

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2015040701

DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on June 7, 2016, in Pomona, California.

Hortensia Tafoya, Fair Hearing Representative, appeared and represented the San Gabriel/Pomona Regional Center (the Service Agency).

Claimant's mother¹ appeared and represented claimant as her authorized representative.

The record was held open for claimant to submit a letter written in Spanish, a translation of the letter, and an Individualized Education Program (IEP) report by June 10, 2016, with any objections to be filed by June 15, 2016. Claimant served an IEP report on June 10, 2016, and filed it on June 13, 2016; claimant did not file or serve a letter or

¹ Claimant and her family members are identified by title, not by name, in order to protect their privacy.

translation of a letter. The IEP report was marked for identification as Exhibit D. On June 14, 2016, the Service Agency filed and served a written response to the IEP report, in English and in Spanish, which was marked collectively as Exhibit 18. The Service Agency implied that the IEP report was irrelevant, arguing that the IEP report does not support claimant's request for regional center services. Although the IEP was filed untimely, claimant served the document on the Service Agency within the time prescribed. The Service Agency's objection was overruled, and Exhibit D was admitted into evidence.

The matter was submitted for decision on June 15, 2016.

STATEMENT OF ISSUES

The issue in this case is whether claimant is eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

EVIDENCE CONSIDERED

Documents: Service Agency's Exhibits 1-17 (Exhibit 18 was reviewed, but not considered as evidence); Claimant's Exhibits A-D.

Testimony: claimant's mother.

FACTUAL FINDINGS

1. The Service Agency issued a Notice of Proposed Action on March 24, 2015, determining claimant was ineligible for regional center services and proposing to close her case. On April 7, 2015, claimant filed a timely Request for Fair Hearing.

2. Claimant is a four-year-old girl who currently lives at home with her mother and her older sister, a 12-year-old girl with Attention Deficit Hyperactivity Disorder. Claimant was born prematurely on April 13, 2012, at 25 weeks gestation with a birth-weight of 1 pound, 12.9 ounces. Her mother's pregnancy was complicated by

gestational diabetes, bleeding throughout the pregnancy, and the spontaneous rupture of membranes at 24-4/7 weeks' gestation. On April 13, 2012, claimant's mother developed chorioamnionitis and labor was induced. Claimant was diagnosed at birth with Respiratory Distress Syndrome (RSD) and was hospitalized for two months. She reportedly experienced three seizures while in the neonatal intensive care unit. Claimant also experienced anemia, an accelerated heart rate, and heart murmur. On June 6, 2012, claimant was discharged from the hospital in stable physical condition.

3. The discharging hospital referred claimant to the Service Agency about regional center services. On August 7, 2012, an occupational therapist evaluated claimant in reference to her eligibility for services. Claimant demonstrated "age appropriate skills, normal tone, and appropriate reflexes" and "did not demonstrate any need . . . for therapeutic interventions." (Ex. 8.) The following day, August 8, 2012, the Service Agency conducted an Early Intervention Interdisciplinary Team conference, meeting claimant and her mother in their home in El Monte. Based on claimant's severe prematurity at birth, the Service Agency funded Early Start intervention services. Claimant received in-home infant specialist services and educational programming.

4. By December 2012, claimant was demonstrating delays in head control and motor skills. On April 30, 2013, a different occupational therapist examined claimant to assess her motor skills. The therapist recommended that claimant continue with educational infant programming, consider occupational therapy services, and continue specialty medical care.

5. Beginning in July 2013, the Service Agency referred claimant to TheraPeds Inc. for weekly occupational therapy services. Claimant demonstrated improvement in her motor skills. However, in a progress report dated November 13, 2013, claimant was observed to require "maximum verbal encouragement and coaxing for reorientation to

activities” and to “[throw] toys when she does not want to play with them and has difficulty when asked to retrieve the toy.” (Ex. 10.)

6. By the age of 25 months, claimant’s conduct was causing concerns about her speech and behavior. Claimant was “too aggressive” and was prone to “hit, bite, and scream when she does not easily get her way.” (Ex. 12.)

7. On May 30, 2014, the Service Agency referred claimant to My World Speech Therapy for a speech and language evaluation. The Preschool Language Scale, 4th edition (PLS-4) and the Rossetti, Infant-Toddler Language Scale were used in the evaluation process. Claimant exhibited delays in both receptive and expressive language skills. Based on the recommendations of the evaluating therapist, claimant began receiving weekly speech-language therapy on September 9, 2014.

