

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH Case No. 2012050505

JOSEPH H.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES

REGIONAL CENTER,

Service Agency.

DECISION DENYING THE APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on June 25, 2012, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Joseph H. (Claimant), who was not present, was represented by his adoptive mother.¹

The South Central Los Angeles Regional Center (Service Agency) was represented by Johanna Arias, Fair Hearings Coordinator.

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

ISSUE

Does Claimant have a developmental disability (autism, mental retardation or a fifth category condition) making him eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1-10 submitted by the Service Agency, exhibits A-G submitted by Claimant's adoptive mother, and the testimony of Dr. Ehab Yacoub, Dr. Rebecca Holtzman, Dr. Ricardo Miles Uychoco, and Claimant's adoptive mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is an 8-year-old male on whose behalf regional center services were requested from the Service Agency in the fall of 2011.
2. By a letter dated April 10, 2012, Claimant's adoptive mother was advised that Service Agency staff had concluded Claimant did not have any of the five qualifying developmental disabilities and therefore was not eligible for regional center services.
3. On May 9, 2012, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, by which the decision denying his eligibility was appealed.

CLAIMANT'S BACKGROUND

4. Claimant was taken away from his biological mother at the age of two months due to neglect and was placed with his mother's sister, who has since had custody of Claimant and recently adopted him.

5. Claimant's biological mother may not have received adequate prenatal care and may have abused drugs during her pregnancy with Claimant. Nonetheless, Claimant's delivery appears to have been non-eventful, and he reached his significant developmental milestones without delay.

6. Claimant lives with his adoptive mother, a family friend who Claimant's adoptive mother describes as like a sister, Claimant's sibling and sons of the family friend of Claimant's adoptive mother. The whereabouts of Claimant's biological father are unknown. It was not established whether Claimant has contact with his biological mother.

7. Claimant has received special education services from local school districts since he was in preschool. Claimant is currently in the third grade. He has been placed in a general education classroom, but he receives one hour per week of specialized academic instruction and one hour per week of language and speech therapy on a pull-out basis.

THE SERVICE AGENCY'S PAST ASSESSMENTS OF CLAIMANT

8. Claimant was twice before referred to the Service Agency for an eligibility assessment. The Service Agency denied those prior two requests for eligibility. Claimant's adoptive mother did not appeal those denials.

9. Claimant's first referral to the Service Agency was in 2007. He was referred by his social worker with the Los Angeles County Department of Mental Health, who was concerned about his speech and language delays and to rule out mental retardation. After an intake assessment by Service Agency staff, Claimant was referred to clinical psychologist Timothy D. Collister for a psychological evaluation. Dr. Collister reviewed Claimant's records, interviewed his adoptive mother and administered a series of tests to Claimant. Dr. Collister ruled out mental retardation because Claimant exhibited substantial strengths in the cognitive testing. Although Dr. Collister noted mild but significant behavioral difficulties, including tantrumming, noncompliance and mild aggression, he did not find

signs of an autistic spectrum disorder. He did note, however, that the level of intensity of the behavioral challenges should be monitored over time. Since Claimant's profile of test scores suggested a language processing disorder, primarily for expressive language, Dr. Collister diagnosed Claimant with Mixed Receptive-Expressive Language Disorder and Phonological Disorder.

10. Claimant's second referral to the Service Agency was in 2010. He was referred due to his enrollment in special education classes under the category of autistic-like symptoms. After an intake assessment by Service Agency staff, Claimant was referred to clinical psychologist Ann L. Walker for a psychological evaluation. Dr. Walker reviewed Claimant's records, interviewed Claimant and his adoptive mother and administered to Claimant a series of tests. Since Claimant performed in the normal range in cognitive intellectual testing and at grade level in most academic areas, Dr. Walker felt a diagnosis of mental retardation was not warranted. She also believed that Claimant did not meet the criteria for a diagnosis of autism, because he tested in the non-autistic range in all areas and he exhibited behaviors inconsistent with autism, such as making eye contact, making and maintaining peer relationships, emotional reciprocity, sharing interests with others, and he lacked restricted and intense preoccupations. Because Claimant was still engaging in frequent tantruming and similar disruptive behaviors, Dr. Walker diagnosed him with Oppositional Defiant Disorder and Disruptive Behavior Not Otherwise Specified (NOS).

