

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Aleena M.,

Claimant,

v.

San Diego Regional Center,

Service

Agency.

OAH No. 2012030232

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on March 29, 2012, and May 17, 2012.

Ronald House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Rebecca L, Aleena M.'s legal guardian, represented Aleena M. (claimant).

Oral and documentary evidence was received on March 29, 2012, and May 17, 2012, at which time the matter was submitted.

ISSUE

In a prior hearing, claimant was determined not to be eligible for services based upon diagnoses of mental retardation or autism. However, the issue of whether or not she had epilepsy remained. At the start of the hearing, SDRC conceded that claimant had a diagnosis of epilepsy, but asserted that it did not constitute a substantial

disability, thereby rendering her ineligible for regional center services. The sole issue at this hearing was whether or not claimant's epilepsy created a substantial disability for her, entitling her to services.

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On February 14, 2012, after an exchange of letters between the parties, an informal meeting, and the production of additional medical records, SDRC notified claimant that she was not eligible for regional center services.

2. On March 4, 2012, claimant filed a Fair Hearing Request appealing SDRC's determination that she was ineligible for regional center services, and this hearing ensued.

### DOCUMENTARY EVIDENCE PRESENTED AT HEARING

3. Claimant is a seven-year-old female whose pediatric neurologist recently diagnosed her with epilepsy. Claimant's medical and birth history is quite complicated. Claimant was born toxicology positive, the child of a woman who used multiple drugs during her pregnancy, including methamphetamines, alcohol and tobacco. Claimant was diagnosed with craniosynostosis<sup>1</sup> at birth and underwent corrective surgery at age one. Prior to surgery she had a history of high fevers, febrile seizures, and projectile vomiting. Claimant also had bilateral ear tubes placed because of recurrent ear

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<sup>1</sup> Craniosynostosis is a birth defect in which one or more of the joints between the bones of the skull close prematurely, before the brain is fully formed, preventing the brain from developing into its normal shape and resulting in a misshapen head.

infections. She has a family history of drug abuse, developmental problems, hyperactivity, learning delays and severe behavioral problems. Claimant was abandoned by her birth family and Rebecca L. became her guardian.

4. A December 8, 2010, Developmental Evaluation conducted by Melissa O'Connell, Ph.D., outlined claimant's history and contained the results of tests administered. Claimant was in kindergarten but not yet receiving special education services, although numerous behavioral issues were noted resulting in her being referred for counseling services. Claimant presented as a playful little girl with a strong will and exhibited oppositional behaviors when she could not have her way. Her cooperation during testing was varied depending on whether or not the task was challenging for her. At times during the testing claimant had some tantruming during which she cried, trashed about on the floor, attempted to throw toys and turn over furniture. Claimant's guardian reported that claimant can be very loving and affectionate, enjoys helping at home and tries to please others; however there have been significant behavioral difficulties in school, especially concerning aggression toward other children in her class. At home, claimant can cry uncontrollably and when told she cannot have, or do, something, she escalates quickly into a tantrum. Dr. O'Connell's diagnostic impressions were low verbal ability, low nonverbal reasoning ability, very low spatial ability and significant behavioral difficulties. Given claimant's complex history and presentation, Dr. O'Connell opined that she is a candidate for ongoing therapeutic support and additional school assessments to determine her need for services.

5. A May 17 2011, SDRC Social Summary noted that claimant has clear speech and attends her local elementary school where she is in a moderate to severe special education program. Claimant makes good eye contact and is able to respond

to questions posed to her. Claimant requires full assistance with bathing, she can wash and dry her hands but requires prompting. She needs assistance with teeth brushing and dressing. She continues to have wetting accidents at school. She uses a spoon to eat but has difficulty using a fork. She has difficulty eating certain textures and will gag. She requires prompting and is distracted very easily. She has no difficulties with walking, running or balancing, but will "get ahead of herself" and falls a lot, which her guardian characterized as being "accident prone." Claimant can go up to others and play with them but becomes aggressive if she does not like the play activity. Claimant's classmates fear her aggression so she does not have friends at school. Claimant has tantrums when she does not get what she wants. She has banged her head on the floor and has hurt herself by biting her arm. Her tantrums are described as violent and she tends to break and destroy things. She will kick, scream, hit others and throw things at others. Her tantrums last 15 to 30 minutes. Claimant began having seizures after 13 months of age. Claimant needs to be watched carefully in public as she tends to wander off and has no sense of danger.

