

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MAXX G.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY REGIONAL

CENTER,

Service Agency.

OAH No. 2012031111

DECISION

Administrative Law Judge Glynda B. Gomez, Office of Administrative Hearings, heard this matter on May 21, 2012, in Van Nuys, California. Maxx G. (Claimant or Maxx) was represented by his mother (Mother) and his father (Father) (collectively Parents). North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by Contract Officer Rhonda Campbell.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on May 21, 2012.

ISSUE

Whether Claimant has a developmental disability entitling him to receive regional center services.

FACTUAL FINDINGS

1. Claimant is a three and a half year-old boy born on December 13, 2008. Claimant contends that he is eligible for regional center services as someone with Autism, Mental Retardation, or under the "Fifth Category" as someone with a condition similar to Mental Retardation or requiring treatment similar to that required by individuals with Mental Retardation. The Service Agency determined that Claimant is not eligible for regional center services because he does not meet the criteria set forth in Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001. Based on this determination, the Service Agency denied services to Claimant on February 1, 2012. Claimant appealed the Service Agency's determination on March 7, 2012. For the reasons set forth below, Claimant's appeal is denied.

INITIAL NLACRC ASSESSMENTS

2. On October 11, 2011, speech and language pathologist Stephanie LaPeidis (LaPeidis) of NLACRC vendor Kochins/Thomas Infant Development Services (KIDS), assessed Claimant's speech and language ability. LaPeidis conducted a parent interview, clinical observation and an oral examination. Based upon her assessment, she opined that Claimant had age appropriate receptive language abilities and significant delays in expressive language skills and articulation. At the time of the evaluation, Claimant was 34 months old and demonstrated expressive language skills that were at the 21-month developmental level.

3. On November 17, 2011, Child Development Specialist Vicki Van Camp Humphrey (Humphrey), also of NLACRC vendor KIDS, performed a developmental assessment of Claimant. Humphrey interviewed Claimant's Parents, made clinical observations of Claimant and administered the Revised Gessell Developmental Scales

(Gessell). Based upon the assessment, Humphrey opined that Claimant, then 35 months old, was functioning at the developmental level of 30 months in the areas of cognitive ability, gross motor skills, fine motor skills, receptive language, and personal-social development. She opined that Claimant's expressive language ability was at the 21 month developmental level. Humphrey opined Claimants' development to be age appropriate in all areas except expressive language.

4. On December 15, 2011, NLACRC vendor psychologist Kathy Khoie (Khoie) conducted an assessment of Claimant. To assess Claimant, Khoie administered the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III), Autism Diagnostic Observation Schedule-Module I, (ADOS), Autism Diagnostic Interview-Revised (ADI-R), Adaptive Behavior Assessment System, Second Edition (ABAS-II), and the Child Symptom Inventory-4: Parent Check List. She also conducted a clinical interview with Claimant's Father and Claimant and reviewed available records.

5. Khoie did not calculate a full scale intelligence quotient (FSIQ) score for Claimant because of a significant discrepancy between his verbal and performance scores. In these circumstances, a FSIQ would not be an accurate summary of Claimant's ability. Claimant received a standard score of 88 on the verbal index, which is within the low average range, and a scaled score of 105, which is within the average range, on the performance index. Claimant scored in the average range on the receptive vocabulary and block design subtests, in the low average range on the information subtest, and in the high average range on the object assembly subtest. Based upon Claimant's performance on the WPPSI-III, Khoie estimated that Claimant was functioning in the overall average cognitive range.

6. Khoie assessed Claimant's adaptive behavior using the ABAS-II. Claimant performed in the average range on the ABAS-II, except on the measures of communication and self care where he performed in the low average range.

7. Khoie also used the ADOS and the ADI-R to assess Claimant. Khoie opined that the results of the ADOS and the ADI-R did not reveal autistic characteristics. Khoie observed Claimant to be friendly and sociable. Khoie opined that Claimant did not have Asperger's Disorder, Mental Retardation or Pervasive Developmental Disorder. She diagnosed Claimant with Mixed Receptive-Expressive Language Disorder.

