

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

A. G.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

OAH No. 2013020323

DECISION

The hearing in the above-captioned matter was held on April 11, 2013, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings. Claimant A. G. was represented by her mother, E.G. (Mom).¹ The Service Agency, North Los Angeles County Regional Center (NLARC or Service Agency) was represented by Rhonda Campbell, Contract Officer. Ms. WesamShahbou acted as interpreter throughout the proceeding.

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

The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders.

¹ Initials are used in the place of the names in the interests of privacy.

ISSUE PRESENTED

The issue is whether Claimant is eligible for services from the Service Agency on the grounds that she suffers from autism, or alternatively, should have further assessment.

FACTUAL FINDINGS

JURISDICTION

1. Claimant is a three and one-half-year-old girl who seeks services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.² based on a claim that she suffers from autism.

2. On January 24, 2013, NLARC issued a Notice of Proposed Action (NOPA) and accompanying letter, which informed Claimant that she was not deemed eligible for services under the Lanterman Act. NLARC asserted that Claimant did not have an eligible disability that was substantially handicapping within the meaning of the Lanterman Act. (Ex. 1, p. 6.)³

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

³ The page numbers in this citation are to the page numbers inserted by the Service Agency in some of its exhibits. Because it did not always do so, and because some of the documents had their own pagination, hereafter citations to page numbers inserted by the Service Agency will be preceded by the letter "B."

3. On January 4, 2013, apparently in anticipation of the NOPA, Claimant, acting through her mother, filed a Fair Hearing Request (FHR), and this proceeding ensued. All jurisdictional requirements have been met.

4. It should be noted that the FHR sought a repeat of Claimant's testing and the use of an interpreter during testing. The Service Agency, at the hearing, posited that the issue was eligibility overall.

ASSESSMENTS BY THE SERVICE AGENCY

The Social Assessment in December 2012

5. The Service Agency performed a social assessment prior to December 11, 2012, when it issued a report on that assessment. According to the report, Mom, who was interviewed, was assisted by a family friend; that friend translated for Mom.

6. (A) The report indicates a number of things about Claimant. In the areas of (then) current function and self-care, it was stated that Claimant could run and jump, but not pedal a tricycle; she was wearing diapers day and night. Her mother had to assist her with basic personal care and hygiene. She could feed herself with a fork or spoon, "with some spillage." (Ex. 3, p. 2.) She needed constant supervision in the community. She was described as climbing to high places.

(B) In terms of her social and behavioral characteristics, Mom described the child as having, before age three, interest in other children, and she would initiate interaction with others. The report indicates that the child had five friends of the same age, but during the hearing Mom attested that was not the case, and that this aspect of the report was based on poor translation by Mom's friend. It was stated that Claimant would play with other children with dolls and blocks, taking apart what others built up with the blocks. She was described as not engaging in imaginary play, and that she only wanted to play with Mom. Claimant could tell if someone was happy or sad, and could

tell if she was bothering someone. She was described as affectionate towards others, and having good eye contact.

(C) According to the report, Claimant did not have repetitive behaviors or unusual body mannerisms, and she was affectionate toward others. While she sometimes would not let go of her toys, she could be distracted away from them by another activity. Behavioral concerns were minimal; the child would sometimes wander in the apartment building where she lived, and might scratch others when her mother angered her. Eye contact was described as good.

(D) Speech delay before age three was reported, and it was stated that she could use gestures to communicate. She would talk in baby talk and gibberish that her parents did not understand; she was described as repetitive or echolalich. She could speak simple words, and use simple phrases in the family's native language; sentences were short, such as "Mom, I want to sleep." (Ex. 3, p. 4.) She could initiate or engage in reciprocal speech and could understand simple words and phrases.

(E) The social assessment report stated that Claimant said her first words at two years, and that she put two words together at two years, six months. She started speaking in three and four word sentences at approximately age three.

Dr. Lamont's Psychological Assessment in January 2013

7. Dr. John Lamont, Ph.D. evaluated Claimant on January 3, 2013. Dr. Lamont is a licensed psychologist who performs assessments on a contract basis for the Service Agency. Mom accompanied the child, and provided information to Dr. Lamont. There was no interpreter there to assist, however.

8. Dr. Lamont utilized a number of testing instruments in the assessment process, including the Vineland Adaptive Behavior Scales-II (Vineland), the Wechsler Preschool and Primary Scale of Intelligence-IV (WPPSI), the Developmental Test of Visual-Motor Integration (DTVMI), and the Autism Diagnostic Interview-Revised (ADI-R).

