

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No: 2018070283

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 15, 2018, in Pomona, California. Guadalupe Magallanes-Angel, Associate Director overseeing Intake and Early Intervention Services at the San Gabriel/Pomona Regional Center, represented the service agency. Mother and father represented claimant (family members' names are omitted to preserve confidentiality). Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 15, 2018.

ISSUE

Whether claimant, afflicted with cerebral palsy, is eligible for service agency services.

FACTUAL FINDINGS

1. Claimant, six years old, will turn seven in November 2018. She lives with her mother, father, and three older siblings, a sister and two brothers. There is no

dispute that claimant suffers from cerebral palsy, and otherwise does not qualify for services or supports.

2. The service agency's June 20, 2018 notice of proposed action (NOPA), advised claimant that an eligibility team had concluded she was ineligible for services. Claimant timely appealed.

3. The NOPA was based primarily on a medical assessment of claimant performed on May 23, 2018, which the service agency had sought from Marwa Moustafa, M.D. Regarding eligibility, Dr. Moustafa wrote: "[Claimant] does appear to have evidence of Cerebral Palsy, however it is not substantially handicapping." (Exhibit 5.)

4. There is no indication in Dr. Moustafa's medical assessment that she reviewed claimant's medical records. The medical assessment states that the doctor's sources of information were claimant and her parents.

5. The medical assessment has some inaccuracies. It states that claimant had cochlear implants placed when she was two years old and living in India. Claimant had a cochlear implant in one ear at that age, but the other ear had no implant until approximately two years later, in January or February 2016, a few months before she came to the United States, in May 2016. The medical assessment states that claimant attends kindergarten at Washington Elementary School, whereas she attends Ben Lomond School.

6. Much of respondent's medical history is unknown, as noted in Dr. Mustafa's assessment, in the service agency's Social Assessment, Exhibit 4, prepared on April 25, 2018 by Efraim Wong, Intake Service Coordinator, and in other records, such as Exhibit 9, a Past Medical History prepared by Children's Hospital Los Angeles (CHLA). If there exist medical records from respondent's years in India, the records were unavailable to her parents, to physicians who have examined or treated claimant since

she arrived in the United States in mid-2016, and to Dr. Moustafa. Moreover such medical records concerning claimant as are available are not extensive.

7. Exhibit 3 is claimant's Individualized Education Program (IEP) dated May 18, 2017.

- A. The IEP takes note at the outset (page 1) of claimant's cochlear implants and "known profound loss of hearing in both ears. . . . Her hearing loss directly impacts her ability to develop speech, language and auditory skills and hinders her ability to keep pace with typically developing peers." In a later note (page 18), there is this summary: "Due to [claimant's] hearing loss and unique communication needs, she requires a more restrictive environment where personnel specializing in Deaf/Hard of Hearing Education can provide the necessary services and accommodations/modifications in order for her to achieve educational benefit."
- B. There is considerable detail on claimant's skills relating to preacademic and academic functional skills, communication development, and gross/fine motor skills. Details include claimant's being able to name single-digit numbers and a few double-digit numbers and to trace shapes using a three-finger grasp of a pencil. As stated on page 3 of the IEP, claimant is "safe and successful on the jungle gym structure at her current school." The details indicate that claimant continues to need to make progress to catch up with peers, but that since a previous IEP she was making progress helpful in both academic and practical settings.
- C. The IEP describes claimant's good social skills, how she enjoys talking with other people and how she expresses concern for their feelings. "She transitions between activities, shares, and takes turns." (IEP, page 3.) She

sometimes resolves conflicts or asks adults for help on a resolution. She enjoys helping younger students and leading group activities.

- D. Claimant is able to care for herself in several ways. She can eat with a utensil with some spillage. She can pour into a glass to drink, though again with some spillage. She will pick up and put away toys if directed to do so. She can brush her hair and uses a toilet without aid, though she must sometimes be reminded to wipe.
- E. Claimant met the great majority of goals set in a previous IEP. Goal #5, to increase the mean length of utterance to five to seven words in describing actions was partially met, an example of how claimant both needs to progress and is progressing. As the IEP notes at page 30, claimant could imitate five-letter utterances but was not yet producing longer ones with correct grammar.

8. Claimant is not able to care for herself in all the ways one might expect of a six-year-old, as mother testified. Claimant takes a great deal of time putting on clothes. She has trouble especially with her lower extremities, such as putting on pants or shoes, and requires help.

9. As parents also stated, and as indicated in the IEP and medical records, claimant's mobility is impaired. Not only does she have trouble walking on uneven surfaces, she has trouble simply walking after short periods of activity. For instance, parents and claimant recently went sightseeing locally, but after approximately half an hour claimant was so tired that she had to be carried.

