diagnosis, but opted against it based on Claimant's social and emotional reciprocity, that he would respond to his name, and his engagement with others.

28. The May 19, 2021 report notes that the school district administered a number of tests, including the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), indicating that Claimant's full-scale IQ was 93, in the 32nd percentile. Claimant had a T-Score of 77, classified as Very Elevated, on the DSM-5 Scale of the Autism Spectrum Rating Scales (ASRS). Claimant's score on the Childhood Autism Rating Scale, Second Edition (CARS2) was 31, indicating Mild-to-Moderate symptoms of ASD.

29. The May 19, 2021 report states, Exhibit C, page Z27: "Based upon current testing, and in accordance with Education Code 3030(b)(1), [Claimant] meets eligibility criteria as a student with Autism." Code 3030(b)(1) is a shorthand reference to section 3030, subdivision (b)(1) of title 5 of the California Code of Regulations.

30. On three dates in July and August 2022, a three-person team assessed Claimant at CHLA. On the team were licensed clinical psychologist, Rebecca Elias, Ph.D., licensed occupational therapist Andrea Sherman, OTD, OTR/L, SWC, and licensed speech-language pathologist Alison Lamoureux, MA, CCC-SLP. They observed Claimant's interaction with Mother and Father, whom they interviewed, observed Claimant in structured play, and administered these tests: Vineland-3, ADOS-2, Social Responsiveness Scale-2 (SRS-2), Social Communication Questionnaire (SCQ), Aberrant Behavior Checklist – Community (ABC-C), Behavior Assessment System for Children, Third Edition (BASC-3), Child Sensory Profile 2 Caregiver Questionnaire (SP2), DAYC-2, Preschool Language Scale – Fifth Edition (PLS-5), and Clinical Evaluation of Language Fundamentals – Preschool – Third Edition (CELF:P3).

31. Regarding communication, Mother reported to the CHLA team that she needed to call Claimant by name three or four times or clap to get his attention. He was not speaking in full sentences. Claimant's ability to answer questions was progressing, as he used one-word responses. Parents reported some echolalia, the repetition of words just spoken by another person, considered symptomatic of a mental condition or disorder.

32. Regarding social interaction, Mother reported that Claimant had become interested in other children, though he tended to wander off on his own after a time rather than continue to play with others. Make-believe play was emerging.

33. Regarding behavior, Mother reported that outbursts with associated aggression began when Claimant was two and a half years old. At the time of the CHLA assessment, Claimant would still become upset, such as when others were not paying attention to him, and then Claimant might throw things and injure himself, to the point of bruising from hitting his head. On the other hand, Claimant usually

behaved well in public. The CHLA team listed a number of Claimant's behaviors and sensitivities, such as low impulse control, low frustration tolerance, and mood swings.

34. Claimant showed some aggression during the assessment, scratching the clinician, and some echolalia. The clinician noted atypical hand and wrist movements. Claimant looked at the clinician at times, but as the clinician noted on page Z37, Exhibit A, he also had "inconsistent coordination of joint attention via eye gaze with verbal and gestural communication."

35. Because the clinician who observed Claimant during the ADOS-2 wore a mask and face shield against COVID-19, the test was not scored. The clinician noted, however, observations that suggested Claimant's had difficulties with reciprocal social communication and repetitive behaviors.

36. On the BASC-3, Claimant's scores were: in the At-Risk range regarding Externalizing Problems, in the Clinically Significant range regarding Internalizing Problems, Clinically Significant under the Behavioral Symptoms Index (BSI), and an At-Risk composite score regarding Adaptive Skills.

37. Results of observation and administration of the PLS-5 and CELF:P3 showed that Claimant's receptive and expressive language skills were moderately impaired. He had mild to moderate deficits in social communication. Regarding his speech, his articulation was within normal limits.

38. Regarding Cognition, Claimant's scores on the DAYC-2 put him in the Below Average range. The CHLA team administered other tests and made observations regarding such matters as fine motor skills and daily activities.

39. The CHLA team made recommendations to help Claimant overcome difficulties and deficits. In reaching diagnoses of ASD and Language Disorder, the CHLA team summarized impressions in Exhibit A, pages Z46 through Z47:

[Claimant] presents with deficits in social communication and social interaction across multiple contexts, as well as restricted, repetitive and stereotyped patterns of behavior, interests and activities. In terms of social and communication deficits, [Claimant] has reduced response to social interactions, uses stereotyped/idiosyncratic use of words and phrases, and demonstrates immediate and delayed echolalia. He exhibits forms of nonverbal communication (e.g., eye contact, gestures, facial expressions) less frequently than expected for his age. Lastly, [Claimant] has difficulty adjusting his behavior to suit various social contexts. In terms of repetitive behavior and restricted interests, [Claimant] has extreme distress at small changes; has difficulties with transitions; and has rigid thinking patterns. [Claimant] has sensory-seeking behaviors such as peering at objects out of the side of his eye and engages in hand mannerisms. [Claimant] also has behavioral outbursts which are highly impairing in the home environment. Taken together, these behaviors warrant a diagnosis of Autism Spectrum Disorder (F84.0).

LEGAL CONCLUSIONS

Principles of Law

1. The party that asserts a claim or seeks to change the status quo generally has the burden of proof in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.) In these proceedings, then, Claimant bears the burden of proof.

2. Under Evidence Code sections 115 and 500, the evidentiary standard Claimant must meet is proof by a preponderance of the evidence, meaning Claimant must show that the evidence makes it more likely than not that he should prevail on his claim of eligibility.

3. This matter concerns one category of disability, autism or ASD, one out of the Lanterman Act's five categories of eligibility set out in the quotation of Welfare and Institutions Code section 4512, subdivision (a)(1), above.

