

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**NORTH LOS ANGELES COUNTY REGIONAL CENTER,**

**Service Agency.**

**OAH Case no. 2021090445**

**DECISION**

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 19, 2021, by video and telephonic conference.

Catherine Peterson, Contract Officer, represented North Los Angeles County Regional Center (NLACRC or Service Agency). Claimant's foster mother (Foster Mother) represented Claimant.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 19, 2021.

Thereafter, on November 1, 2021, the ALJ ordered the record re-opened, so that he could obtain the parties' position on the receipt of exhibits not clearly received in evidence, and regarding the ALJ taking official notice of the OAH file for this case. The order provided that the parties had until the close of business on November 8, 2021, to respond.

On November 3, 2021, the Service Agency submitted a letter stating that it had no objection to the receipt of any of the exhibits. Claimant did not object to the receipt of any exhibits, and therefore all exhibits will be received in evidence, and the ALJ will take official notice of the OAH file in this case.

### **ISSUE PRESENTED**

Should Claimant's Lanterman Act eligibility be retroactive to September 9, 2020, (the day of his Early Start eligibility) instead of June 8, 2021?

### **EVIDENCE RELIED ON**

Exhibits 1 through 29; Exhibits A through D;<sup>1</sup> testimony of Margaret M. Swaine, M.D., Rachel Lovers, Elisa Hill, and Claimant's Foster Mother.

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<sup>1</sup> Exhibit D contains several documents. At times during the hearing it may have been referred to as exhibit C or C-1, but is relabeled here as exhibit D. Exhibit C is a copy of an unsigned court order.

## **SUMMARY OF THE CASE**

This is a somewhat unusual case, where Claimant was made eligible, well before his third birthday, for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.<sup>2</sup> Despite being made eligible before his second birthday, Claimant would have his date of eligibility backdated up to nine months. From her opening statement at the hearing, it is discerned that Foster Mother believes earlier eligibility will affect the stipend the child receives for his support.

The weight of the evidence does not support backdating the eligibility date, and to do so would be of questionable legality. Under the circumstances, the appeal will be denied.

## **FACTUAL FINDINGS**

### **The Parties and Jurisdiction**

1. Claimant is a boy who turned two years old on November 1, 2021. He suffered a serious head injury in June 2020, which necessitated emergency brain surgery. Thereafter, the Los Angeles County Department of Children's and Family Services (DCFS) placed him in foster care with a couple who live within the Service Agency's catchment area.

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<sup>2</sup> Further statutory citations are to the Welfare and Institutions Code unless otherwise noted.

2. After DCFS referred Claimant's case to NLACRC, the Service Agency made Claimant eligible to receive services under the California Early Intervention Services Act (Early Start), Government Code section 90000, et seq.<sup>3</sup> The Service Agency made Claimant eligible effective September 9, 2020. Thereafter, Foster Mother sought services under the Lanterman Act. Effective June 8, 2021, the Service Agency deemed Claimant eligible for services under the Lanterman Act.

3. Foster Mother filed a Fair Hearing Request (FHR) on September 13, 2021, along with an Early Start Complaint Investigation Request. In her FHR, Foster Mother stated that she had had Claimant in her care for approximately one year, and that he should have been eligible for P2—shorthand for the Lanterman Act eligibility earlier than June 8, 2021. Foster Mother wanted the date of his eligibility under the Lanterman Act backdated to reflect the date that medical records had been submitted to the Service Agency. The Early Start Complaint had a similar claim.

4. A hearing was set, and started, by ALJ Glynda Gomez on October 5, 2021. OAH file notes indicate the hearing could not be conducted that day, in part because of issues with the filing of exhibits, and because Foster Mother could not attend for the entire day. At that time the parties agreed to a continuance, and they agreed that the hearing was to proceed under the Lanterman Act, and not the Early Start program,

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<sup>3</sup> Federal law has established a program for discovering and treating infants and toddlers who suffer from some disability, or risk of disability; it is found at Part C of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1431, et. seq. The law provides funding to those states that choose to participate in the program. California is a participating state and provides assistance through the Early Start program. The regional centers provide Early Start services.

and thus the Early Start timelines for hearings did not control. The issue statement, above, comes from ALJ Gomez's notes in the OAH file system.

5. The hearing on October 18, 2021, ensued, all jurisdictional requirements having been met.

## **Claimant's Background**

6. On June 8, 2020, Claimant, then barely seven months old, was brought to the emergency room at Cedars Sinai Hospital by paramedics. Earlier that day, while Claimant was in the care of his godparents, he was found unresponsive after a nap. He had a seizure at the hospital. Examination revealed Claimant was suffering from a subdural hematoma. A craniotomy was performed, to evacuate the hematoma, and to place an epidural drain and intracranial pressure monitor.