10. A Listening and Spoken Language Evaluation, Exhibit F, provides a little more detail regarding claimant's progress, deficits, and challenges. The evaluation prepared at the time of the May 18, 2017 IEP by Speech-Language Therapist Sylvia Witt,

- A. Ms. Witt found that claimant was below average in most areas tested: sentence comprehension, linguistic concepts, word structure, formulated sentences, recalling sentences, and understanding spoken paragraphs. One area of strength was word classes. Claimant demonstrated categorization skills and the ability to associate word meanings.
- B. Ms. Witt found that claimant's "overall phonological awareness skills are in the below average range. Children who lack explicit phonological knowledge have difficulty acquiring sound/symbol correspondences in words."
- C. Ms. Witt noted strength in claimant's letter sound recognition. "Her ability to give sounds to corresponding letters was within the average range."

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- D. Regarding progress, Ms. Witt summarized: "Children with cochlear implants are expected to make a month's gain of language development for each month they have used a cochlear implant. [Claimant] continues to make steady listening progress at 4 years 2 months post initial implant, with language scores splintered in the 3 years 0 months (expressive skills) to 5 years 0 months range (receptive skills)."
- E. Ms. Witt's recommendation was that claimant should "continue to receive individual aural habilitation therapy 60 minutes per week with a professional that is knowledgeable in cochlear implants and developing listening skills through spoken language, preferably a listening and spoken language specialist. Additionally, speech and language therapy is recommended to help bridge the gap between her receptive and expressive language."

11. Parents described some significant problems they have observed at school. One is that, because of her limited mobility, other children sometimes make fun of claimant, such as when they see her fall. They make fun of her also because of her

delayed expressive language skills. Claimant can also become frustrated from being unable to hear in a loud environment, as school sometimes becomes. She suffers from fatigue often, and coupled with emotional immaturity and a low tolerance for frustration, claimant may sometimes lash out against peers. She may hit or scratch them, although such misbehavior is much more commonly directed at claimant's siblings. Parents stressed, however, that her siblings treat claimant quite well and support the family's efforts to prevent any misbehavior by claimant.

12. Claimant's primary pediatrician, Jovi Cacnio, M.D., who referred claimant to CHLA, notes the "little medical history" concerning her. (Exhibit C.) Dr. Cacnio made the referral to CHLA, as he states in a May 25, 2018 letter, "after observing her [claimant's] continual toe walking and ankle pronation, for further treatment of her Cerebral Palsy and she now wears D[A]FOs [a type of leg and foot brace] on both her legs to assist her daily." (Exhibit C.) Dr. Cacnio goes on to state that, her braces notwithstanding, claimant falls often and has especial trouble with uneven surfaces. He concludes: "She continues to need treatment to improve her stability and balance and strengthen her muscles to live a full independent life." (*Ibid.*)

13. Vernon T. Tolo, M.D., Chief Emeritus of Children's Orthopedic Center at CHLA noted in his May 18, 2018 letter that there is hope that continued treatment will make claimant more "independent with more mobility and stability, less fatigue in activities," and with less falling and resultant injury. (Exhibit D.) The letter concludes: "I also think that monitoring by physical therapists, and active physical therapy as is warranted, will be an important component of [claimant's] ongoing treatment plan." (*Ibid.*)

14. In her May 25, 2018 letter, Vicky Blank stated that she is employed as an Adapted Physical Education (PE) Specialist by the school district where claimant is a student. Ms. Blank was in charge of the weekly adapted PE in which claimant engaged in

the 2017-2018 school year. Ms. Blank noted that claimant falls often, though her braces have reduced the frequency, so that in the month before the letter, the school had called claimant's parents three or four times to let them know that claimant had been injured from a fall. Exhibit A is a note from CHLA stating that claimant had suffered an ankle sprain on August 9, 2018, but was able to return to school that day. Ms. Blank's letter continued: "I am currently working with [claimant] to improve her balance, coordination and object-control skills." (Exhibit B.) Ms. Blank recommends physical therapy to help claimant gain strength, which would improve motor skills and prevent mobility problems from worsening with time and "would also continue to help her minimize injuries and pain while at school and home and be able to interact with others, especially playing with other children during school and able to participate in sports and activities with others." (*Ibid.*)

15. In a June 1, 2018 letter, Mark Rodriguez, CPO (certified prosthetist orthotist), stated that he had recently examined claimant and recommended to her mother that they follow up with physical therapist. He describes some of the difficulties claimant has with walking but states: "It is important to maintain ROM [range of motion] of the lower extremities to facilitate safe independent ambulation." (Exhibit E.)

