

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

S.G.,

Claimant,

v.

SOUTH CENTRAL LOS ANGELES

REGIONAL CENTER,

Service Agency.

OAH Case No. 2012030306

DECISION

Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on May 1, 2012, in Los Angeles, California.

Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented the South Central Los Angeles Regional Center (Service Agency).

Cori Swaner, M.S.W., represented P.S. (Claimant).¹ Claimant's mother was present; Claimant was not present.

The parties submitted the matter for decision on May 1, 2012.

STATEMENT OF THE CASE

Claimant contends he has a developmental disability and therefore qualifies for services from the Service Agency.

¹ Initials identify Claimant to preserve Claimant's privacy.

The Service Agency contends Claimant does not have a developmental disability, as defined in the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), and therefore is not eligible for services.

FACTUAL FINDINGS

1. Claimant applied to the Service Agency, claiming he has a developmental disability. On January 23, 2012, the Service Agency denied Claimant's application, asserting that he does not meet the definition of developmental disability in the Lanterman Act. In its denial letter of the same date, the Service Agency stated that Claimant "does not have a substantial disability found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation."

2. Through his representative, Claimant appealed the Service Agency's denial on February 1, 2012.

3. Claimant is 11 years old. He lives with his parents and siblings. He receives special education services from the Los Angeles Unified School District. An undated and incomplete special education Individual Education Plan offered at hearing did not establish the diagnosis(es) that make(s) him special education eligible; however, the Service Agency's social assessment, dated September 21, 2011, stated that his special education eligibility was "due to a specific learning disability." He is in the fifth grade. He is teased and bullied by the other special education students.

4. In June 2011, Claimant attempted suicide at school by choking himself. Claimant tried to kill himself because of the teasing and bullying he experienced at school. Claimant feels a sense of worthlessness. He was hospitalized after the suicide attempt at Kedren Psychiatric Hospital from June 9 to June 22, 2011. His discharge diagnoses were mood disorder, not otherwise specified; impulsive disorder; and learning disorder. Claimant currently takes Risperdal.

5. According to his representative at hearing, who meets with Claimant one time per week at school, Claimant's feelings are easily hurt. He has limited coping skills and has difficulty controlling his temper.

6. According to Claimant's mother, Claimant needs significant help at school. He cannot learn. He is extremely forgetful at home and at school. He must be told where his clothes are when they are within his visual range. He cannot ask for things properly; he has great difficulty expressing himself. He cannot use a computer. Even though he has received psychiatric services for the past four years, his problems continue. For this reason, Claimant's mother does not believe his problems are solely psychiatric in nature. Claimant is hyperactive. He is playful and loving.

7. Claimant's mother is distraught by Claimant's poor learning skills and his suicide attempt. She testified with great emotion. She explained that the other special education students tease and bully Claimant for not being able to read or keep up with his schoolwork. She seeks services for Claimant to better his academic skills and improve his overall condition.

8. Roberto De Candia, Ph.D., evaluated Claimant on November 8, 2011, at the request of the Service Agency. De Candia is a licensed clinical psychologist who performs psychological evaluations for the Service Agency as an independent consultant.

9. At the time of De Candia's evaluation, Claimant was 10 years old. De Candia administered the Peabody Picture Vocabulary Test 4 (Peabody 4), the Wide Range Achievement Test, Revision 4 (WRAT 4), the Leiter-R, and the Vineland Adaptive Behavior Scales (Vineland). Claimant's scores on all tests were low.

10. On the Peabody 4, Claimant scored a standard of score of 70 and a receptive language ability equivalent to a 6-year, 5-month-old child. De Candia wrote,

"As compared to others of the same age, these scores fall significantly below the average range."

11. On the WRAT 4, Claimant scored a 61 word reading standard score (a kindergarten grade equivalency), and a 79 math computation standard score (a third grade equivalency). De Candia described these scores as "very low scores."

12. On the Leiter-R, Claimant achieved a 69 fluid reasoning intelligence quotient (IQ), and a 76 brief IQ. De Candia opined that his fluid reasoning IQ "fell significantly below the average range" and Claimant's brief IQ "fell within the borderline range of intellectual ability." De Candia noted that the scatter between the two scores (the seven point difference) was somewhat significant in that Claimant may have greater cognitive ability than the testing demonstrated. In his opinion, the scatter was likely due to his lack of attention. He wrote, "it was my impression that perhaps difficulties with attention and concentration did interfere with his overall performance. In any case, the overall scores do rule out the presence of any cognitive delay at this time. However, I remain uncertain as to whether or not the scores obtained herein represent his best performance." De Candia explained that Claimant's psychiatric condition, his hyperactivity, and the recency of his suicide attempt and hospitalization, might have affected his intellectual performance. De Candia further explained that when considering the diagnoses of mild mental retardation and borderline intellectual functioning, he opined that borderline intellectual functioning was the more appropriate diagnosis precisely because he could not determine with certainty whether Claimant's psychiatric problems and hyperactivity depressed his cognitive abilities and thus, his intellectual scores.

13. On the Vineland, Claimant achieved the following standard scores: communication, 38; daily living skills, 63; and socialization, 63. The scores translate to the following age levels, respectively: three years, two months; six years, 10 months; and

five years, five months. De Candia described these scores as “significant deficits” and “mild adaptive deficits.” He did not explain these contradictory descriptions.