8. On June 7, 2014, another occupational therapist evaluated claimant and concluded: “[Claimant] is performing just one month below her adjusted age of 22 months. She appears to demonstrate age-appropriate fine and gross motor skills during her therapy sessions. She does demonstrate with mild-moderate delays with self-help/feeding skills, as well as difficulty with organization of behavior, more specifically with attention to tasks.” (Ex. 12.)

9. On March 13, 2015, claimant began receiving in-home mental health services from Enki Youth and Family Services (Enki). At the time of her admission, claimant exhibited the following behaviors:

Sensory seeking behaviors such as jumping off/into things, extreme impulsivity, smells/touches food before eating, does not tolerate different foods/clothing textures, increased pain tolerance, poor affective regulation, does not mind extreme temperature changes for example she does not feel cold. Finds being contact with water soothing, no symbolic play,

she tends to be fascinated with parts of objects, lines toys instead of playing with them, poor coordination, inappropriate affect and poor social skills, no reciprocity in interactions since she was a baby. [Claimant] was given a diagnosis of Childhood emotional Disorder, unspecified and Phonological Disorder with a consideration of Autism Spectrum disorder. (Sic.)

(Ex. A.)

10. Claimant's Master Treatment Plan at Enki is administered by Maribel Gonzalez M.D. The identified long-term goals are for claimant "to behave and not hit" and not to be "so violent." (Ex. B.) Other noted objectives include decreasing hyperactivity and impulsivity, and improving attention and concentration. On May 31, 2016, Dr. Gonzalez prescribed medication for claimant to treat hyperactivity and hypertension.

11. Claimant has never been diagnosed with autism, epilepsy, cerebral palsy, or an intellectual disability. Her mother testified that claimant is uncontrollable, unresponsive to commands, and dangerous to herself and others. Claimant does not play with other children and is prone to fighting. Claimant broke her clavicle while jumping because she is unable to judge distances or dangers. Claimant's mother cannot keep knives in drawers because claimant has used a knife to strike her sister. Claimant has daily delusions, asking, "Who is that?" when no one is in the room, or shushing her mother to listen while no sound is audible. She has violent reactions to noises, such as blenders, vacuum cleaners, or outdoor use of leaf-blowers. Claimant is unable to focus, does not read, and does not listen when her mother reads aloud.

12. The mother testified that, two years ago, claimant began acting like a dog. She continues to walk around the house on her hands and feet, as if a four-legged

animal. She runs with her arms in dog-paddle position. She barks at people, tries to lick their faces or bite their legs, and puts her plate of food on the floor to eat in the same manner as a dog. She attacks or violently reacts to small animals, pulling their tails or stepping on them. Claimant's mother bought a fish tank for the house, hoping the water might have a calming effect on claimant, but claimant took the fish from the tank and ate them.

13. Anticipating claimant's third birthday, her mother sought continuing regional center services after the age of three years when Early Start intervention was scheduled to expire. Regional centers refer to the diagnostic criteria in Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), to determine eligibility under the Lanterman Act.

14. On January 22, 2015, claimant underwent a psychological evaluation to assess whether claimant had a developmental disability. Thomas Carillo Ph.D., a clinical psychologist, interviewed claimant and her mother for historical data, and performed clinical observations. The psychologist performed the following mental status examinations:

(A) To measure claimant's general intellectual ability, the psychologist administered the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV). Claimant scored consistently within the normal range. Overall test results yielded a Verbal Intelligence Quotient (IQ) score of 95, a Visual Spatial IQ composite score of 86, a Working Memory IQ score of 103 and a Full-Scale IQ score of 93. The results suggested claimant's cognitive abilities were within the normal range.

(B) To measure claimant's adaptive functioning, the psychologist used the Vineland Adaptive Behavior Scales, Second Edition (VABS-II). Her overall adaptive abilities scored within a "borderline range of delay" with an Adaptive Behavior Composite of 71. (Ex. 4.)

(C) The psychologist noted “some worrisome behaviors . . . that are sometimes seen in autism.” (Ex. 4.) He observed that claimant displayed adaptive delays in communication, social, and adaptive functioning, and “some autistic like behaviors.” Accordingly, to screen claimant for Autism Spectrum Disorder, the psychologist administered the Gilliam Autism Rating Scale – Second Edition. Claimant received an Autism Index Score of 66, within “the unlikely probability of an Autism Spectrum Disorder.” (Ex. 4.)