THE SERVICE AGENCY'S RECENT ASSESSMENT OF CLAIMANT

11. This is Claimant's third referral to the Service Agency for an eligibility assessment. Claimant this time was referred by his treating psychiatrist, Dr. Harsukh J. Savalia, who suspected Claimant was mentally retarded and diagnosed him with Pervasive Developmental Disorder (PDD). On October 7, 2011, Service Agency Intake Service Coordinator Maritza Cortés met with Claimant and his mother and conducted a social

assessment. In her intake report, Ms. Cortés generally noted that Claimant was cooperative and responsive during her interview, but that he did not maintain consistent eye contact and he lacked clarity of speech. Based on evidence in Claimant's record of apparent deficits in the areas of communication, socializing and behavioral challenges, Ms. Cortés recommended that Claimant be referred for a psychological evaluation.

12. The Service Agency referred Claimant to Rebecca R. Holtzman, Psy.D., for a psychological evaluation, which she conducted on January 26, 2012. Dr. Holtzman interviewed Claimant and his mother, reviewed records, and administered to him a number of tests. In terms of his cognitive skills, Dr. Holtzman scored Claimant as performing within the average range in most skills, although his score in the working memory component was in the low average range reflective of short-term memory problems. Because there was such a significant difference in Claimant's component scores, Dr. Holtzman felt his Full Scale IQ score was likely invalid. However, Dr. Holtzman concluded that Claimant's overall cognitive test scores suggested he likely fell within the average range, which ruled out a diagnosis of mental retardation. Claimant's average range scores in adaptive functioning tests was also inconsistent with mental retardation. The results from testing used to assist in assessing for autism suggested to Dr. Holtzman that minor odd behaviors exhibited at home were not sufficient for a diagnosis of an autistic spectrum disorder. Dr. Holtzman did not see evidence of significant impairments in socializing, communicating, or that Claimant had any unusual preoccupations or repetitive and stereotypical behaviors. For those reasons, Dr. Holtzman concluded that Claimant was not autistic.

13. Dr. Holtzman believes Claimant's behavioral problems are related to mood and/or behavioral disorders. She links those problems more with anger management issues than developmental disabilities. Dr. Holtzman therefore diagnosed Claimant with Oppositional Defiant Disorder. She also believes that Claimant's communication deficits

are caused by his inability to articulate particular letters or sounds. She therefore diagnosed Claimant with Phonological Disorder.

14. On April 3, 2012, the Service Agency's interdisciplinary corestaff team reviewed and discussed the above information. The team concluded that Claimant was not eligible for regional center services, because he did not meet the criteria for a diagnosis of mental retardation or autistic disorder, or any of the three other qualifying conditions. The corestaffing team recommended that Claimant continue to receive intensive speech and language therapy to improve his communication skills, as well as continue to receive special education services and psychiatric care to meet his behavioral challenges.

CLAIMANT'S EVIDENCE

15. Claimant's adoptive mother testified. She has been Claimant's primary caregiver since he was two-months old. Her primary concern is his unruly behaviors at home, including physical attacks on her for unknown reasons. She is also worried about his poor performance at school and deficits in the areas of socializing and communicating. Claimant's adoptive mother also submitted records from her son's school and treating health care providers, which are summarized as follows.

16. In January of 2008, Claimant's therapist from the Los Angeles County Department of Mental Health made a working diagnosis for Claimant of Pervasive Developmental Disorder NOS (PDD-NOS). Her report does not specifically mention autism or autistic spectrum disorders. Claimant's therapist strongly recommended that Claimant continue with his speech and language therapy at school, that he engage in weekly play therapy to help him self-regulate his behaviors, and that his caretakers receive behavior modification training to help them respond when he acts out. She also strongly recommended a neurological evaluation to provide a concrete mental health status due to

his biological mother's own long history of substance abuse and behavioral challenges.
(Exhs. B, C & G.)

17. The Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV-TR), which is published by the American Psychiatric Association, is a generally accepted tool for diagnosing mental and developmental disorders. While the DSM-IV-TR lists the diagnosis of PDD-NOS as one of many autistic spectrum disorders, it is not the same as a diagnosis of Autistic Disorder.