14. Based on his evaluation, that included interviewing Claimant’s mother, De Candia reported that Claimant can dress and undress himself, tie his shoes, is completely toilet trained, and can feed himself. He can make a sandwich and can use the microwave oven. He is able to help with minor chores; he occasionally helps with cleaning the house. He understands the value of coins. He can answer the telephone and take messages. He can initiate a telephone call to his father. He is affectionate with family. He is generally friendly.

15. De Candia’s description of Claimant was not completely accurate. While he found that Claimant can use a microwave oven, the Service Agency’s social assessment (noted in Factual Finding 3), stated that he cannot. De Candia also noted that Claimant has friends and a best friend at school. In light of Claimant’s mother’s testimony, that Claimant is teased and bullied, it was not established that he has friends (although it is noted that Claimant did not dispute the descriptions of Claimant’s abilities within De Candia’s report).

16(a). De Candia diagnosed Claimant as follows:

Axis I: 799.9 Diagnosis Deferred to treating Psychiatrist 315.32 Mixed Receptive/Expressive Language Disorder

Axis II: V62.89 Borderline Intellectual Functioning

16(b). The diagnostic numbering in De Candia’s diagnoses comes from the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). The DSM-IV-TR is the current publication of the American Psychiatric Association that contains the diagnostic criteria for a number of conditions, including borderline intellectual functioning and mental retardation. It is widely accepted by

psychologists as containing the professional standards and criteria for diagnosing conditions like mental retardation. (See Gov. Code, § 11425.50, subd. (c).)

17. De Candia opined that Claimant's functioning is difficult to determine because his psychiatric disabilities might be depressing his cognitive skills. He noted that Claimant was tested only five months after his suicide attempt and subsequent hospitalization. De Candia opined that Claimant's scores could qualify Claimant for a diagnosis of mild mental retardation, but for the effects of his psychiatric condition. As he could not determine with certainty whether Claimant's mental health has impacted his cognitive functioning, De Candia recommended that Claimant be retested in three years, and after his psychiatric health stabilizes. There was no expert testimony or written opinion to the contrary. Claimant did not specifically contest De Candia's opinions, other than to argue that waiting three years to be retested appeared excessive. De Candia's explanation regarding the possible effect of Claimant's psychiatric disorders on his cognitive functioning was persuasive. That is, the possibility that Claimant's psychiatric disorders depress his cognitive functioning cannot be ruled out.

18. As De Candia utilized the DSM-IV-TR in his diagnosis of Claimant, and the ALJ required an objective definition of mental retardation to assess whether Claimant has mental retardation or a condition closely related to mental retardation, the ALJ takes official notice of the DSM-IV-TR.

19. According to the DSM-IV-TR, "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety The onset must occur before age 18 years General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment

Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”

20. There was no evidence or argument that Claimant had autism, cerebral palsy, or epilepsy. The parties focused their arguments on whether Claimant had mild mental retardation or a condition closely related to mental retardation.

LEGAL CONCLUSIONS

1. Cause exists to deny Claimant’s appeal, as set forth in Factual Findings 1-20, and Legal Conclusions 2-9.

2. Welfare and Institutions Code section 4512 states in part:

(a) “Developmental disability” means a disability that originates before an individual attains age 18 years, 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 mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

[¶] . . . [¶]

(l) “Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

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

3. California Code of Regulations, title 17, section 54001 states in pertinent part:

(a) "Substantial disability" means:

- (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
- (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
 - (A) Receptive and expressive language;
 - (B) Learning;
 - (C) Self-care;
 - (D) Mobility;
 - (E) Self-direction;
 - (F) Capacity for independent living;
 - (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of

similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

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

4. California Code of Regulations, title 17, section 54002 states, "[c]ognitive' . . . means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience."

5. Due to his disabilities, Claimant experiences significant functional limitations in receptive and expressive language, learning, self-care, and self-direction. Thus, he is substantially disabled by his disabilities. (Welf. & Inst. Code, § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001.) Claimant, however, has no diagnosis of mental retardation, autism, cerebral palsy, or epilepsy.

6. Claimant implicitly argued that he has mild mental retardation. De Candia conceded that Claimant's test results might have warranted a diagnosis of mild mental retardation, but for his psychiatric conditions, which De Candia believes are interfering with his intelligence testing performance. De Candia's undisputed opinions were fully credited. Claimant's low test results present a child with significant deficits. The evidence, however, did not establish that those deficits were the result of mental retardation or a condition closely related to mental retardation.

7. In considering whether Claimant has mental retardation or a condition closely related to mental retardation, Claimant's adaptive skills were closely assessed. His Vineland scores were low, but Claimant's mother's description of Claimant's daily living skills was not that of a person with mental retardation or a condition closely

related to mental retardation. She described Claimant as having emotional and psychological problems, as well as problems learning at school. These problems appear to emanate from the emotional trauma he has endured at school from peer bullying and teasing and his frustration at being unable to keep pace academically. Moreover, when describing Claimant's general abilities, Claimant's mother described a child who largely knew how to accomplish his daily living tasks, but needed some prompting to initiate them. There was no evidence that he did not understand how or why to complete such tasks. There was insufficient evidence to establish that Claimant has a cognitive delay, as the pertinent regulations define "cognitive." (Cal. Code Regs., tit. 17, § 54002.)

8. Claimant's mother's testimony was fully credited, but with no evidence or argument to dispute De Candia's opinions, the evidence of Claimant's abilities and deficits was insufficient to establish that Claimant has mental retardation or a condition closely related to mental retardation. It was also not established that he requires treatment like persons with mental retardation.

9. With the above and no evidence that Claimant has autism, cerebral palsy, or epilepsy, Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied.

Dated: May 11, 2012

DANIEL JUAREZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.