9. Dr. Lamont was able to obtain information about Claimant from Mom despite the potential language barrier. Hence, he reported Claimant is shy and hides behind her mother when other children are present, and that if her mother cries, Claimant asks "what's wrong?" and appears worried. The child was reportedly using imagination to play, and would try to feed oatmeal to her dolls, and she would cover the dolls for sleep. She would pretend that a remote control was a phone, trying to talk through it. She would imitate her mother dancing.

10. Dr. Lamont observed Claimant to make good eye contact, and she smiled at him. She brought blocks to him, and shared enjoyment. She pointed to things in response to questions, but her language was minimal. He did not observe oddities in speech or behavior.

11. (A) The WPPSI was administered, and Claimant's overall IQ was within the low average range, at 86. Claimant's visual spatial index score was in the average range—94—by her verbal comprehension index was substantially lower, at 76. Some subtest scores were in the average range—Block design and Picture Memory—while others were significantly lower, such as Receptive Vocabulary (6), and Information (5). (Ex. 5, p. 5)

(B) On the Vineland, Claimant's score on the Communication portion was a 69, clearly deficient, and a sign of significant impairment. Her score in the Socialization Domain was borderline, at 72. The other two domains, in the area of Daily Living Skills and Motor Skills, were in the average to low average ranges, 93 and 81, respectively. (Ex. 5, p. 5.)

(C) The DTVMI score was a 92, an average score. (Ex. 5, p. 5.)

(D) The ADI-R showed that Claimant was at the cut-off score for communication, but she did not meet the cut-off for Reciprocal Social Interaction or for Repetitive and Stereotypical Behavior. (Ex. 5, p. 5)

12. Dr. Lamont diagnosed Claimant as suffering from Mixed Receptive-Expressive Language Disorder. He did not diagnose any condition that might make Claimant eligible for regional center services under the Lanterman Act, such as Autistic Disorder or Mental Retardation.

ASSESSMENTS BY THE SCHOOL DISTRICT

13. In March and April 2013, Claimant's school district, the Los Angeles Unified School District (District) conducted assessments of Claimant, to determine if she were eligible for special education services. She was found eligible, and an Individual Education Program (IEP) was developed.

14. (A) On March 18, 2013, the District conducted a Psycho-Educational Assessment of Claimant, who was then 39 months old. The assessment was performed with the assistance of an interpreter. According to the report, issued the same day as the assessment, Mom wanted the assessment because concerns about her child's communication skills.

(B) Claimant's behavior during the assessment indicated that she had "largely appropriate" nonverbal social behavior, in that she made good eye contact, engaged in social referencing, and smiled appropriately. (Ex. 14, p. 2.) She showed some difficulty in transitions, both when she arrived, and when she left, but it was noted that within five minutes of arrival, Claimant was exploring toys and then was able to participate in the evaluations.

(C) The District does not use IQ tests to evaluate students. However, a non-standard test showed that Claimant demonstrated "variability in cognition, with relative strengths in nonverbal aspects and needs in verbal aspects." (Ex. 14, p. 3.) It was concluded that her needs in this area would impact her ability to access the general education curriculum. However, the needs were not so severe as to indicate eligibility on the basis of Mental Retardation.

(D) The assessment looked at other areas, such as self-help and adaptive skills, and social-emotional status. In the end, the report determined that Claimant should be deemed eligible under the category of Developmentally Delayed

15. (A) A speech and language assessment was performed by the District, on March 18, 2013. A report issued that same day.

(B) Ms. Parmenter, a Speech and Language Pathologist, conducted the assessment. She observed the child to engage in preferred activities, needing maximum prompting and repetition to respond to assessment tasks. "On her own, [Claimant] explored the play area, dumping and filling baskets and gathering dolls and doll-related toys together. She separated from the adults and played without words or sounds in close proximity to her mother." (Ex. 15, p. 1.) Because Arabic is Claimant's primary language, the assessor had to rely on Mom for much information.