7. Medical professionals at the hospital considered the injury to be suspicious, as it was of the type consistent with "shaken baby syndrome." Hospital staff contacted DCFS. The record is not clear as to the course of events that led to the Claimant's placement with Foster Mother, but as seen below, by August 4, 2020, DCFS had referred Claimant to the Service Agency. Claimant now resides with Foster Mother, her husband, and their four other children.

8. In early July 2020, an operation was performed at Cedars Sinai to install a Gastrostomy tube, commonly referred to as a G-tube, for feeding Claimant.<sup>4</sup>

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<sup>4</sup> An operative report, found in exhibit 4, indicates the procedure occurred July 2, 2020. The report appears to be dated July 9, 2020; most of the document is not readable.

## Early Start Eligibility

9. The Service Agency opened a case for Claimant on August 4, 2020, the day the Service Agency received a referral from DCFS. The case was assigned to service coordinator Veronica Bayer. Bayer took steps to obtain consent forms from Claimant's biological parent. Bayer also communicated with the DCFS social worker, and had some phone contact with Foster Mother. Bayer and other Service Agency staff took steps to fund an assessment of Claimant. On August 24, 2020, Bayer had a phone conversation with Foster Mother, and according to notes she made, Bayer explained the steps to obtaining Early Start eligibility. Foster Mother requested a wheelchair, and Bayer told her Early Start did not provide such equipment and that Foster Mother should speak to a pediatrician and the DCFS social worker.

10. The testimony of the Service Agency's witnesses indicated that when children under age three are referred to NLACRC, they are assessed for Early Start services, and not Lanterman Act services. Dr. Swaine testified that with very young children such as Claimant, it is difficult to establish whether a disability will be lifelong—her reading of the statutory requirement that the disability in question is expected to last indefinitely—which must be found for Lanterman Act eligibility.

11. On September 9, 2020, the Service Agency's clinical team found Claimant eligible for Early Start services because he was "high risk" for developmental delay.<sup>5</sup>

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<sup>5</sup> This is one of the three categories of eligibility for Early Start services, set out in Government Code section 95014, subdivision (a)(1) through (a)(3). Dr. Swaine therefore deemed Claimant to be at "high risk of having substantial developmental

This was just over one month after DCFS had made its referral, and within the 45-day timeline set out in California Code of Regulations, title 17 (CCR), section 52086, subdivision (a).

## **Events Subsequent to Early Start Eligibility**

12. Bayer held a planning meeting with Claimant’s biological mother on September 15, 2020, to develop an Individual Family Service Plan (IFSP) and the mother gave verbal consent to services.

13. Bayer had a phone conference with Foster Mother on September 25, 2020, regarding medical records from Dr. Gaw, a pediatrician who had treated Claimant, and according to Foster Mother, had diagnosed Claimant with epilepsy and cerebral palsy. Bayer told Foster Mother that Dr. Gaw’s report had not been attached to an email from Foster Mother. Bayer also explained that either or both diagnoses would need supporting documents, such as MRI films, and that a pediatric neurologist would be the best person to make diagnoses of epilepsy or cerebral palsy.

14. The ID notes—notes made into a consumer’s chart by Service Agency staff—show the efforts to obtain services for Claimant. Entries in the ID notes from early October 2020 indicate vendors were then in place, or were being put in place, to provide occupational therapy (OT), physical therapy (PT) and feeding. Another service, described as CD was in place as well.

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disability due to a combination of biomedical risk factors,” the definition found in section 95014, subdivision (a)(3).

15. On November 10, 2020, the DCFS social worker contacted Bayer, requesting that forms for a higher rate be signed; whether that was for a higher rate of service from DCFS or the Service Agency is no clear from the ID notes. Bayer consulted with a supervisor, and told the social worker that the forms couldn't be signed because they pertained to children over age three. On November 30, 2020, Bayer spoke with Foster Mother about the paperwork for "dual rate." Bayer told Foster Mother the paperwork was incorrect, and she had sent the correct information to the social worker.

16. On December 2, 2020, another IFSP meeting was held, and all services were continued. According to the ID note for that day, Claimant had been seen by a neurosurgeon in October, but did not have a diagnosis.

17. According to the ID notes, over the next several weeks, Bayer was in contact with various persons about Claimant's services. For example, in early February 2021, Foster Mother wanted to change the vendor of PT, and Bayer took steps to make that change. It appears that the transition was a slow one, as the purchase of services authorization was not ready until February 26, 2021. A March 31, 2021 ID note shows that scheduling PT sessions had been problematic for Foster Mom.

18. In late February 2021, Bayer received confirmation that Foster Mother had been designated by the Superior Court as Holder of Educational Rights for Claimant, which gave her further authority in obtaining services from various sources. Foster Mother told Bayer the biological mother's parental rights had been terminated. During this time period Bayer had tried to contact the biological mother, but could not because her phone was out of service.