SCHOOL ASSESSMENTS

8. On October 17, 2011, Los Angeles Unified School District (LAUSD) speech and language pathologist Barbara Staley (Staley) assessed Claimant. Staley was not able to perform a formal assessment of articulation because Claimant refused to pronounce the words required by the test. Staley used the Preschool Language Scale-4 (PLS-4) to assess Claimant's language abilities. Claimant received a standard score of 73 in auditory comprehension, a standard score of 55 in expressive communication and a total language score of 50. According to Staley, the PLS-4 scores and her own observations, revealed a moderate to severe delay in receptive and expressive language skills. She also noted deficits in pragmatic language. Staley opined that Claimant was eligible for special education as a child with speech and language impairment.

9. On November 17, 2011, LAUSD school psychologist Marilyn Bermudez-Alonso (Bermudez-Alonso), conducted a preschool assessment of Claimant. The assessment included a review of previous evaluations, observations, administration of the Preschool Team Assessment Experimental III (PTAEIII), Developmental Profile 3 (DP 3), Autism Spectrum Rating Scale (ASRS), and the Child Behavior Checklist: Parent Rating Scale. Claimant performed in the average to above average range on measures of non-verbal problem skills and well below average range in verbal problem solving skills. Bermudez-Alonso concluded that Claimant had delays of 25 to 50 percent in the areas of vocabulary, auditory memory, auditory comprehension, motor skills, academic readiness,

and social-emotional development. Bermudez-Alonso opined that Claimant met eligibility for special education under the category of Developmental Delay.¹

10. Claimant was made eligible for special education services through LAUSD under the eligibility category of Developmental Delay on November 28, 2011. Claimant's November 28, 2011 Individual Education Program (IEP) lists goals in the areas of language, school readiness, communication and social skills. Claimant is placed in a special day class comprised of children with mixed disabilities.

FISCHER'S OBSERVATIONS

11. By agreement of the parties, NLACRC Psychologist Sandi J. Fischer (Fischer) conducted an observation of Claimant on April 19, 2012 and April 23, 2012. As part of her observation, Fischer reviewed results of the prior assessments and reports by NLACRC vendors and by LAUSD and the results of the Gilliam Autism Ratings Scale-Second Edition (GARS-II) completed by Claimant's teacher. Claimant received a standard score of 66 on the GARS-II. Fischer noted that Claimant received elevated scores in the areas of stereotyped behavior, communication and social interaction on the GARS-II. However, she opined that Claimant's overall score on the GARS-II made it unlikely that Claimant had Autistic Disorder.

12. Fischer observed Claimant in his school classroom and on the playground on April 19, 2012 and April 23, 2012. Fischer noted:

Max was observed making eye contact and his teacher reported that he makes eye contact.

¹ Developmental Delay is a category of special education eligibility for children ages three through five.

He used nonverbal gestures (e.g. frequently pointed, held his arms out while pretending to fly outside, and sometimes made hand movements during songs in the classroom.) He made some facial expressions. Maxx frequently pointed to things that he wanted to share with others. Again, it was sometimes difficult to determine what he was trying to convey due to limited expressive language skills. His teacher reported that he loves to be praised. There is no marked impairment in his seeking to share enjoyment, interests or achievements.

Maxx engaged in social reciprocity (e.g. he wanted to play tag or chase with his peers.) Although it required some adult facilitation, Maxx was able to briefly engage in a game of catch with a peer.

Maxx's expressive language skills are significantly delayed. He is unable to initiate and sustain conversations because of his limited ability to express himself. ... Maxx was not observed to engage in stereotyped or repetitive use of language or idiosyncratic language.

Maxx did imitate a peer who was pretending to shoot a gun.

Maxx did not engage in any preoccupations with one or more stereotyped and restricted patterns of interest.