(C) The Speech Pathologist concluded that "based on parent reporting, observation, and informal assessment, [Claimant] presents with a moderate receptive and expressive language disorder and speech production delay, . . ." (Ex. 15, p. 4.) It was then concluded that Claimant did not meet the criteria, for purposes of special education eligibility, of Speech and Language Impairment. (*Id.*)

16. (A) Based on the two assessments, Claimant was made eligible to receive special education services based not on Speech and Language Impairment, but as Developmentally Delayed. (Ex. 16, p. B 9.) An IEP Team met on April 4, 2013, and an IEP was generated.

(B) The IEP notes that Ms. Parmenter, the Speech and Language Pathologist, recommended a language based special education program where Claimant would receive maximum support for receptive and expressive English language development. (Ex. 16, p. B 5.)

(C) A series of goals were set for Claimant, covering a number of areas, including transition from preferred to non-preferred activities (Ex. 16, p. B 14), answering questions (*Id.*, p. B 11), and expressing her wants and needs in three and four word sentences. (*Id.*, p. B 12.)

(D) The IEP team also authorized Extended School Year, essentially summer school, services. At the time of the hearing, services under the IEP had yet to commence.

DIAGNOSTIC CRITERIA FOR AUTISM AND RELATED DISORDERS, AND FOR MENTAL RETARDATION

17. (A) Two main sources of assessment criteria are available in this case to determine whether or not Claimant has been established as autistic or suffers from a related disorder. One of those sources also provides the assessment criteria for Mental Retardation.

(B) The primary source for diagnostic criteria is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, also known as the DSM-IV-TR, which is published by the American Psychiatric Association. (Hereafter DSM.) The other source is the Best Practices Guidelines published by the Department of Developmental Services in 2002.⁴ The Guidelines pertain to the assessment of autism and related disorders, while the DSM provides the diagnostic criteria for those conditions.

18. The DSM lists five separate disorders under the heading "Pervasive Developmental Disorders." They are Autistic Disorder, Pervasive Developmental

⁴Properly, Autistic Spectrum Disorders, Best Practices Guidelines for Screening, Diagnosis, and Assessment, hereafter "the Guidelines."

Disorder-Not Otherwise Specified (PDD-NOS), Asperger's Disorder or Syndrome, Rhett's Disorder, and Childhood Disintegrative Disorder. Different diagnostic criteria are set forth for each within the DSM. Autistic Disorder is not Asperger's Disorder or PDD-NOS, even though the conditions have similarities.⁵

19. (A) To find that a person suffers from Autistic Disorder, the DSM requires that impairments in social interaction and communication be found, through examination of certain criteria, and there must also be evidence of restricted repetitive and stereotyped patterns of behavior, interests, and activities. There must be delays or abnormal functioning in social interaction, or language as used in social communication, or symbolic or imaginative play, before three years of age. Further, the disturbance must not be better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder. The diagnostic criteria lay out certain touchstones within each of the aforementioned areas, and the person in question must meet a number of the criteria. Furthermore, the symptoms must be clinically significant.

(B) The diagnostic criteria for Asperger's Disorder have some similarities to those set forth for autism, but focus on impairment in social interaction and restricted repetitive and stereotyped behaviors.⁶ Typically, language development has been adequate, hence there must not be a clinically significant general delay in language,

⁵ The ALJ is aware that the DSM-V is slated to change some of the classification of autism spectrum disorders, but the DSM-IV-TR is the current manual, and must govern the analysis in this case.

⁶ Although the Lanterman Act makes autism, and not the other PDDs the eligible condition, discussion of the diagnostic criteria for Aspergers and PDD-NOS may further the analysis necessary in this case.

such as the use of single words by age two, and communicative phrases by age three. There must not be clinically significant delay in cognitive development, or in the development of age-appropriate self-help skills, nor in adaptive behavior other than social interaction, and curiosity about the environment. Finally, it must be determined that criteria are not met for another pervasive developmental disorder or schizophrenia.

(C) The diagnostic criteria for PDD-NOS are the most abbreviated of the three maladies discussed herein. There is no "checklist" of criteria as may be found in the DSM for autism and Asperger's. A short paragraph sets forth the diagnostic criteria, and follows in full:

This category should be used when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotyped behavior, interests, and activities, but the criteria are not met for a specific Pervasive Developmental Disorder, Schizophrenia, Schizotypal Personality Disorder, or Avoidant Personality Disorder. For example, this category includes "atypical autism"—presentations that do not meet the criteria for Autistic Disorder because of late age at onset, atypical symptomatology, or subthreshold symptomatology, or all of these.

(DSM, p. 84, at Ex. 8, p. B 18.)