(D) The psychologist considered the diagnostic criteria for Autism Spectrum Disorder set forth in the DSM-5. The psychologist concluded that claimant did not meet the criteria for Autism Spectrum Disorder, diagnosing her instead with a Language Disorder, as follows:

i. Claimant did not exhibit persistent deficits in social communication and social interaction across multiple contexts because she was able to engage in back-and-forth conversation, albeit in “impoverished language.” Moreover, claimant displayed good and meaningful eye contact and had a wide range of facial expressions. The psychologist observed that claimant will seek out others and engage in play activity.

ii. Claimant did not exhibit sufficient restricted, repetitive patterns of behavior, interests, or activities. She did not display any inflexible adherence to a routine or ritual and she was able to easily transition from one activity to another. She did not have any fixated interests of abnormal intensity for unusual objects. She did not display any sensory issues to the psychologist.

15. On March 16, 2015, the Service Agency held an interdisciplinary team conference to determine claimant’s eligibility for continued services after the age of three years. The Service Agency determined that claimant had no developmental disability as defined in the Lanterman Act.

16. On May 12, 2016, Deborah Langenbacher, Ph.D, and Judith D. Aguilera, M.A., CCC-SLP, performed a subsequent assessment as part of the Service Agency's Autism Clinic. To carry out the assessment process, the assessment team interviewed the mother, observed claimant while she played with toys, reviewed prior reports and records, and administered further testing using the Autism Diagnostic Observation Schedule -2 Module 1 (ADOS-2), the Childhood Autism Rating Scale-2ST (CARS-2ST), and the VABS-II. In their assessment report, the assessment team noted, "Overall [claimant] scored far below the threshold for [Autism Spectrum Disorder] or Autism." (Ex. 16.) The assessment team concluded that claimant did not meet the criteria for a diagnosis of Autism Spectrum Disorder and that all indications were consistent with the prior diagnosis of Language Disorder. The team noted claimant's disruptive behaviors of aggression and tantrums.

17. On June 10, 2016, claimant's mother attended a meeting with claimant's school district regarding claimant's eligibility for special education programming. The IEP meeting notes reflect that claimant's behaviors were not indicative of a child with Autism Spectrum Disorder. The IEP team observed the dog-like behaviors described by claimant's mother in her testimony, as described at Factual Finding 12, and characterized the behavior as "odd/atypical." (Ex. D.) They noted that claimant exhibits disruptive behaviors of aggression and tantrums, a high threshold for pain, and has difficulty staying asleep at night. The team recommended specialized academic instruction and proposed specialized academic instruction, speech language therapy services, and occupational therapy.

18. Claimant's mother testified that she is unable to safely take claimant out into public areas. According to the minutes from a school district Multi-Disciplinary Team (MDT) Meeting, claimant has tantrums, screams uncontrollably, runs into the street, throws herself on the floor, and has thrown her shoes at people. The MDT

minutes note, "Psychiatrist suspects autism (high functioning), lacks self-regulatory behaviors, seems to have delayed processing." (Ex. A.)

19. Claimant is paid Supplemental Security Income (SSI) and receives Medi-Cal benefits. Her mother receives child support (not in relation to claimant) and food stamps. Her mother has attempted to work at home as a seamstress, but providing child care has been too demanding and disruptive to work in steady employment. Claimant's biological father does not share in child care responsibilities and reportedly had unspecified psychiatric disorders. Claimant's mother relies on neighbors to occasionally assist in child care.

LEGAL CONCLUSIONS

1. Because claimant seeks to establish eligibility for services, the burden is on claimant to demonstrate that the Service Agency's proposed decision is incorrect and that claimant is entitled to the requested benefits and services. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156.) At any point, a failure to satisfy a requirement for eligibility by a preponderance of the evidence will result in a conclusion of ineligibility. (Evid. Code, § 115.)

2. In order to be eligible for regional center services, claimant must have a developmental disability. (Welf. & Inst. Code, § 4512, subd. (a).) To establish that she has a "developmental disability," claimant must first prove that she suffers from a qualifying disability. Certain conditions are expressly excluded from the definition of a developmental disability. Specifically, conditions that are solely physical in nature do not qualify. (Welf. & Inst. Code, § 4512, subd. (a).) Also, psychiatric disorders alone and learning disabilities alone are not qualifying conditions. (Cal. Code. Regs., tit. 17, § 54000.) However, the regulations do not deny services to a claimant with a learning disability or psychiatric disorder, so long as the claimant can also establish a qualifying

condition under the Lanterman Act. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462.)