Maxx did not engage in inflexible adherence to specific, non functional routines or rituals. He consistently pointed to the letters and numbers on the carpet but this was a functional routine. He listened for the letter or number then pointed to it.

Maxx did not engage in stereotyped and repetitive motor mannerisms such as hand flapping.

Maxx did not engage in persistent preoccupation with parts of objects and his teacher did not report that this is a problem in the classroom.

13. Based upon the previous assessment data, GARS-II rating scales and her observations, Fischer opined that Claimant's expressive language skills were significantly delayed. Fischer opined that Claimant's lack of expressive language skills prevented him from initiating or sustaining conversations. Fischer diagnosed Claimant with Expressive Language Disorder and Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS).

14. On May 8, 2012, NLACRC sent Claimant's parents a letter informing them that, following Fischer's school observation and the test results, the eligibility committee determined that Claimant does not have a developmental disability entitling him to regional center services.

15. At the hearing, Fischer testified credibly on behalf of the Service Agency. Her testimony established the following:

- a. For a diagnosis of Mental Retardation, the Diagnostic and Statistical Manual IV Text Revised (DSM-IV-TR) requires administration of a cognitive test with a resulting FSIQ of 70 or below. Cognitive functioning will be significantly below others of similar age, and there will also be significant deficits in adaptive functioning. Deficits in adaptive functioning can result from many factors other than cognitive deficits, such as lack of motivation, learning disabilities, language delays and mental illness.
- b. Claimant does not meet the criteria for a diagnosis of Mental Retardation even though FSIQ was not calculated. His lowest score of 88 and highest score of 105 on the subtests noted in Finding 5 are far beyond that which a person with Mental Retardation could achieve.
- c. When the NLACRC eligibility committee assesses whether a claimant is eligible for regional center services under the "fifth category," it must determine whether the person either functions in a manner similar to persons with mental retardation or requires treatment similar to that for persons with

- mental retardation. The committee first looks at the claimant's FSIQ and the configuration of scores from a cognitive test to ascertain information about the claimant's cognitive ability. A person who functions similar to someone with mental retardation typically obtains scores at the lower end of the borderline range of cognitive functioning. As IQ scores rise above 70, the committee looks to the claimant's adaptive deficits to determine what is causing the deficits and must determine that the adaptive deficits are related to cognitive functioning rather than other factors. In determining whether a claimant needs treatment similar to that for persons with mental retardation, the committee must find that the claimant requires treatment that is concrete and requires skills to be broken down into small steps with repeated practice.
- d. As set forth in Findings 15(a) and 15(b) above, Claimant's cognitive ability is within the average range and he does not function in a manner similar to that of a person with Mental Retardation. While it is true that Claimant demonstrates some adaptive deficits, the deficits are primarily within the areas impacted by his language delay. Claimant's adaptive deficits are directly attributable to his language delays, not a cognitive deficit. Accordingly, treatment similar to that required for a person with Mental Retardation is not appropriate for Claimant.
 - e. Pervasive developmental disorders include Autistic Disorder, Asperger's Disorder, and PDD NOS. With PDD NOS, a person will demonstrate marked impairment typical of Autistic Disorder in some areas but not as globally as with Autistic Disorder. Only Autistic Disorder is an eligible diagnosis for regional center services. A claimant with a pervasive developmental disorder which is not Autistic Disorder is not eligible to receive regional center services.
 - f. For a diagnosis of Autistic Disorder, the DSM-IV-TR requires that the individual have at least six of the specific indicia of Autistic Disorder, including

two from the social interaction category, one from the communication category and one in the behavior/interests category. Additionally, the onset must have been before the age of three and not be better accounted for by Rett's Disorder or Childhood Disintegrative Disorder. Although Claimant displayed some of the features common to individuals with Autism, he does not meet the full diagnostic criterion for Autistic Disorder. Many of Claimant's delays are related to his speech and language impairment and his condition is most appropriately diagnosed as PDD-NOS.