20. Autistic Disorder is a malady that occurs by age three, but Asperger's or PDD-NOS can be diagnosed with a later onset. Regarding Autistic Disorder, the DSM

states that “by definition, if there is a period of normal development, it cannot extend past age 3 years.” (DSM, p. 71; Ex. 8, p. B 5.)

21. The Department of Development Services (DDS) published the Guidelines in 2002, after extensive study and with the assistance and participation of numerous experts. The book is not a diagnostic manual per se, but gives guidance in the areas of screening, evaluation, and assessment of those who may suffer from what it labels an “autistic spectrum disorder” (ASD), a reference to the concept that at least some of the maladies categorized as separate pervasive developmental disorders might be seen as a singular condition, on a continuum of related disorders. The Guidelines provide information that may assist the diagnostic analysis. However, the Guidelines do not have the force of law, and are not established as regulations adopted by DDS.

22. (A) Some important concepts may be gleaned from the Guidelines. One is that the term ASD, when used in the Guidelines, is a descriptive term, and not a diagnosis. It is descriptive of three conditions on a spectrum of autism-like conditions: Autistic Disorder, PDD-NOS, and Asperger’s Disorder. (Guidelines, p. 2.) It must be understood that ASD, as defined in the Guidelines, is not co-extensive with the definition of Pervasive Developmental Disorders used in the DSM, as the latter umbrella term also includes Rhett’s Disorder and Childhood Disintegrative Disorder. The term “autistic spectrum disorder” or ASD has been the subject of some controversy among professionals.

(B) The authors of the Guidelines state that the DSM-IV-TR, or its immediate predecessor, the DSM-IV, provides the current standards for the diagnosis and classification of ASD. (Guidelines, p. 3.)

(C) When determining whether or not a person suffers from an ASD, there is no substitute for sound clinical judgment based on experience, familiarity with the population, and familiarity with the research. (Guidelines, p. 4.) Professionals with such

experience and expertise are not just found in the regional centers, but also in private health systems and university settings. (*Id.*)

(D) Information obtained from parents is quite valuable. "Because parents are the experts regarding their children, eliciting and valuing parental concerns is imperative." (Guidelines, p. 14.) The Guidelines make this general statement in the context of screening, but the concept can not be ignored in any case where the parent can provide information pertaining to the child's development. While potential reporter bias is an issue that cannot be ignored, the possibility of reporter bias cannot be allowed to swallow up a parent's report.

(E) A substantial number of children with an ASD have normal to superior cognitive function; 20 to 25 percent demonstrate such in at least one of the two major cognitive domains, verbal and non-verbal.⁷(Guidelines, p. 49.)

(F) Impairment in *communication*, rather than in *language*, is a key issue, as children with ASD have a vast range of language skills. As taught by the Guidelines, ". . . it is clear that the fundamental difficulty is with communication, of which speech and language are components." Further, "Delays in speech and language alone are not specific to autism, nor are the presence of intact language skills contraindicated of an ASD." (Guidelines, p. 60, citations omitted.)

(G) Diagnosis of ASDs, and especially PDD-NOS in children and adolescents, must be differentiated from other problems, such as language and sensory impairments.

⁷ But, such percentages may not apply to Autistic Disorder. As noted by the DSM, "in most cases, there is an associated diagnosis of Mental Retardation, which can range from mild to profound. The profile of cognitive skills is usually uneven, regardless of general level of intelligence, with verbal skills typically weaker than non-verbal skills." (DSM, pp. 71-72, at Ex. CL 8, pp. 38-39.)

23. The DSM is the most widely accepted source of diagnostic criteria for developmental disorders such as Mental Retardation and Autism. It teaches that the essential features of mental retardation are first, a significantly subaverage general intellectual functioning that, second, is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM, p. 41.) "Significantly subaverage intelligence" is defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id.*) Put another way, "significantly subaverage" translates to IQ scores falling in the second percentile; that is, a score of 70 or below would place that person in the bottom two percent of the population, in terms of IQ.

FINDINGS DISPOSITIVE OF THE CASE

24. It has not been established that Claimant suffers from Autism. Dr. Lamont did not find that Claimant suffered from Autism, the only ASD that would make Claimant eligible. While the District did not necessarily test for that malady, it must be noted that nothing in the two assessments, or in the IEP, indicate Autism. Indeed, those assessments indicated good eye contact, and communication, even if the communication was non-verbal. It is clear from the diagnostic criteria that communication, and not language, are key issues in determining if someone is autistic, and Claimant is attempting to communicate. Indeed, the District's staff was able to communicate with Claimant. She was observed to engage in spontaneous play, finding her way to the toys, and gathering up the dolls to play with them. The available evidence does not point to Autism.