3. If claimant suffers from a qualifying disability, the evidence must then show that the condition meets each of the following elements:

(A) The disability originated before claimant attained age 18;

(B) The disability is likely to continue indefinitely, and

(C) The disability constitutes a substantial disability for claimant.

(Cal. Code Regs., tit. 17, § 54000, subd. (a).)

4. A developmental disability is presumed with evidence of any of the following four diagnoses: intellectual disability, cerebral palsy, epilepsy, or autism. (Welf. & Inst. Code, § 4512, subd. (a).) In this case, no medical evidence was presented to show that claimant has been diagnosed with any of these presumed grounds for eligibility. Two psychological evaluations expressly rule out a diagnosis of Autism Spectrum Disorder. Claimant's cognitive functioning scored in the low average range and she did not exhibit behaviors that meet the criteria in the DSM-5 for autism or Autism Spectrum Disorder. The evidence shows that claimant was diagnosed with a Language Disorder and that she qualified for special education services on the basis of SLI, neither of which is conclusive evidence of eligibility.

5. Claimant may nonetheless qualify under a fifth category in two ways: (a) if she has a disabling condition closely related to intellectual disability or (b) if she has a disabling condition that requires treatment similar to that required for individuals with intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) This alternate category of eligibility is commonly referred to as the "fifth category." Fifth category eligibility is broad, encompassing unspecified or undiagnosed conditions and disorders. However, this broad language is not intended to allow unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average

functioning and impaired adaptive behavior who would benefit from regional center services. Under the Lanterman Act, the criterion is not whether someone would benefit; rather, it is whether a claimant's condition *requires* regional center services.

6. Establishing eligibility under the fifth category does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability (e.g., reliance on IQ scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on her performance renders her like a person with intellectual disability.

7. In this case, the evidence tends to show that claimant suffers from a disabling condition causing delays in communication, social, and adaptive functioning. The Service Agency's psychiatrist described claimant's behaviors as worrisome and autistic-like. (Factual Finding 14(C).) Her conduct has raised suspicions of autism. (Factual Finding 17.) However, there is no competent medical evidence to show that claimant's condition is closely related to intellectual disability or that her unspecified condition requires treatment similar to that required for individuals with intellectual disability.

8. Claimant's circumstance bears some similarities to the facts in the case of *Samantha C. v. Department of Developmental Services, supra*, 185 Cal.App.4th 1462. In the *Samantha C.* case, the claimant was born prematurely and with oxygen deprivation. During the process of requesting regional center services, the claimant was given cognitive tests, and scored in the average range. She functioned adequately in daily living and social skills. She was eligible for special education services because she had deficits in auditory processing, language, speech and memory. The claimant received SSI disability benefits and qualified for services from the Department of Rehabilitation.

9. In this case, claimant was also born prematurely, after a gestation fraught with complications, and with a diagnosis at birth of RSD. She experienced three seizures within the first two months of her life. Throughout her life, claimant has exhibited tantrums and abnormally aggressive behaviors, including hitting, biting, and screaming when she does not get her way and using a knife to strike her sister. She has exhibited poor social skills and a failure to reciprocate in interactions. She receives SSI disability benefits and receives special education services based on deficits in speech and language.

10. However, in the case of *Samantha C.*, the claimant presented expert testimony to show that the claimant had the same treatment needs as an individual with intellectual disability. The expert "testified at great length that her clients with [intellectual disability] and with fifth category eligibility both needed many of the same kinds of treatment" and that the claimant in *Samantha C.* needed all of the same types of treatment. (*Samantha C. v. Department of Developmental Services, supra.*, 185 Cal.App.4th at 1493.)

11. In this case, the evidence shows that claimant has received treatment in speech-language therapy, occupational therapy, special education services, and medication for hyperactivity and hypertension; but claimant has failed to present reliable medical evidence to establish that these therapies are similar to those used to treat children with intellectual disability.

12. Accordingly, the evidence is insufficient to show that claimant has a qualifying disability, resulting in a conclusion of ineligibility without the need to examine whether the condition is likely to continue indefinitely or whether the condition is a substantial disability. As claimant matures, she may learn to adapt or further evaluations may provide clarity about her condition. In the latter case, claimant is not barred from seeking regional center services at a later date. However, claimant has failed to meet her

burden to show by a preponderance of the evidence that she currently has a developmental disability under Welfare and Institutions Code section 4512, subdivision (a). Accordingly, claimant is ineligible for regional center services under the Lanterman Act.

ORDER

Claimant's appeal is denied without prejudice.

DATED: June 27, 2016

MATTHEW GOLDSBY
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.