

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

J.V.,

Claimant,

and

NORTH LOS ANGELES

REGIONAL CENTER,

Service Agency.

OAH Case No. 2013010084

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Van Nuys, California, on May 23, 2013.

Rhonda Campbell, Contract Officer, represented North Los Angeles Regional Center (Regional Center or Service Agency).

Claimant's mother, Cecilia A.<sup>1</sup>, represented Claimant with the assistance of Javier M., her husband.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision.

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<sup>1</sup> Initials have been used to protect the privacy of Claimant and his family.

## ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code<sup>2</sup> section 4500 et seq. (Lanterman Act)?

## FINDINGS OF FACT

1. Claimant is 16 years old, and resides with his mother, his stepfather, and his seven-year-old brother.

2. Claimant was initially made eligible for Regional Center services following a provisional diagnosis of Autism, made by Larry E. Gaines, Ph.D. (Gaines), on December 28, 1999. As measured through the Leiter International Performance Scale, Claimant's cognitive level was in the average range. Adaptive skills were in the borderline range. However, Claimant presented with moderate delays in communication. Dr. Gaines also noted some characteristics typically associated with autism, such as aloofness, little eye contact, lack of interaction with his mother or the evaluator, and possible difficulties with imaginative play. Dr. Gaines was also concerned about the possible presence of idiosyncratic behavior; although his mother did not report such behavior, Dr. Gaines observed screeching and spontaneous and repetitive lining up of objects. Dr. Gaines also diagnosed Mixed Receptive Expressive Language Disorder and Attention Deficit Hyperactivity Disorder (Rule Out).

3. a. Dr. Gaines re-evaluated Claimant on September 2, 2002, at five-years, five-months of age. Claimant had been receiving special education services, including speech therapy and services designed for autistic children. His mother was

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code.

concerned about language-related difficulties, but reported no concerns regarding social issues, idiosyncratic play or body mannerisms.

b. Claimant's cognitive functioning was measured, through the Leiter International Performance Scale, Revised, in the low average range. His language skills fell within the low-average range of performance on the Vineland Adaptive Behavior Scales (Vineland). However, in the Peabody Picture Vocabulary Test – III, his receptive language skills fell below the one-year, nine-month level of development. Claimant was able to express his needs and discuss his activities and experiences in simple conversation. He also engaged in some nonstop talking in a non-pragmatic manner, which Dr. Gaines found more consistent with the excessive speaking of a child with Attention Deficit Disorder rather than the idiosyncratic language associated with Autism. Dr. Gaines observed word-repetition, but was not sure if it was echolalic-type behavior or repetition due to confusion.

c. Social skills fell within the low-average range of performance on the Vineland. His mother described him as very sweet and friendly, and compassionate toward others. According to his mother, he plays with others, especially run-around games. No idiosyncratic object play was reported or observed. No unusual or idiosyncratic body movements were reported. Dr. Gaines observed significant hyperactivity. The scores on an Autism screening test, the Childhood Autism Rating Scale, fell in the non-Autistic range.

d. Dr. Gaines removed his provisional Autism diagnosis and concluded that Claimant had no Diagnostic and Statistical Manual of Mental Disorders (DSM) IV Axis II diagnosis. He wrote: "While [Claimant] today clearly exhibited behavioral difficulties, his pattern of behaviors, particularly in light of ongoing parental reports, were not seen as best fitting an Autism Spectrum Condition. Instead, his behaviors are more consistent with Attention Deficit Hyperactivity Disorder. However, parental reports of lack of such

behaviors with friends or in the school setting may bring into question this diagnosis, as well.” (Exh. 7, at p.4.) Dr. Gaines noted the following DSM-IV Axis I diagnoses:

Communication Disorder NOS, Attention Deficit Hyperactivity Disorder (Rule Out), and Parent-Child Relational Problem (Rule Out).

4. Service Agency did not revisit the matter of Claimant’s eligibility immediately following Dr. Gaines’s 2002 assessment, and Claimant continued to receive services.

5. On September 29, 2004, John Lamont, Ph.D. (Lamont), evaluated Claimant. Dr. Lamont administered the Vineland, the Wechsler Intelligence Scale for Children – IV (Wechsler), and the Wide Range Achievement Test – 3. Dr. Lamont measured Claimant’s cognitive ability in the low average range. Adaptive skills were deficient in the daily skills area. Academic functioning skills in spelling and reading were low, which the clinician attributed to learning disabilities in those areas. Dr. Lamont ruled out a diagnosis of mental retardation and made no other DSM Axis II diagnosis. He diagnosed Learning Disorder NOS.