6. Beatriz Netter, Ph.D., performed a psychological evaluation on May 27, 2011, and authored a report. Dr. Netter noted that a March 2011 school district evaluation led to claimant's placement in a moderate to severe special day class under the category of speech or language impairment. She has an aide at all times and has not mastered the pre-academic and early academic skills necessary for kindergarten. Claimant was described in the school district report as "having difficulty understanding basic concepts, recalling recently given information and understanding categories." She "has a lot of difficulties focusing during classroom activities; frequently has difficulty with her peers and tries to dominate social play...appears to hoard toys in the classroom and doesn't like to share her friends with other children...has been defiant,

aggressive, destructive and violent in school on several occasions...will have outbursts with loud crying sometimes turning over tables and refusing to return to her classroom or child care...will run away from her classroom and refuse to comply with directions to stop..." Claimant has "meltdowns" approximately once or twice every couple of weeks. Dr. Netter administered several tests. In the Vineland adaptive behavior scales, claimant scored moderately low to low in the communication domain, moderately low in the daily living skills domain, adequate to moderately low in the socialization domain and moderately low in the motor skills domain. Dr. Edgar opined that claimant "demonstrated delays/deficits in all areas accessed." Based upon all of her testing and observations, Dr. Netter concluded that although claimant did not meet criteria for mental retardation, pervasive developmental disorder or autism, she did however "demonstrate significant difficulties that appeared to be both neurologically and emotionally based." Claimant "demonstrates deficits in adaptive functioning." Her social impairment was not of the quality associated with a pervasive developmental disorder and was most likely related to difficulty modulating emotion due to attachment related difficulties associated with her early neglect and abandonment. Dr. Netter opined that given claimant's explosive outbursts, with reported lack of awareness, it was important to rule out a seizure disorder and/or a disorder in the bipolar spectrum. Dr. Netter recommended close monitoring of claimant's academic development and a regular assessment of her academic and social progress. Continued consultation and treatment with mental health professionals was highly recommended and claimant would likely benefit from behavioral intervention services, as well as expressive play therapy in order to develop a better ability to cope with her emotions and find more appropriate ways to express them. Consideration should also be given to the possibility of psychotropic medications if her outbursts persisted and

continued to impact her ability to adapt socially.

7. August 9, 2011, Sutter Memorial Hospital records documented claimant's admission for an evaluation of her possible seizures. Claimant had a history of neonatal exposure to methamphetamines and alcohol and was presenting with new onset seizures. A CT evaluation showed no evidence of a structural cause and the seizures were likely due to her neonatal exposures. The admitting impression was a generalized epilepsy and learning disability. Claimant was referred for an MRI, EEG, and consultation with a neurologist. The MRI and EEG were both normal. Claimant was discharged and was going to follow up with her Southern California physicians.

8. On September 23, 2011, Laura Petrovich, M.D., claimant's pediatrician, authored a letter making a formal recommendation and referral for services to SDRC. She opined that claimant would benefit from services "due to her substantial disability related to her seizures and developmental delays." On October 3, 2011, a nurse practitioner in Dr. Petrovich's office noted that claimant is followed closely in that office "for her seizure disorder as well as other developmental issues." No medical records from this office were introduced.

9. Claimant's initial Individualized Education Program (IEP)<sup>2</sup>, dated March 21, 2011, noted that her primary disability was speech or language impairment and that she has "receptive/expressive language disorder which impedes her ability to participate in the general education curriculum and interferes with her ability to

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<sup>2</sup> The IEP took place following a Multidisciplinary assessment conducted by claimant's school district between January and March of 2010, which detailed her many "learning difficulties which were impacting her ability to successfully perform at school" and which concluded she was eligible for specialized academic services.

interact with peers and adults." Claimant has "difficulty understanding basic concepts, recalling recently given information, and understanding categories" which "limit her ability to process and interpret spoken sentences when the language increases in complexity." She has fine motor skill difficulties and her visual motor integration skills are within the significantly below average range. She has a lot of difficulties focusing during classroom activities and difficulty with her peers. She has been defiant, aggressive, distracted and violent at school on several occasions. Her adaptive behavior is much lower than other same age children. Her behavior impedes her learning because she will have outbursts with loud crying, sometimes turning over tables and refusing to return to her classroom or child care. She will run away from her classroom or her child care and refuse to comply with directions to stop. Claimant's IEP was updated in September 2011 to provide additional medical information with "Other Health Impairment" being added as a secondary diagnosis on her IEP. Claimant's guardian expressed her difficulty in obtaining SDRC services. The IEP team felt that claimant's needs were being met at school, but the guardian felt she would benefit from additional services to support claimant at home. The guardian further reported that although claimant's medications had been increased, she exhibited an increase in her seizures.