4. Section 54000 of title 17 of the California Code of Regulations states that eligibility depends not only on whether a person's disability comes within one of the Lanterman Act's five categories, but also on characteristics such as whether the disability is likely to last indefinitely and is substantially disabling. The regulation's provisions parallel provisions in Welfare and Institutions Code section 4512.

5. Section 54001, subdivision (a)(1), of title 17 of the California Code of Regulations states that to be substantial, a disability must result in major impairment of cognitive or social functioning. Subdivision (a)(2) of the regulation lists significant functional limitations that a person's disability must impose to be eligible, including for instance limitations in receptive and expressive language. The regulation's

provisions, like those in the previous regulation, parallel provisions in Welfare and Institutions Code section 4512.

6. Section 54010 of title 17 of the California Code of Regulations describes procedures for a Service Agency's decision on eligibility following intake and assessment, and how the decision may be appealed.

7. Autism under the Education Code and its implementing regulations is different from autism and ASD described in the DSM-5, the authority used by psychologists and other mental health professionals across the country.

8. Section 3030, subdivision (b)(1), of title 5 of the California Code of Regulations, is a regulation pertinent here in that it implements the Education Code regarding students with exceptional needs. It provides in part:

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting 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.

9. The DSM-5 description of ASD, Exhibit 9, page A83, begins thus: "Persistent deficits in social communication and social interaction across multiple contexts" Contexts include failure to interact with others, such as in conversation,

poor verbal and nonverbal communication, and deficits in forming and maintaining relationships, such as friendships.

Analysis

10. The testimony was quite convincing that Claimant has for years since turning one exhibited developmental delays and atypical behaviors. The different professional evaluations of Claimant performed in various years support this view. Only one evaluation, however, from CHLA, supports a diagnosis of ASD that would make Claimant eligible under the Lanterman Act. It does not outweigh the others.

11. Mother has much more confidence in the CHLA assessment than the others. She believes it was much more thorough. The three members of the CHLA team spent approximately three hours interacting with Claimant in person. Dr. Lefler's evaluation, by contrast, was a Zoom meeting. It lasted less than two hours.

12. Mother testified that Dr. Lefler spent only perhaps a minute or so directly observing Claimant, too little time to truly evaluate his behaviors and abilities or disabilities. Mother described Dr. Lefler's evaluation to a friend who works as a school psychologist, who reinforced Mother's view that Dr. Lefler's evaluation was not conducted carefully or as it should have been.

13. Dr. Lefler acknowledged that COVID-19 protocols restricted his evaluation, particularly in that he conducted it by remote means. The conditions were not ideal. But Dr. Lefler pointed out that the CHLA team were also masked and shielded because of COVID-19. As a result, though they administered the most reliable test for ASD, the ADOS-2, they did not score it. That omission casts doubt on the reliability of the ASD diagnosis by the psychologist on the team and endorsed by the

other two members of the team, the Speech-Language Pathologist and the Occupational Therapist.

14. Mother recounted in straightforward fashion, with the immediacy of a parent who is with her child each day for most of the day, how Claimant often does not pay attention to her or other people, but is oddly abstracted, how he speaks abnormally and with fewer words and shorter phrases than other children his age, how he does not engage with or imitate or look up to his older brothers in the way that younger siblings tend to do.

15. As Mother stated, Claimant, her son, needs help. Mother herself feels that she has faced much difficulty and confusion while trying to find such help and to determine what form it should take. Parents in general are at times, as Mother is now, at a loss over "which way to go." Mother was tentatively happy when Dr. Lefler found against ASD in December 2020. That there was no ASD diagnosis encouraged her that Claimant might not really be disabled. But her personal experiences with him have increasingly made her uneasy and kept her in quest for what may be best for him. The diagnosis from CHLA was not welcome to Mother, but it was a relief, because it validated what she sees in Claimant.

16. Mother was eloquent and affecting in the simplicity of her appeal. A parent's view of such matters can never be completely discounted or ignored. The DSM-5, for all its finely discriminating terms and analyses, is nonetheless underlain by close and caring observations and comparisons to and experience with other children such as parents are uniquely in position to formulate. Also worth noting is that experts need not be credited, despite specialized learning and trained insight. As the court stated in *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890, a fact finder may

reject the testimony of a witness, even an expert witness, although the expert is not contradicted.

17. In this matter, however, Claimant's evidence, persuasive as Mother's was, was insufficient to show autism or ASD, a diagnosis that would qualify Claimant for services under the Lanterman Act. Dr. Lefler was early to evaluate Claimant professionally. His observations and findings are remarkably consonant with those of later evaluators, even the CHLA team. Claimant's speech, his social interaction, and other characteristics and abilities, have long shown signs of delay and atypicality, but repeatedly the evaluators have gauged them to be below average or the like, not so disabling as to merit an ASD diagnosis at this time.

18. The autism found by Claimant's school district adds little, because the school psychologist tested Claimant under the standard stated in the Education Code, substantively different from that in the Lanterman Act. Mother's friend, also a school psychologist, did not testify, but even if she had, her view would necessarily be of limited value in light of the Education Code standard.

19. In the end, most persuasive here against a finding of ASD and eligibility is the evaluation by Dr. Ortiz. Dr. Ortiz engaged directly with Claimant. He had the benefit of previous evaluations, including that at CHLA. He scored the ADOS-2 that he administered. He reviewed school records. The report by Dr. Ortiz is detailed, setting down observations both favoring and disfavoring an ASD diagnosis. Dr. Ortiz saw that Claimant struggles in certain ways that are holding back his development as compared to his peers. Still, Claimant's disabilities and delays cannot currently be accounted enough to consider him eligible by reason of autism or ASD.

20. Claimant did not establish by a preponderance of the evidence that he is eligible for services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

DATE:

THOMAS LUCERO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.