25. It has not been established that Claimant suffers from Mental Retardation. Her IQ tests do not place her overall IQ at 70 or below; put another way, it has not been

shown that she is in the bottom two percent for intelligence. Likewise, her adaptive skills do not show a global and substantial delay of the type associated with Mental Retardation.

26. It has not been shown that Dr. Lamont's assessment is tainted by the fact that there was not an interpreter. In part this is because he was able to perform some testing of the child without an interpreter. It also appears he was able to gain information about Claimant from Mom, which information did not come from the social assessment. Further, his findings tend to be corroborated by the District's assessments.

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to Code section 4710 et seq., based on Factual Findings 1 through 3.

LEGAL CONCLUSIONS PERTAINING TO ELIGIBILITY GENERALLY

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

Developmental disability" means a disability which originates before an individual attains age 18, 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.

This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by DDS, pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR).⁸ At section 54000, a further definition of "developmental disability" is found which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

⁸ All references to the CCR are to title 17.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

4. Section 4512, subdivision (l), provides that, "substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

LEGAL CONCLUSIONS SPECIFIC TO RESOLUTION OF THE CASE

5. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that she suffers from Autistic Disorder or Mental Retardation as those terms are defined in the DSM. This Conclusion is based on section 4512, subdivision (a), and Factual Findings 17 through 23.

(B) The governing statute uses the term autism, and it does not use the term autism spectrum disorder, Asperger's Disorder, or PDD-NOS. When used in a statute, technical words are given their peculiar and appropriate meaning. (*Handlery v. Franchise Tax Bd.* (1972) 26 Cal.App.3d 970, 981; Civ. Code, § 13.) Given the Legislature's specific use of a technical term—autism—resort must be had to technical criteria such as the DSM. Furthermore, the Legislature has maintained the technical term in the statute for a period exceeding 30 years, which augers for use of a more narrow definition. Although the Lanterman Act has been amended many times since it was first enacted in 1975, none of the amendments have been made with an eye toward expanding eligibility to cover the other Pervasive Developmental Disorders, such as Asperger's or Childhood Disintegrative Disorder.⁹ This is an indication that the Legislature does not intend to expand the definition. (See *De Young v. City of San Diego* (1983) 147 Cal.App.3d 11, 18-19, overruled on other grounds by *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.)

6. The record establishes that Claimant does not suffer from Autistic Disorder, based on Factual Findings 4 through 24. Claimant provided no assessments by competent professionals that supported a claim she is was autistic, and the evidence regarding Claimant's behaviors that were provided did not so contradict the other reports or assessments of Claimant so that Dr. Lamont's diagnosis could be set aside. In the end, the evidence indicates that this child can and does communicate, that she does engage in play, and that she does not engage in the sort of repetitive or narrowly-focused activity associated with Autism.

⁹ Some of which were only recognized as such in recent years. For example, Asperger's Syndrome was not recognized by the DSM until the DSM-IV was published in 1994. The DSM-III-R, published in 1987, recognized only Autism and PDD-NOS.

7. It has not been established that Claimant is mentally retarded, based on Factual Findings 4 through 23, and 25. Her IQ is in the low average range, and her adaptive function is not so limited.

8. Claimant had sought further testing, with an interpreter in her request for a hearing. If there were evidence that seriously called Dr. Lamont's diagnosis into question, that might be a reasonable alternative. However, it should be noted that Dr. Lamont had information about the child not included in the social assessment. It is reasonably inferred that he obtained that information from Mom and that communication was not as hindered as was implied. At the same time, when using an interpreter, Mom communicated information to the District that indicated Claimant is not autistic. Thus, the District staff described a child who would play with dolls, and would communicate with others, even if only with gestures. In this circumstance, ordering another assessment is not necessary, as there is insufficient evidence that Claimant suffers from an eligible condition. (§ 4642.)

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ORDER

The appeal of Claimant A. G. is denied, and the action of the Service Agency to deny eligibility is sustained, and Claimant shall not be eligible for services.

April 25, 2013

_____/s/____

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.