

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

In the Matter of:

CLAIMANT

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency

OAH No. 2019110561

DECISION

Brian H. Krikorian, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 30, 2020, in Los Angeles, via video conference.

Claimant was present and represented by his mother (Mother) and stepfather (Stepfather).¹

¹ Claimant and his parents are identified by titles to protect their privacy.

Dana Lawrence, Fair Hearing and Administrative Procedures Manager, represented the North Los Angeles County Regional Center (Service Agency or NLACRC).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on September 30, 2020.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 2 through 10, 12 through 14, 16 through 18, and 27 through 37.

Testimonial: Sandi Fischer, Ph.D., Supervisor, Psychological and Intake Services; and Claimant, Mother, and Stepfather.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 28-year-old man. In October 2019, Mother requested regional center services to aid Claimant with work and social training in the workforce. On October 8, 2019, Service Agency sent Mother a letter notifying her of its decision that Claimant is not eligible for services.

2. On November 4, 2019, Mother filed a fair hearing request, on Claimant's behalf, to appeal Service Agency's decision. Claimant designated Mother as his authorized representative. In the fair hearing request, Mother wrote that she requested a fair hearing because Service Agency did not fairly evaluate Claimant regarding his medical condition and prior medical records.

3. On November 18, 2019, Ms. Lawrence held an informal meeting with Mother regarding her appeal request. On November 19, 2019, Ms. Lawrence corresponded with Mother. She indicated Service Agency would defer "an informal decision" on Claimant's eligibility in order for Service Agency to gather further records and assessment information from Claimant's medical providers.

4. On February 12, 2020, and September 22, 2020, the Interdisciplinary Eligibility Determination Committee (Committee) met and reviewed Claimant's additional records. On September 23, 2020, Ms. Lawrence corresponded with Mother. Ms. Lawrence advised Mother that upon further review, the Committee found Claimant ineligible for services.

Claimant's Background

5. Claimant lives at home with Mother, Stepfather, and his younger siblings. Claimant's biological father passed away in 2016.

6. On April 13, 2004, Claimant was referred to the Penny Lane Centers for evaluation by his physician Oscar Rosas, M.D. At the time of the assessment, Claimant had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Dr. Rosas prescribed Adderall and Risperdal for Claimant. Claimant was born five weeks prematurely and deaf in his right ear. He had moderate hearing loss in his left ear. The

evaluator diagnosed Claimant with ADHD with a rule out of Post-Traumatic Stress Disorder.

7. On September 19, 2006, Claimant was discharged by Penny Lane because he no longer needed services, and due to his "lack of attendance." Mother testified that the discharge was due to the family not having the proper insurance. The discharge report indicated Claimant's diagnosis was ADHD and Pervasive Development Disorder.

8. Claimant graduated from East Side High School in 2011. Claimant had an individualized education program (IEP) for special education services. His primary eligibility was "Hard of Hearing" and his secondary eligibility was "Specific Learning Disability." He completed 230 out of 230 credits towards graduation and received Bs, Cs, and a D- in ceramics. The Antelope Valley Special Education Local Plan Area (SELPA) provided a transition IEP for Claimant following graduation.

9. Claimant previously applied for services from Service Agency in 2016. Claimant listed ADHD and a diagnosis of Asperger Syndrome (Asperger) from Dr. Rosas when he was 11 years old. Service Agency found Claimant was not eligible for services, based on a psycho-social assessment and psychological evaluation described below. Those same evaluations were also considered by Service Agency in connection with the current 2019 application.

August 2016 Social Assessment

10. On August 29, 2016, NLACRC service coordinator Silvia Mejia, LCSW, conducted an intake interview with Claimant and Mother. Ms. Mejia prepared a Social Assessment report that summarized the information provided during the interview and her recommendations. (Exh. 10.)

11. During the intake interview, Ms. Mejia made behavioral observations of Claimant. She noted that Claimant walked in calmly and gave appropriate eye contact. Claimant answered many questions during the intake interview and made sidebar comments he wanted to share after answering a question. Claimant said goodbye at the end of the intake interview.

12. Ms. Mejia obtained information from Claimant and Mother regarding Claimant's current functioning. Claimant was able to ambulate independently, hold a pencil appropriately, and write his full name, numbers, and simple sentences. It was reported that Claimant was able to help at home with household chores, use a microwave oven, pour cereal, drink, and prepare a peanut butter and jelly sandwich. He was capable of doing self-care, although Mother indicated he required occasional reminders to shower.

