

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL  
CENTER,

Service Agency.

OAH No. 2019020251

DECISION

The hearing in the above-captioned matter was held on March 19, 2019, in Alhambra, California, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Claimant was represented by his mother, hereafter Mom.<sup>1</sup> The Service Agency, Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Jacob Romero, Fair Hearing Coordinator.

Anna Topuzoglo acted as interpreter for Mom.

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date.

ISSUE PRESENTED

Is Claimant eligible for services from the Service Agency on the grounds that he suffers from autism spectrum disorder, or any other eligible condition?

---

<sup>1</sup> Titles are used in the place of the names in the interest of privacy.

As detailed below, Claimant could not establish, by the required preponderance of the evidence, that he is eligible for services from the Service Agency.

## FACTUAL FINDINGS

### THE PARTIES AND JURISDICTION

1. Claimant is a six-year-old boy (born August 2012) who seeks services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.<sup>2</sup> based on a claim that he suffers from autism spectrum disorder.

2. On December 18, 2018, ELARC notified Claimant's mother he was not deemed eligible for services under the Lanterman Act. ELARC asserted that Claimant did not have an eligible disability within the meaning of the Lanterman Act. (Ex. 1.)

3. On January 10, 2019, Mom submitted a Fair Hearing Request, and this proceeding ensued. (Ex. 2.) All jurisdictional requirements have been met.

### CLAIMANT'S FAMILY HISTORY AND GENERAL BACKGROUND

4. Claimant is one of three children. He has a twin sister, and an older sister who is approximately 16 years old. His father died in early 2013 in a car accident. He and his siblings live with their mother in the Service Agency's catchment area. (Ex. 3, p.1.) He was three pounds at birth, which was by an emergency caesarian section. He and his sister were hospitalized in the NICU for 22 days.

5. Claimant met developmental milestones as follows: he sat independently at six months, crawled at seven to eight months, and walked assisted at 11 months.

---

<sup>2</sup> All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

However, when he was one year of age, he still had not mastered use of single words and could not walk unaided. He was not then toilet trained. (Ex. 3, p. 4.) Later reporting by Mom indicates that language development was somewhat delayed. (Ex. 11, p. 5.) Indeed, it was reported that Claimant spoke his first words when three to four years old, and was not toilet trained until two to three years of age. (Ex. 10, p. 2.)

6. In September 2013, the Service Agency found Claimant eligible for Early Start services based on developmental delay, in the area of communication. It was determined that his services should address play, language, social, and parent education, and he was provided occupational therapy (OT) once per week for six months. (Ex. 4; ex. 5, pp. 1, 5.)

7. In August 2015, Claimant's Early Start case was inactivated, not because it was determined that he did not meet Lanterman Act eligibility, but because the Service Agency was informed by a vendor that was providing services to Claimant that the entire family had moved to Mexico. (Ex. 8.)

#### SPECIAL EDUCATION SERVICES

8. At the time of the hearing, Claimant was enrolled in a public school within ELARC's catchment area. He has an Individual Education Plan (IEP), which calls for services based on autism. (Ex. 9.)

9. In June 2018, when Claimant was in kindergarten, the school district performed assessments and issued a "Confidential Multi-Disciplinary Team Report," a copy of which is found at exhibit 10. The team included a school psychologist, a school psychologist intern, a resource specialist, the regular classroom teacher, and a speech and language pathologist. (Ex. 10, p. 1.) There was a paragraph-long explanation as to why Claimant had been referred for assessment. It included that Claimant would scream when irritated, would wander around the classroom, would elope, would not attend to the whole group lesson, and he was defiant and aggressive. It was reported that

Claimant would cover his ears in response to loud noises, and he would have meltdowns. Even when provided with one-to-one support he made little progress in school. (*Ibid.*)

10. Assessments indicated that Claimant's intellectual functioning was in the below average to average ranges, using an instrument known as the Kaufman Assessment Battery for Children-II (Kaufman), which is not an Intelligence Quotient (IQ) test. (Ex. 10, pp. 3, 5.) He displayed a short attention span and high levels of distractibility, being off task 73 per cent of the time when observed in a classroom. (*Id.*, p. 6.) He showed significant deficits in language, sometimes scoring in less than the first percentile, that is, .1, and no better than the 50th percentile. (*Id.*, p. 3, 4-5.)