16. The DSM-IV-TR discusses Autistic Disorder in the section entitled "Pervasive Developmental Disorders." (DSM-IV-TR, pp. 69 - 84.) The five "Pervasive Developmental Disorders" identified in the DSM-IV-TR are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS. The DSM-IV- TR, section 299.00 states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism, childhood autism, or Kanner's autism*. (Emphasis in original.)

(*Id.* at p. 70.)

17. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

- A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):
- (1). qualitative impairment in social interaction, as manifested by at least two of the following:
- (a). marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction
 - (b). (Claimant uses gestures and compensatory non-verbal behaviors to communicate. Claimant makes eye contact with others and has varied facial expressions.)
 - (c). failure to develop peer relationships appropriate to developmental level (Claimant has difficulty developing appropriate peer relationships because he does not have the requisite expressive language to maintain conversation with peers.)
 - (d). a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest) (*Claimant seeks to share his interests with others and gestures to direct attention.*)
 - (e). lack of social or emotional reciprocity
 - (f). (Fischer and Khoie observed Claimant's demonstrations of social and emotional reciprocity.)
- (2). qualitative impairments in communication as manifested by at least one of the following:
- (a). delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime) (*Although Claimant has a delay in*

development of spoken language, he compensates through gestures and mime.)

- (b).in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others (*Claimant does not have adequate spoken language, but attempts to initiate conversations with others.*)
 - (c). stereotyped and repetitive use of language or idiosyncratic language (Claimant has limited spoken language, but it is not repetitive or idiosyncratic.)
 - (d).lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level (Fischer observed Claimant engage in make-believe play, but Fischer observed him to imitate another child in make believe gun play.)
- (3). restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus (*Claimant has interests in a variety of activities and wants to interact with others.*)
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals (This behavior was not observed by the assessors or reported by Claimant's parents or teacher.).
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements) (*Claimant does not engage in these behaviors.*)
 - (d) Persistent preoccupation with parts of objects (Claimant did not demonstrate preoccupation to any of the assessors)

- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play. (Claimant displayed delays in social interaction and language before the age of 3 years.)
- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder
(Claimant does not meet diagnostic criterion for either Rett's Disorder or Childhood Disintegrative Disorder.)

(Id. at p. 75.)

18. The totality of the evidence did not establish that Claimant suffers from Mental Retardation.

19. The totality of the evidence did not establish that Claimant suffers from a condition similar to mental retardation or requiring treatment similar to persons with mental retardation.

20. The totality of the evidence did not establish that Claimant suffers from Autistic Disorder.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability entitling him to regional center services.

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

3. To be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

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 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.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (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.

5. 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.

6. In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).)

7. While the Legislature did not define the fifth category, it did require that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512, subd. (a).) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. 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 his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such treatment.

8. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or

a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination), and who does not have a developmental disability would not be eligible.

9. Claimant does not meet the diagnostic criterion for Autistic Disorder. Claimant met only one of the six required items of Criterion A. Specifically, Claimant displayed a failure to develop peer relationships appropriate to his developmental level as required by Criterion A when six are required. Claimant did not establish that he is eligible for regional center services under the diagnosis of Autistic Disorder.

10. Claimant has average cognitive abilities, but demonstrates deficits in adaptive functioning in the areas of communication and social skills. Because Claimant is of average cognitive ability, he does not meet the criteria under the DSM-IV-TR for a diagnosis of Mental Retardation. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of Mental Retardation.

11. The evidence did not demonstrate that Claimant suffers from a condition similar to Mental Retardation or that he requires treatment similar to that required for mentally retarded individuals. Based on the foregoing, Claimant has not met his burden of proof that he falls under the fifth category of eligibility.

12. Claimant has also failed to meet his burden of proof that he has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001.

13. The weight of the evidence did not support a finding that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal is denied. The Service Agency's determination that Claimant is not eligible for regional center services is affirmed.

DATED: June __, 2012

GLYNDA B. GOMEZ

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.