10. Many records from Rady Children's Hospital were introduced. Claimant treats with Jonathan Bui, Ph.D., M.D., a pediatric neurologist. The records documented claimant's medical condition and noted a diagnosis of epilepsy. The records also documented that claimant's seizures were not controlled despite being prescribed various anti-seizure medications and the dosages of those medications being increased. Dr. Bui's impression in his August 26, 2011, note was that claimant's "seizures and developmental delay are related events and she ought to get services to

ensure continued development.” On April 13, 2012, Dr. Bui documented that despite the high doses of her current medication, claimant continued to have worsening seizures. Dr. Bui’s plan was to change claimant’s medications to see if they could get better seizure control but he would not discontinue the current medication until claimant was on the new medication. Dr. Bui opined that the new medication would “likely help her with the hyperactivity and aggression that goes along with her developmental disability and epilepsy.” Dr. Bui further noted that claimant’s “epilepsy with developmental disability severely limits her continued cognitive and social developments which is best served by services through the regional center.”

11. Claimant submitted a spreadsheet in which she identified several life activities which were detrimentally affected by claimant’s condition, which she asserted demonstrated that epilepsy was a substantial disability. That document was received as argument in support of claimant's position.

12. Claimant submitted an article entitled “Epilepsy and Learning,” which identified learning difficulties children with epilepsy may have.

13. A December 14, 2011, letter from claimant's social worker identified substantial disabilities “all of which are directly related to her epilepsy.” There was no information provided regarding the social worker’s level of expertise to formulate that opinion and this letter was not relied upon in reaching the decision rendered herein.

#### TESTIMONY INTRODUCED AT HEARING

14. Joan Reese, M.D., a neuro-developmental pediatrician employed as a staff physician at SDRC, performs comprehensive evaluations of individuals seeking regional center services. She was the physician member of the SDRC team that evaluated claimant and determined that she was ineligible for services. The team met several times, reviewing the various records presented, and concluded that claimant’s epilepsy



did not constitute a substantial disability, thereby rendering her ineligible for services. Dr. Reese testified consistent with the SDRC reports and documents submitted.

Dr. Reese testified that the team looked at eligibility definitions identified in the Lanterman Act and determined that claimant's epilepsy did not constitute a substantial disability and was not expected to be life long. Dr. Reese explained that based upon their review of all the documents, the team found that claimant did not meet the eligibility requirements because her epilepsy did not constitute a substantial disability, and because she did not have significant functional limitations in three or more of three categories required by the regulations; receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living or economic self-sufficiency. Additionally, Dr. Reese testified about a number of studies which have documented that epilepsy in children is a transient condition, with between 50 and 76 percent of children outgrowing the condition. Accordingly, Dr. Reese believed that, based upon those studies, it is difficult to conclude at this point in time that claimant's epilepsy would be a lifelong condition.

15. Claimant's guardian testified about claimant's many difficulties and developmental delays. The guardian testified about the number of seizures claimant still experiences despite the changes in her medication and dosages. Dr. Reese conceded that this would indicate that claimant's seizures are currently not under control.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a

preponderance of the evidence. (Evid. Code, § 115.)

In this proceeding, claimant had the burden to establish that she has a “developmental disability” within the meaning of Welfare and Institutions Code section 4512, subdivision (a) by a preponderance of the evidence.

#### STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4512, subdivision (a) defines “developmental disability” as follows:

“‘Developmental disability’ means a disability which originates before an individual attains age 18, 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 mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.”

#### REGULATORY AUTHORITY

3. California Code of Regulations, title 17, section 54000 provides:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that 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. California Code of Regulations, title 17, section 54001 provides:

“(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, parents, guardians/conservators, 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.
- (d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

## EVALUATION

5. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. The evidence established that claimant has a substantial disability as that term is defined in the regulations. Her education records established that she has significant delays in receptive and expressive language and learning. The medical records and her guardian's testimony established self-care and self-direction delays, and the evidence overwhelmingly established behavioral issues. While Dr. Reese's testimony was credible and demonstrated her wealth of knowledge in this area, given the fact that claimant's seizures are currently not under control, it is simply too premature to conclude at this time that her epilepsy is not causing her substantial disability. Once claimant's seizures are controlled with medication, that determination will be easier to make. Given that mental retardation, autism, and pervasive developmental disorder have all previously been ruled out, the only condition currently remaining is seizures/epilepsy which at this point in time is the only explanation for claimant's substantial disability. Moreover, although the studies have demonstrated that a majority of children will "outgrow their epilepsy," it is simply speculative at this point in time to assume that claimant will outgrow hers.

Accordingly, a preponderance of the evidence established that at this juncture claimant has a diagnosis of epilepsy which is likely to continue indefinitely and which constitutes a substantial disability.

## ORDER

Claimant Aleena M.'s appeal from the San Diego Regional Center's

determination that she is not eligible for regional center services and supports is granted. She currently is eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act based upon a diagnosis of epilepsy which poses a substantial disability for her at this point in time.

DATED: May 31, 2012

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MARY AGNES MATYSZEWSKI

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 ninety days.