11. An autism rating scale, the Autism Spectrum Rating Scales (ASRT) was utilized with Mom and a teacher responding to it. The results indicated that Claimant had many behaviors associated with autism. (Ex. 10, pp. 9-15.) He scored low on tests designed to assess adaptive function. (*Id.*, p. 17.)

12. The District found Claimant to be eligible for special education services based on autism. As explained in the report, the state eligibility criteria for autism means a pupil with autistic-like behaviors. (Ex. 10, pp. 30-31.) That is not the same as the criteria used by the Service Agency and other regional centers.

#### ASSESSMENTS BY THE SERVICE AGENCY

13. In October 2017, when Claimant was five years and three months old, he was assessed by Robert de Candia, Ph.D., a clinical psychologist. Dr. de Candia reviewed records, interviewed Mom, interacted with Claimant, making clinical observations.

14. Dr. de Candia administered standardized tests, including the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition, and he used the Vineland Adaptive Behavior Scales, Third Edition, to assess adaptive function. As to the Wechsler, only nonverbal portions were administered to Claimant in light of his tendency to speak

only in Spanish. (Ex. 14, p. 3.) The scores indicated average to low average results on the IQ test, and similar results were found for adaptive function. Dr. de Candia did not find that Claimant had autism or another eligible condition, but he did diagnose him with Language Disorder. (*Id.*, p. 4.)

15. In September 2018, Larry E. Gaines, Ph.D., a clinical psychologist, conducted an assessment of Claimant. He reviewed a number of reports, including the school district's assessment, a speech and language evaluation, and Dr. de Candia's report. Dr. Gaines administered tests, including the Wechsler Intelligence Scale for Children-V, the Autism Diagnostic Interview—Revised (ADI-R), and the Vineland Adaptive Behavior Scales, Second (Vineland 2). He interacted with Claimant as well; he used Mom as the source of information for the ADI-R. (Ex. 16.)

16. According to Dr. Gaines, Claimant presented with good eye contact, a social smile, and a good greeting, showing excellent emotional expression. He started formal testing in a cooperative and attentive manner, but as the testing went on, he became frustrated and did not sustain effort. (Ex. 16, p. 2.)

17. The IQ test indicated that Claimant was functioning in the low average to average range. The ADI-R yielded scores below the cut-off level for autism. The scores for adaptive function, taken from the Vineland 2, for which Mom was the reporter, were in the deficit to borderline range. (Ex. 16, p. 6.)

18. Dr. Gaines concluded that Claimant was not autistic, and not eligible for services from the Service Agency. His diagnosis was Attention Deficit Hyperactivity Disorder, combined type, and Language Disorder. (Ex. 16, p.5.)

19. Heike Ballmaier, Psy.D., BCBA-D, conducted a review of the various assessments that Claimant has undergone, and she concluded that based on the prior assessments, Claimant was not eligible for services. (Ex. 17.)

## CLAIMANT DOES NOT SUFFER FROM AUTISM SPECTRUM DISORDER

### The DSM-5 and Autism

20. (A) The Diagnostic and Statistical Manual, Fifth Edition, commonly known as the DSM-5, is a standard reference manual used by mental health professionals to diagnose developmental disabilities, and various mental disorders. It is utilized by the Service Agency and other regional centers to determine if a person suffers from one of the developmental disabilities that might establish eligibility. Citations to the DSM-5 shall be to its page numbers.