6. Service Agency found Claimant not eligible for continuing services after Dr. Lamont’s evaluation. Claimant’s family did not appeal this determination.

7. Claimant continued to receive special education services under the qualifying category of Autism after 2002. Sandi J. Fischer, Ph.D. (Fischer), a Service Agency staff psychologist, reviewed Claimant’s individual educational program (IEP) plans from 2002 to 2010, while Claimant was in grades Kindergarten through Eighth, and concluded that despite the Autism basis for eligibility, Claimant received services typically provided to those with learning disabilities or behavioral issues, such as Attention Deficit Hyperactivity Disorder. Dr. Fischer did not see reported difficulties with social interaction or stated goals to address social interaction deficits in the IEPs reviewed. After Kindergarten, Claimant received instruction primarily in general

education classes. He is presently in High School and does not receive special education services.

8. a. On August 4, 2012, Claimant's then insurer, Southern California Permanente Medical Group (Kaiser), referred Claimant to Service Agency for eligibility for services on the basis of Autism. Dr. Lamont performed a second assessment, on November 1, 2012. He administered the Vineland II, the Wechsler, the Autism Diagnostic Observation Schedule (ADOS), and the Autism Diagnostic Interview – Revised (ADI-R).

b. Claimant's intellectual ability was measured in the average range. In the Vineland II, he scored in the average range on the communication domain, on the borderline deficient range on the daily living skills domain, and in the mildly deficient range in the socialization domain.

c. In terms of score on the Autism screening tests, Claimant scored below the Autism cutoff on the ADOS. In the ADI-R, he scored at or above the Autism cutoff in one area, Reciprocal Social Interaction, and below the cutoff in the areas of Communication and Restrictive, Repetitive and Stereotypic Patterns of Behavior.

d. Dr. Lamont evaluated Claimant with respect to the Autism Disorder criteria set forth in the DSM-IV-TR, where at least six of twelve criteria must be present, including at least two in the area of social interaction, at least one in the area of communication, and at least one in the area of restrictive or repetitive activities. Dr. Lamont concluded that Claimant met only five of the criteria. In the area of social interaction, Dr. Lamont found that Claimant had difficulty in developing peer relationships appropriate to developmental level and in demonstrating social or emotional reciprocity. Claimant experienced delay in the development of spoken language and had difficulty engaging in spontaneous or imaginative play, two of the criteria in the area of communication. Claimant is quite interested in boxing and often talks about it to the point that his mother characterized it as an obsession, and Dr.

Lamont concluded that Claimant had mild difficulty in this area, thus meeting one diagnostic criterion in the area of restricted or repetitive activities.

Dr. Lamont concluded that Claimant made adequate eye contact, that he used gestures well to regulate social interaction, and that he shared his interests with his mother, all pertinent social interaction criteria. In terms of communication, Dr. Lamont determined that Claimant was able to initiate and sustain conversations with his mother and that he showed no evidence of stereotypic or repetitive use of language. In the third diagnostic area, restricted or repetitive activities, Dr. Lamont concluded that Claimant had no nonfunctional routines or rituals, that he had no repetitive or stereotypic motor mannerisms, and that he showed no persistent preoccupation with parts of objects.

e. Because of the presence of a severe and pervasive impairment in the development of reciprocal social interaction, as established by the presence of two diagnostic criteria in the area of social interaction, and because of Claimant's difficulties in communication, Dr. Lamont diagnosed Claimant with Pervasive Developmental Disorder NOS. He made no diagnosis on Axis II.

9. On November 26, 2012, Service Agency concluded that Claimant was not eligible for services under the Lanterman Act, and informed the family of its decision on the following date. On December 28, 2012, Claimant's mother filed a fair hearing request.

10. On January 31, 2013, Donald P. Gallo, Ph.D., a Kaiser psychologist, evaluated Claimant and diagnosed Autism Disorder. He administered the Vineland II, conducted a clinical interview of Claimant's mother and Claimant, and conducted an observation of Claimant, a process that took approximately two-and-one-half hours. Dr. Gallo noted that during the first half of the meeting Claimant did not answer questions or speak to the adults in the room. When asked questions, Claimant would nudge his

mother to answer for him. After one hour, he became more comfortable and answered questions.