13. Claimant was able to respond to his name, recognize shapes, colors, and count past 100. He misstated his age as 23. He was able to compute essential mathematical functions and read at grade level. He was able to communicate in complete sentences and have a conversation with others. He preferred not to initiate interactions with others but was friendly when approached by his peers. Although he did not have any friends, his 19-year-old cousin visited each week, and Claimant interacted well. Claimant did not exhibit any self-injurious behavior, destroy property, or run off. He was able to cope with transitions, although he preferred to have schedule changes communicated to him in advance.

14. Based on the intake interview, Ms. Mejia recommended, among other things, that Claimant complete a psychological evaluation with Dr. Kim (discussed below), and that Service Agency review medical reports and determine eligibility upon completion.

Psychological Evaluation

15. Renee Kim, Psy.D., a licensed psychologist, performed a psychological evaluation of Claimant on October 27, 2016. Claimant was referred to Dr. Kim for evaluation to determine his current level of functioning and determine his eligibility for regional center services. Dr. Kim limited the evaluation's scope to assess for possible diagnoses of intellectual disability or autism spectrum disorder. Mother accompanied Claimant to the assessment.

16. Dr. Kim prepared a written report of her findings and conclusions. Dr. Kim interviewed Mother and Claimant, made behavioral observations, reviewed medical records, and administered the Autism Diagnostic Interview-Revised (ADI-R), the Vineland Adaptive Behavior Scales, 2nd Edition (VABS-II), the Wechsler Adult Intelligence Scale– 4th Edition (WAIS-IV), and the Autism Diagnostic Observation Schedules—2nd Edition Module 4 (ADOS-II).

17. Dr. Kim observed that Claimant presented as a socially aware and cordial young man. He displayed good eye contact and social referencing. He also demonstrated speech, and used language to initiate conversation, answer questions, and clarify data regarding himself. Claimant often interjected information to explain answers made by Mother. Although he appeared to display difficulties expressing himself at times, he was attentive to assessment tasks and remained cooperative during the session.

18. Dr. Kim administered the WAIS-IV to assess Claimant's cognitive functioning. The WAIS-IV is a standardized intelligence test that measures cognitive functioning across verbal and non-verbal domains. Claimant's performance on the subtests indicated oral comprehension in the average range; perceptual or fluid

reasoning in the low average range; working memory in the extremely low range; and processing speed in the borderline range. The results of the WAIS-IV indicated Claimant's full-scale IQ was in the borderline range and at the fifth percentile.

19. Dr. Kim assessed Claimant for adaptive functioning using the VABS-II, which measures Claimant's practical everyday skills required to function and negotiate environmental demands. Claimant obtained an overall Adaptive Behavior Composite of 53, which fell in the low range, and below the first percentile. His communication, daily living skills, and socialization skills also fell in the low range.

(A) In the Communication domain, Claimant was able to follow directions of at least two steps, tell about his experiences in detail, and have a conversation that lasts at least ten minutes.

(B) In the Daily Living Skills domain, Claimant could attend to his self-care tasks independently. He required occasional reminders to maintain hygiene and take his medication. He was able to do household chores and use a computer. He could tell time from an analog clock.

(C) In the Socialization domain, Claimant started small talk with people he knew. He has historically met with his peers regularly, although he does not consistently meet with his friends due to distance. He showed good sportsmanship and acted appropriately when introduced to strangers. He was able to control his anger or hurt feelings due to constructive criticism.

20. Dr. Kim administered the ADI-R and ADOS-II to determine if Claimant had autism or an autism spectrum disorder. The ADI-R is a standardized, semi-structured clinical interview for caregivers of children and adults to help diagnose whether an individual has autism. The interview focuses on behaviors in three content

areas: quality of social interaction, communication and language, and repetitive, restricted, and stereotyped interests and behavior. The ADOS-II is a standardized assessment of one's communication, reciprocal social interaction, imagination, and creativity that consists of socially referenced activities that allow the assessor to observe behaviors that have been identified as necessary to the diagnosis of autism spectrum disorders. Dr. Kim noted that no family member was present to provide an account of Claimant's history during the session.

21. Based on her evaluation, Dr. Kim concluded that Claimant's performance on the ADI-R and ADOS-II fell below the autism cut-off range, indicating that Claimant did not meet the diagnostic criteria for an autism spectrum disorder. In her written report, Dr. Kim explained:

The results of the assessment are consistent with Borderline Intellectual Functioning....