19. (A) On March 2, 2021, Bayer received a report of an assessment of Claimant by the Cedars Sinai High Risk Clinic, exhibit 10, which showed Claimant was severely delayed in receptive and expressive communication, gross motor and fine motor skills. He was in the sixth percentile in his expressive communication score, less than the .01 percentile for receptive communication and gross motor, and his fine motor skills were at the first percentile. Cognitive, communication, and physical development showed similar low scores.

(B) A number of diagnoses were stated in the assessment report, including diffuse anoxic brain injury, epilepsy, global developmental delay, and H/O status epilepticus.

### **Lanterman Act Eligibility**

20. It appears from the ID notes that the first time that Bayer considered the notion of eligibility under the Lanterman Act was on March 31, 2021. Foster Mother had contacted her that day and asked how to obtain respite services. The note indicates nursing services were then being sought from California Children's Services (CCS).<sup>6</sup> The ID note indicates Bayer would review documentation to see if there was documentation about a diagnosis that would make Claimant "status 2" or Lanterman eligible and therefore eligible for respite services. (Ex. 21, p. 407.) Bayer told Foster Mother a specialist was needed to diagnose cerebral palsy, which can be an eligible condition under the Lanterman Act, and Foster Mother said the child had an upcoming appointment with a pediatric neurologist.

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<sup>6</sup> CCS is a program in the California Department of Health Care Services that can provide services to some regional center consumers.

21. On April 9, 2021, Foster Mother spoke to Bayer and reiterated her desire for respite care, noting that CCS was not providing a nurse. Bayer was going to obtain a neurological report from Cedar Sinai because Foster Mother told her they had made a diagnosis but had not communicated it to her.

22. On April 26, 2021, Foster Mother sent an email to Bayer, stating her desire for respite care and citing to the CCR rules regarding transition from Early Start to Lanterman Act services. Once again, they discussed the issue of Dr. Gaw's diagnosis of cerebral palsy, and the Service Agency's position that a specialist would need to make that diagnosis. On the next day, Bayer told Foster Mother that she would refer the case for Lanterman eligibility with the information available. On April 28, 2021, Bayer submitted the case for evaluation of eligibility under the Lanterman Act; Dr. Swaine acknowledged the submission on that day.

23. On May 5, 2021, the Service Agency received a letter from Cedars Sinai, dated April 26, 2021. The letter, signed by Tammy E. Yuen, M.D., stated Claimant was under her care for several diagnoses, including hypoxic brain injury and global developmental delay. The letter identifies Dr. Yuen as a member of Cedars Sinai's Division of Child Neurology/Pediatric Epilepsy.

24. Dr. Swaine reviewed several documents while considering the issue of eligibility under the Lanterman Act, and she wrote a medical summary on June 8, 2021. She testified that Dr. Yuen's letter, and specifically the diagnosis of global developmental delay, supported eligibility; the other documents did not. For example, Dr. Gaw had diagnosed cerebral palsy, but Dr. Swaine testified that such a diagnosis should be made by a specialist. The records she reviewed did not establish epilepsy. Claimant's history of status epilepticus is not a diagnosis of that malady.

25. On June 9, 2021, the clinical team determined Claimant was eligible for services under the Lanterman Act. Bayer informed Foster Mother of the determination on June 14, 2021. Written notice was given to the DCFS social worker on June 16, 2021.

### **Claimant's Contentions and Evidence**

26. Foster Mother pointed to several documents which she believes showed that Claimant was eligible for Lanterman Act services as early as September 9, 2020. One of those documents is an assessment report by a vendor, McRory Pediatric Services, Inc. The date of the assessment (an occupational therapy feeding assessment) is December 12, 2020. That report does not set forth a diagnosis but does show that Claimant had significant developmental delays that impacted safe eating and drinking, and it showed significant motor and sensory impairments.

27. Another McRory report, from an assessment for the need for durable medical equipment, was generated in late March 2021. The report states various diagnoses for Claimant, including developmental delay and cortical vision impairment, but the source of those diagnoses is not stated. As the report was written by an occupational therapist, it cannot be given the weight that a physician's diagnosis might carry.

28. Dr. Swaine acknowledged that she had seen, prior to the determination that Claimant was eligible for Early Start services, a provider evaluation report made by Every Child Achieves on August 28, 2020. That document shows the diagnosis or reason for referral to be shaken baby syndrome. Testing with the Developmental Assessment for Young Children-2 placed him in the first percentile, or less, in a number of areas including communication and, importantly, cognition.

29. Claimant points to records generated by Cedars Sinai after the surgery that show that Claimant had suffered from diffuse anoxic injury, and that his prognosis was "poor." (Ex. 18, p. 140.)