18. Claimant was initially deemed qualified for special education services under the category of mental retardation. However, there were no school records presented which indicate that any health care professional has made that diagnosis for Claimant. When Claimant transferred school districts, his new school district did not designate him eligible for special education services under that category, nor does his current Individualized Education Program (IEP) document reference him being mentally retarded or cognitively impaired to that degree. In fact, cognitive testing done at school suggests Claimant functions in the average to high range of intellectual ability. Claimant's recent IEP also states that he exhibits adequate daily living skills for his age. (Exhs. E & F.)

19. In 2010, Claimant's current school district changed his category of eligibility for special education to autistic-like behaviors. It must be noted that eligibility under that category does not mean he has been diagnosed with Autistic Disorder or even one of the autistic spectrum disorders. It simply requires that a student demonstrate autistic-like behaviors. By no later than 2012, a secondary category of eligibility was added, i.e., speech or language impairment. The change in eligibility from mental retardation to autistic-like behaviors was based primarily on a psychoeducational assessment report conducted by a school psychologist in February of 2010. During that assessment, Claimant received elevated scores on tests designed to demonstrate the presence of autistic-like behaviors.

The school psychologist also noted in her report that Claimant avoided eye contact, and did not initiate social interactions with her. Claimant's current IEP specifies the particular goals and objectives for the services he is being provided. In the area of articulation/expression, Claimant is being provided speech and language therapy. The two other goals deal with academic skills in reading and math. None of these goals is necessarily related to dealing with a child with Autistic Disorder. The fact that Claimant has been mainstreamed in a general education class without an aide is also inconsistent with his having Autistic Disorder. (Exhs. E & F.)

20. In documents generated in 2011, Dr. Savalia stated Claimant had diagnoses of Impulse Control Disorder, PDD, and Mental Retardation NOS. As defined by section 319.00 of the DSM-IV-TR, the diagnosis of Mental Retardation NOS is warranted when there is a strong presumption of Mental Retardation but the person's intelligence is untestable by standard tests. The documents from Dr. Savalia presented in this case do not contain any elaboration on those diagnoses or indicate that the Mental Retardation NOS diagnosis was based on cognitive testing. However, Dr. Ehab Yacoub, a Service Agency consultant, credibly testified that he contacted Dr. Savalia by telephone and was advised that Dr. Savalia included the diagnosis of Mental Retardation NOS because Claimant's adoptive mother told him that her son had been previously diagnosed with Mental Retardation. Dr. Savalia advised Dr. Yacoub that he did not perform any cognitive testing of Claimant.

21. Under the above circumstances, it was not established that Dr. Savalia has diagnosed Claimant with Mental Retardation, or, if he did, that such a diagnosis is valid. (Exh. D.)

22. A letter was also presented from Claimant's Resource Specialist at school, Sushmita Mukherjee. She notes that Claimant is very bright, incredibly loquacious in

speech and capable of high achievement in certain academic areas. She has never seen Claimant become physically violent or aggressive at school, but has seen him refuse to complete some tasks or follow directions. She describes Claimant as not being difficult to redirect. She does view Claimant as having difficulty communicating his needs. (Exh. A.)

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

2B. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.* at p. 1137.)

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the Service Agency's.

3. An applicant is eligible for services under the Lanterman Act if he can establish that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) A qualifying condition must onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512.)

IS CLAIMANT MENTALLY RETARDED OR DOES HE HAVE A FIFTH CATEGORY CONDITION?

4. It was not established that Claimant is mentally retarded. Although he was initially made eligible for special education services under the category of mental retardation, that basis for eligibility was subsequently changed. No evidence was presented indicating that any health care professional has diagnosed Claimant with mental retardation. Dr. Savalia's diagnosis of Mental Retardation NOS on its face indicates that he simply presumed Claimant was mentally retarded without confirmation. Evidence obtained from the Service Agency indicates that Dr. Savalia did no independent cognitive testing of Claimant and that he had simply relied on comments from Claimant's adoptive mother in making a presumptive diagnosis. Moreover, three successive rounds of testing by Service Agency consultants, as well as that conducted at Claimant's current school district, all reveal that Claimant has produced scores in the average to high average range of intellectual functioning. Claimant has also routinely produced adaptive functioning test

scores in the average range, which is inconsistent with a diagnosis of mental retardation. (Factual Findings 4-22.)