16. Exhibit G is an August 13, 2018 letter from pediatric neurologist Megan M. Languille, M.D., explaining that in 2016 claimant came under her care "due to delays in her development." Dr. Languille explains that her diagnosis of cerebral palsy is based on findings from physical examination and "the non-progressive nature of her symptoms." She observes that: "Vision and hearing issues can also be seen in children with cerebral palsy" and concludes: "[Claimant] has continued to be followed at orthopedics clinic and wears leg braces. She also continues with physical therapy sessions to help work on her ongoing issues with balance and mobility."

17. The vision issues mentioned by Dr. Languille are discussed in other records. For instance, claimant was examined by Rui Zhang, M.D. in August and October 2017 and again in January 2018 because of "eye twitching." (Exhibit 7.) The doctor assessed exotropia (misalignment of the eyes, so that they turn outward), nystagmus (repetitive, uncontrolled eye movement), amblyopia (lazy eye), for which an eye patch was recommended twice per day, microcornea (underdeveloped cornea), and myopia or nearsightedness with astigmatism (blurred vision due to irregularly shaped cornea or lens), for which claimant wore corrective lenses. Dr. Zhang noted that all of these conditions were stable.

LEGAL CONCLUSIONS

1. As claimant is the party seeking to change the status quo, she bears the burden of proof. The evidentiary standard is proof by a preponderance of the evidence. (Evid. Code, §§ 115 and 500.) Claimant did not meet that burden in this case.

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2. Service agencies implement the Lanterman Act, Welfare and Institutions Code section 4500 et seq. They do so by providing "services and supports" (Welf. & Inst. Code, § 4501) authorized by the Lanterman Act. The law mandates that service agencies are to provide an "array of services and supports . . . regardless of age or degree of disability . . ." (*Ibid.*)

3. The phrase just quoted, "regardless of . . . degree of disability," should be interpreted as "regardless of how severe the degree of disability," in light of Welfare and Institutions Code section 4512, subdivisions (a) and (1)(1). Subdivision (a) states that a developmental disability, including cerebral palsy, must be "a substantial disability," substantially disabling, for the person seeking services:

(a) "Developmental disability" means 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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism.

Subdivision (j)(1) states that to qualify as substantial, a disability must meet at least three criteria:

(j)(1) "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:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

4. Claimant is not substantially disabled from self-care, under Welfare and Institutions Code section 4512, subdivision (j)(1)(A). She can care for herself in several ways, able to eat and drink with some independence, for instance, though she might spill food, as children do. (Finding 7D.) As parents noted, claimant falls short in self-care in certain ways. (Finding 8.) In general, however, claimant is more self-sufficient than not, with allowance made for her young age.

5. Claimant has definite delays and deficits in language, especially expressive. (Finding 10.) Claimant meets the criterion for substantial disability under Welfare and Institutions Code section 4512, subdivision (j)(1)(B).

6. Claimant is not substantially disabled from learning, under Welfare and Institutions Code section 4512, subdivision (j)(1)(C). She has not learned as much as many peers, but she is making good progress. Allowance made for delays due to deafness, now remedied to some extent with implants, claimant is able to learn, as her meeting IEP goals indicates. (Finding 7E.)

7. Claimant is substantially disabled from mobility, under Welfare and Institutions Code section 4512, subdivision (j)(1)(D). Her mobility problems have been mitigated by DAFO's and physical therapy, but she continues to fall frequently and she cannot walk for long. (Finding 9.)

8. Claimant is not substantially disabled from self-direction under Welfare and Institutions Code section 4512, subdivision (j)(1)(E). She is able to do many activities without direction from others, and relies on direction from adults regarding some activities, but only as one might expect of a six-year-old. (Finding 7, particularly 7C and D.)

9. Claimant's young age makes inapplicable the criteria in Welfare and Institutions Code section 4512, subdivisions (j)(1)(F) (capacity for independent living) and (j)(1)(G) (economic self-sufficiency).

10. By all accounts, claimant is a bright and resourceful person who is slowly but steadily overcoming many of the obstacles to her development. Even in an area of substantial disability that has been extensively examined and treated, her language deficits and delays, she is improving. Some obstacles she may be unlikely to overcome, such as the weakness in her lower extremities, attributable to cerebral palsy. Mobility is a second area in which claimant has substantial disability. But even in this area, claimant

has advanced since parents have been successful in acquiring resources for her, notably leg braces. Weighing all the evidence, and considering that claimant meets two, not three, of the criteria for

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substantial disability in Welfare and Institutions Code section 4512, subdivisions (1), her disability is not substantial within the meaning of the statute. Claimant is ineligible for service agency services at this time.

ORDER

Claimant's appeal is denied.

DATED:

THOMAS Y. LUCERO

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.