[T]he results of the current assessment do not appear to be consistent with a diagnosis of autism spectrum disorder. While [Claimant] was reported to have been previously identified as having symptoms consistent with Asperger's disorder, these documents were not available for review at the time of the current assessment. It was not reported in session that [Claimant] received formal testing measures to confirm this diagnosis. [Claimant]'s early history also does not appear to be consistent with autism spectrum disorder, as there does appear to be lack of clear evidence of restrictive and repetitive behaviors.

(Exh. 13, p. 6.)

22. On November 21, 2016, NLACRC found Claimant ineligible for services.

Service Agency's Evidence

23. Service Agency's September 23, 2020 letter to Mother summarizes its final decision that Claimant is not eligible for regional center services based upon the October 2019 request for services. (Exh. 33.) The final decision was made by the Committee on September 22, 2020, based on the team's consideration of the Penny Lane records, educational records from Antelope Valley SELPA, Dr. Kim's 2016 psychological evaluation, the psycho-social assessment completed by Ms. Mejia in 2016, and medical records from High Desert Medical Group. The Committee found Claimant "ineligible for regional center services" because he does not have a "developmental disability" as defined by applicable provisions of the Lanterman Act and Title 17 regulations.² The letter explained:

Upon thorough review of available information, the NLACRC Interdisciplinary Eligibility Determination Committee has determined that [Claimant] is not eligible for regional center services, as his condition does not meet the definition of a developmental disability as defined in law and regulations.

(Exh. 33, p. 8.)

² See Legal Conclusions 3-7.

24. Sandi J. Fischer, Ph.D., is NLACRC's Co-Supervisor of the Clinical and Intake Departments. Her duties include reviewing cases for eligibility as part of NLACRC's interdisciplinary team. Dr. Fischer testified regarding Service Agency's decision that Claimant is not eligible for regional center services. Her testimony was consistent with and supplemented the explanations given in Service Agency's September 23, 2020 letter.

25. The DSM-5³ is a manual that lists the diagnostic criteria for various mental illnesses and developmental disabilities. Dr. Fischer testified that Service Agency uses the DSM-5 diagnostic criteria in determining whether a person has a qualifying diagnosis of, for example, intellectual disability or autism.

26. Under the DSM-5, the following three criteria (A, B, and C) must be met for a diagnosis of intellectual disability:

A. 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.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for

³ DSM-5 stands for the "Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition," published by the American Psychiatric Association. Service Agency presented excerpts from the DSM-5 pertaining to autism and intellectual disability. (Exhs. 34, 35.)

personal independence and social responsibility. Without ongoing support, the adaptive deficits 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.

C. Onset of intellectual and adaptive deficits during the developmental period.

(Exh. 35.)

27. The DSM-5 diagnostic criteria for autism spectrum disorder require, among other things, (1) persistent deficits in social communication and social interaction across multiple contexts, as manifested by, for example, deficiencies in social-emotional reciprocity, deficits in nonverbal communicative behaviors used for social interaction, and deficits in developing, maintaining, and understanding relationships; (2) restricted, repetitive patterns of behavior, interests, or activities, as manifested by, for example, stereotyped or repetitive motor movements, use of objects, or speech; insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; highly restricted, fixated interests that are abnormal in intensity or focus; and hyper activity to sensory input or unusual interest in sensory aspects of the environment; and (3) these disturbances are not better explained by intellectual disability or global developmental delay. (Exh. 34.)

28. Dr. Fischer testified Claimant did not meet the DSM-5 diagnostic criteria for intellectual disability, given his cognitive abilities in the borderline range and his adaptive functioning in the low range. Dr. Fischer explained that a diagnosis of low or borderline functioning is a level of cognitive ability that is “a little higher” than the

level of cognitive ability needed to diagnose intellectual disability. In this case, Claimant was having some cognitive problems with math and written expression, but not in all subjects.

29. Dr. Fischer testified Claimant did not meet the DSM-5 diagnostic criteria for autism. In their evaluations, Dr. Kim and Ms. Mejia did not observe Claimant having difficulties typically associated with autistic persons, such as difficulty sustaining eye contact or problems with engaging in reciprocal conversation. Dr. Kim found Claimant fell below the autism cut-off range, indicating that he did not meet the criteria for an autism spectrum disorder. (Exh. 13, p. 6.) While Claimant did have a history of pacing and hand shaking, there did not appear to be any other evidence of restrictive or repetitive behaviors by history or by observation during Dr. Kim's assessment.

30. Dr. Fischer testified the Committee concluded that Claimant did not have a "fifth category" condition, as his condition is not similar to, nor requires the same treatment as, intellectual disability. Further, Claimant's adaptive functioning level did not establish that he had a "substantial disability." Although Claimant needed occasional reminders and prompts, someone with "low functioning" would need constant reinforcement.