Dr. Gallo found the following significant delays in adaptive functioning in all three domains tested in the Vinland II. The greatest deficits were in the socialization domain, where based on his mother's report, Claimant functioned at the level of a six-month baby in interpersonal relationships and in play and leisure time; coping skills were at the age-equivalent level of a two-year, six-month toddler. Communication skills were low, ranging from an age-equivalent one year, six months in receptive language, four years, five months in expressive language, and 11 years and nine months in written language. Daily living skills were deemed moderately low, ranging from a low age-equivalent six years and six months in the domestic area to an age-equivalent 12 years and nine months in the community area. When the same test was given with Claimant as the reporter, the scores were higher, in the moderately low range in all three domains.

Dr. Gallo concluded that, "Given the history of deficits described by the mother and all of the services [Claimant] has received in the past and continues to require, a referral should be made for an [Applied Behavioral Analysis] evaluation to determine if [Claimant] would benefit from such services." (Exh. 26, at p.4.)

11. Dr. Fischer reviewed all documents received at the hearing and conducted a school observation on February 20, 2013. Dr. Fischer observed Claimant in a high school general education Spanish class for approximately 40 minutes. She did not see any behavior consistent with the presence of Autism. Rather, Claimant volunteered to answer questions, waited to be called upon, and engaged in appropriate conversation. He interacted with a boy in the class but did not interact with two girls near him. In her opinion, Claimant does not have Autism or any other qualifying condition.

## LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically defined as "a disability that originates before an individual attains age 18 years, 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 individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a).)

2. In this case, no evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that he has either condition. Claimant's cognitive ability has been measured in the average range over the years. Except for the last Vineland scores obtained by Dr. Gallo, Claimant's adaptive skills scores have not been in a range that would indicate low cognitive functioning. The results obtained by Dr. Gallo present such a stark departure from all others that the test's validity has been discounted. A person with the interpersonal relationships skills of a sixth-month baby or with the coping skills of a two-year-old toddler, as scored in the test, would not have made it to high school, much less with decreasing special education supports. Accordingly, it was not established that Claimant has mental retardation, a condition closely related to mental retardation, or a condition requiring similar treatment as mental retardation.

3. Claimant does present with some characteristics associated with Autism Disorder. These characteristics were such that Dr. Gaines issued a provisional diagnosis when Claimant was about three years old. Dr. Gaines removed his provisional diagnosis



as additional evidence and the passage of time revealed that the characteristics were more consistent with those of a person with Attention Deficit Hyperactivity Disorder. Dr. Gaines's opinion was subsequently confirmed by Dr. Lamont's evaluations. In his last evaluation, Dr. Lamont utilized two tests, including the more structured and intensive ADOS, specifically designed to assist in the diagnosis of Autism. No other clinician utilized such diagnostic tools. Nor did any clinician other than Dr. Lamont conduct a detailed analysis of the DSM-IV diagnostic criteria. Dr. Lamont's detailed analysis is supported by the clinical data and his opinion that Claimant does not have Autism is persuasive. Dr. Fischer reviewed Claimant's history, conducted her own observation, and agreed with Drs. Gaines and Lamont that Claimant does not have Autism.

Dr. Gallo's opinion has not been given any weight. He performed no Autism-specific screening test. He did not analyze specific pertinent diagnostic criteria. He did not review any pertinent records. His opinion was chiefly based on a questionable Vineland scores. His analysis was largely conclusory and unpersuasive.

Accordingly, it was not established that Claimant has Autism.

4. Section 4643.5, subdivision (b), provides: "An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous." This provision does not apply here because Claimant's family did not appeal Service Agency's determination in 2004 that Claimant was no longer eligible for services under the Lanterman Act, and, therefore, Claimant must be treated as a new applicant. Nevertheless, even if the test found in section 4643.5, subdivision (b), is employed, Service Agency established, following a comprehensive reassessment, that the original determination that Claimant had a developmental disability was clearly erroneous. Claimant was made provisionally eligible

on relatively weak evidence, and subsequent evidence, including multiple assessments spanning ten years, has made it clear that the initial diagnosis was clearly erroneous.

5. By reason of the foregoing factual findings and legal conclusions, it was not established that claimant has a developmental disability that makes him eligible for services under the Lanterman Act.

## ORDER

Claimant's appeal is denied.

DATED: June 5, 2013

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SAMUEL D. REYES

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

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