## **Other Matters**

30. Dr. Swaine was credible in her testimony. It is noted that she is highly qualified, having years of training, most notably a three-year fellowship in Developmental-Behavioral Pediatrics at UCLA.

31. Dr. Swaine testified that as severe as Claimant's injuries were, it would be difficult to say, soon after the injuries occurred, just how much recovery might be had, and thus it is difficult to perceive, at an early juncture, whether there will be lifelong disability. Dr. Swaine believed that it was proper to assess Claimant as at high risk of developmental delay, and to not promptly determine such would be a life-long issue. Dr. Swaine also testified a specialist should make a diagnosis of cerebral palsy or epilepsy. She did not perceive Dr. Gaw to be such a specialist.

32. As noted in Factual Finding 10, the Service Agency's general policy is to assess children under age three for Early Start rather than Lanterman Act services. The two schemes have significantly different eligibility criteria. At bottom, to obtain Early Start services a child must be significantly delayed in a number of areas or be at significant risk for developmental delay. Eligibility for Lanterman Act services essentially requires a diagnosis that places a person in one (or more) of five developmental disabilities that are recognized by the Lanterman Act. There are other requirements as well, described in Legal Conclusions 3 and 4.

33. The record indicates that information that might be relied upon by the team that makes eligibility decisions flows to the team through the case management

team. Dr. Swaine and others on the eligibility team are not updated with new reports as they come in, so until she was asked to consider Claimant for Lanterman Act eligibility, Dr. Swaine would not have seen documents such as the Cedars Sinai High Risk Clinic report. (Factual Finding 19.) It is noteworthy that Dr. Swaine and the eligibility team consider approximately 900 eligibility referrals per month, approximately 400 for Early Start and the balance for Lanterman Act eligibility.

34. The Service Agency witnesses testified credibly that the services provided Claimant during his Early Start period were substantially the same as those provided by the Service Agency since he was made eligible for Lanterman Act.

## **LEGAL CONCLUSIONS**

### **Jurisdiction**

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 5.

### **Legal Conclusions Pertaining to Eligibility Generally**

2. While Claimant has been made eligible under the Lanterman Act, the basic rules of eligibility should be reviewed here. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years of age, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . This 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.

This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in the CCR. CCR section 54000 sets out a definition of "developmental disability" which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of

generalized mental retardation, educational or psychosocial deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for intellectual disability.

4. Section 4512, subdivision (f), provides:

“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.

5. Nothing in the foregoing, or in other parts of the Lanterman Act, bars assessment for eligibility before age three.

6. The Service Agency, along with the other 20 regional centers in California administer both the Early Start program<sup>7</sup> and the Lanterman Act. While a child under three years of age may be eligible for Lanterman Act services, as Claimant is now, there was no legal requirement that he had to be assessed for Lanterman Act eligibility rather than Early Start at the time of the initial referral. That the Service Agency followed its usual practice of assessing a nine-month-old-infant for Early Start appears a reasonable choice.

7. It has not been established that Claimant was eligible for Lanterman Act services in September 2020. Dr. Swaine's testimony on the need to discern long-term disability in order to bring a consumer under the Lanterman Act umbrella is credited, as is her testimony that cerebral palsy should be diagnosed by a specialist. While it appeared that Claimant's prognosis was indeed poor, that alone did not bring him within the narrow eligibility criteria, and Bayer told Foster Mother of the need for a specialist to render a diagnosis. Once Foster Mother requested eligibility under the Lanterman Act, the Service Agency made him eligible, within appropriate timelines, i.e., 120 days of the request to consider Claimant eligible under the Lanterman Act. (§ 4643, subd. (a).)

8. (A) The ALJ's jurisdiction in a fair hearing is fairly broad. Section 4706, subdivision (a), provides that "all issues concerning the rights of persons with

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<sup>7</sup> See Government Code, section 95016, subdivision (b).



developmental disabilities to receive services under this division shall be decided under this chapter, including those issues relating to fair hearings, . . . ”

(B) Acknowledging this broad grant of authority, the ALJ does not believe he has the authority to backdate a determination of eligibility, especially where the record indicates the Service Agency provided similar services under both Early Start and the Lanterman Act. It should be noted that in cases where the issue is whether or not a person is eligible to receive services, a determination of eligibility is not made retroactive; it runs prospective from the time of the decision in the case.

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9. Because it was not established Claimant was eligible, or could be deemed eligible for services under the Lanterman Act in September 2020, and because of the lack of clear jurisdiction to make the requested order, Claimant's appeal is denied.

## **ORDER**

Claimant's appeal is denied, and his determination of eligibility for services under the Lanterman Act will not be backdated.

DATE:

JOSEPH D. MONTOYA  
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.