31. Dr. Fischer testified that the Committee reviewed Claimant's IEPs and school records. Claimant's educational goals were inconsistent with those of children diagnosed with intellectual disabilities or autism spectrum disorders. For example, one of Claimant's strengths was reading comprehension. Dr. Fisher explained that reading comprehension is a high functioning skill. She also noted that Claimant was reported to participate in class and being social with his peers regularly. Dr. Fisher found that the school records did not provide data or specific scores for each of Claimant's subtests in assessments, only referring to Claimant's results as being "below average"

or “low average.” Dr. Fisher opined that Claimant’s scores would have had to be in the extremely low deficit range for a DSM-5 diagnosis. The criteria for a DSM-5 diagnosis are stricter than the requirements for special education services.

32. Dr. Fischer noted the school progress reports showed Claimant’s grades in various subjects were within the functioning range. Although Claimant was not required to take the California exit examinations due to his learning disabilities, he took the math examination twice, passing it the second time well above the passing score requirement. Dr. Fischer explained that academic achievement is not the same as cognitive ability, which speaks to a person’s capacity to learn, reason, and problem solve. A person with a diagnosis of intellectual disability is expected to have deficits across the board, not just in one area (i.e., math or expression).

33. At the hearing, Mother pointed to the Discharge Summary of Penny Lane, which indicated that Claimant’s diagnosis included Pervasive Development Disorder (Exh. 4). Dr. Fisher testified that the Committee reviewed this record but found there was no specific data provided that supported such a diagnosis. She opined that having hearing loss is often inconsistent with an Asperger diagnosis.

Claimant’s Evidence

34. Mother testified at the hearing. Her main concerns with Claimant are in the areas of daily living skills. Mother disagrees with the description of Claimant’s functioning levels in the respective reports by Dr. Kim and Ms. Mejia.

35. Mother pointed out that when he was 11 years old, Claimant was diagnosed with Asperger’s disorder by Dr. Rosas. While Dr. Kim’s report noted this diagnosis in its history, the report also stated that no confirming medical records were

supplied to review this diagnosis. No testimony or evidence from Dr. Rosas was submitted as evidence or reviewed by the Committee in making its decision.

36. Mother testified that Claimant did show signs of autism spectrum disorder. She stated he could not be in huge crowds. He will not attend church due to the size of the crowds. Because Claimant does not like too many people and children being around him, he is reluctant to go on vacation with his family. He exhibits autism-like symptoms such as hand flapping, repetitive movement, and pacing. He cannot hold down a job.

37. Stepfather testified at the hearing. Stepfather believes that the only reason Claimant graduated from high school was a change in the law that made it easier for him to do so.

38. Claimant testified at the hearing. He indicated that during a portion of high school, he was bullied and teased. The bullying lasted until his senior year. He also clarified notes on the IEPs, indicating he had completed projects in his ceramics class as requested.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (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 timely and adequately requested a fair hearing, and therefore jurisdiction for this case was established. (Factual Findings 1-2.)

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].) The standard of proof in this case is a 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. 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: "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, 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 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. California Code of Regulations, title 17, section 54002 defines the term “cognitive” as “the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.”

7. In addition to proving a “substantial disability,” a person must show that his disability fits into one of the five categories of eligibility outlined 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 defined 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. Claimant did not establish by a preponderance of the evidence that he has a “developmental disability” as defined under Welfare and Institutions Code section 4512. Claimant is not substantially disabled due to intellectual disability, autism, or a “fifth category” condition. He does not have significant functional limitations in major life activity, as appropriate to his age. Although he received special education services, he graduated high school with full credits and passed the state math exit examination on the second try. His cognitive functioning is in the borderline range, and his adaptive functioning is in the low range. While the evidence showed that Claimant did need occasional reminders regarding hygiene and other life skills, he also exhibited a level of cognition and functioning consistently higher than those with a “developmental disability.” He does not meet the DSM-5 diagnostic criteria for either intellectual disability or autism, based on the psychological evaluation completed by Dr. Kim, the testimony of Dr. Fischer, and the records presented in evidence.

9. Based on the foregoing, Claimant’s evidence was not sufficient to establish eligibility for regional center services. His appeal shall be denied. (Factual Findings 1-38; Legal Conclusions 1-8.)

ORDER

Claimant's appeal is denied. Service Agency's determination that Claimant is not eligible for regional center services is affirmed.

DATE:

BRIAN H. KRIKORIAN

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.