5A. The "fifth category" is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subd. (a).) A more specific definition of a "fifth category" condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are specific (e.g., epilepsy or cerebral palsy), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature requires that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th at p. 1129.)

5B. It was not established that Claimant's condition is closely related to mental retardation. As discussed above, cognitive testing shows Claimant has average to above average intellectual abilities. Claimant's adaptive skills appear to be age appropriate, which one would not expect of someone who suffers from a condition closely related to mental retardation. Claimant's resource specialist at school describes him as being very bright. The IEP and other school records do not show that Claimant receives services required by a person with a gross cognitive deficit. The Service Agency's experts persuasively opined that Claimant does not function similar to a mentally retarded person. (Factual Findings 4-22.)

DOES CLAIMANT HAVE AUTISM?

6A. It does not appear that the Legislature intended to include autistic spectrum disorders such as Asperger's Disorder, PDD or PDD-NOS in the category of "autism." The Legislature has amended the Lanterman Act, including section 4512 (regarding eligibility),

since it was first enacted, but has not changed the list of qualifying conditions to include "autistic spectrum disorders." The Legislature is apparently aware of the difference between autism and autistic spectrum disorders, as demonstrated by its enactment in 2001 of section 4643.3, which refers to "autism disorder and other autistic spectrum disorders."³ If the Legislature wished to add other autistic spectrum disorders to the list of qualifying conditions under section 4512, it could have done so. It is a cardinal rule of statutory construction that, where the Legislature has utilized a term of art or phrase in one place and excluded it in another, it should not be implied where excluded. (*Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) Therefore, the word "autism" under section 4512, subdivision (a), is seen to refer to the Autistic Disorder diagnosis of the DSM IV-TR, which is the disorder classically considered to be "autism," and not to "autistic spectrum disorders," such as Asperger's Disorder, PDD or PDD-NOS.

6B. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has the qualifying condition of autism. The Service Agency's experts have concluded that Claimant does not have autism; in fact, they have not even diagnosed him with any autistic spectrum disorder. Although the school district has deemed Claimant eligible for special education services under the category of autistic-like behaviors, eligibility under that category does not require one to have a diagnosis of autism or Autistic Disorder. Two health care providers who have worked closely with Claimant have apparently diagnosed him with PDD, i.e., a therapist with the county Department of Mental Health and Claimant's treating psychiatrist Dr. Savalia. The diagnosis

³ Section 4643.3, subdivision (a)(1), provides, in pertinent part, "the department shall develop evaluation and diagnostic procedures for the diagnosis of autism disorder and other autistic spectrum disorders."

of PDD is one of the autistic spectrum disorders. As discussed immediately above, however, having an autistic spectrum disorder like PDD is not autism for purposes of eligibility under the Lanterman Act. To prevail in this case, Claimant must establish that he has Autistic Disorder. He failed to do so. (Factual Findings 4-22.)

IS CLAIMANT ELIGIBLE FOR SERVICES?

7. Since Claimant failed to establish by a preponderance of the evidence that he has any of the five qualifying developmental disabilities, he failed to establish a basis of eligibility for regional center services under the Lanterman Act. (Factual Findings 1-22; Legal Conclusions 1-6.)

8. Some pause for concern is warranted. Namely, two health care professionals have diagnosed Claimant with a pervasive developmental disorder (PDD), and both Ms. Cortés of the Service Agency and a school psychologist in 2010 observed some behaviors consistent with autism, such as lack of consistent eye contact and lack of communicative spontaneity. Under these circumstances, Claimant's continuing development should be closely monitored for the presence or emergence of more suspect behaviors. Claimant's adoptive mother is strongly encouraged to submit any new information to the Service Agency for further evaluation, particularly if Claimant is diagnosed with a qualifying developmental disorder by a qualified health care professional.

ORDER

Claimant Joseph H.'s appeal of the South Central Los Angeles Regional Center's determination that he is not eligible for regional center services is denied.

DATED: July 28, 2012

/s/

ERIC SAWYER,
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.