(B) The Lanterman Act defines autism as one of the developmental disabilities that makes a person potentially eligible for services from the regional centers. (See Legal Conclusion 2, below.) That is the term that has been used for many years in the applicable statute. However, the definition of autism, and indeed, the name for that disorder, was substantially revised with the May 2013 publication of the DSM-5. "Autism Spectrum Disorder" (ASD) is now the diagnostic nomenclature, and it encompasses several diagnostic criteria previously used in the prior version of the Diagnostic and Statistical Manual, the DSM-IV-TR. Thus, individuals who in the past might receive a diagnosis of autistic disorder, Asperger's disorder, or PDD-NOS, might now receive the diagnosis of Autism Spectrum Disorder, if the new criteria are otherwise met. (DSM-5, p. 51.)

21. The DSM-5 provides a summary description of ASD, stating that it "is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with

development and may be masked by compensatory mechanisms, the diagnostic criteria may be met by historical information, although the current presentation must suggest significant impairment.” (DSM-5, pp. 31-32.)

22. The DMS-5 diagnostic criteria for Autism Spectrum Disorder are as follows:
  - A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:
    1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
    2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
    3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.
  - B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history:
    1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
  3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
  4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sound or textures, excessive smelling or touching of objects, visual fascination with lights or movement).
- C. Symptoms must be present in early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

23. Notwithstanding the school district's determination that Claimant is eligible for special education due to autism, it has not been established by a preponderance of the evidence that Claimant suffers from autism within the meaning of the DSM-5. The reports of Dr. de Candia and Dr. Gaines indicate Claimant does not suffer from autism spectrum disorder. As noted during the hearing, the eligibility criteria for "autism" in the context of special education services is not the same as that set out in the DSM-5, which guides the Service Agency. (Compare exhibit 10, pp. 30-31 with Factual Finding 22.) Dr. Gaines utilized the ADI-R, which is known as a "gold standard" test instrument when attempting to determine if someone suffers from autism. Based on this record, eligibility cannot be established.



## 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 3.

### LEGAL CONCLUSIONS PERTAINING TO ELIGIBILITY GENERALLY

2. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means a disability which originates before an individual attains age 18 years, 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 title 17 of the California Code of Regulations (CCR).<sup>3</sup>

---

<sup>3</sup> All references to the CCR are to title 17.

At CCR section 54000 a further definition of "developmental disability" is found 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 psycho-social 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 mental retardation.

4. Section 4512, subdivision (l), provides that,

"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.

5. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that he suffers from an eligible condition, i.e., Autism. This Conclusion is based on section 4512, subdivision (a) and Evidence Code section 500. He must also prove that he has a substantial disability as a result of his eligible condition, within the meaning of section 4512, subdivision (l).

(B) For many years, the undersigned and other ALJ's have considered that since the governing statute uses the term autism, and did not use the term Autism Spectrum Disorder, Asperger's Disorder, or PDD-NOS, then only the former condition was an eligible one. However, since the DSM-5 has been published, the term Autistic Disorder has been abandoned by the professionals who diagnose and treat the condition. When used in a statute, technical words are given their peculiar and appropriate meaning. (*Handlery v. Franchise Tax Bd.* (1972) 26 Cal.App.3d 970, 981; Civ. Code § 13.) Because that technical definition has changed, it appears appropriate to use the provisions of the DSM-5 to determine eligibility in this area. Otherwise, an absurd result could follow; that nobody could obtain services under the statutory rubric of autism. And, while it might be argued that the DSM-IV definition should continue to bind the definition of the condition, it has to be noted that the definition of autism was substantially different under the DSM-IV than it had been in prior editions of the DSM. Since the Lanterman Act was enacted in the mid-1970's, the definition of autism has

changed more than once, without barring services to those deemed autistic within the technical definition then in place. The definition has changed again, and the latest definition is utilized.

6. Claimant has not established he is eligible for services by having Autism Spectrum Disorder, based on Factual Findings 1 through 23, and Legal Conclusions 1 through 5. He appears to suffer from Language Disorder and ADHD, which conditions do not constitute eligible conditions under the Lanterman Act.

## ORDER

Claimant's appeal is denied, and he shall not be eligible for services under the Lanterman Act.

DATED: April 3, 2019

---

Joseph D. Montoya  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.