

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MAXAMILIAN C.,

Claimant,

vs.

**SOUTH CENTRAL LOS ANGELES REGIONAL
CENTER,**

Service Agency.

OAH No. 2013050392

DECISION

This matter was heard by Laurie R. Pearlman, Administrative Law Judge with the Office of Administrative Hearings, on June 12, 2013, in Los Angeles, California.

Maxamilian C. (Claimant) was present and was represented by Carla G., his mother and authorized representative.¹ South Central Los Angeles Regional Center (Regional Center or Service Agency) was represented by its Fair Hearing/Government Affairs Manager, Johanna Arias-Bhatia.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 12, 2013.

¹ Claimant's and his mother's initials are used, in lieu of their last names, to protect their privacy.

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 section 4500 et seq. (Lanterman Act)?

FACTUAL FINDINGS

1. Claimant is a male who is three years and nine months old. He claims to be eligible for regional center services under the qualifying categories of autism/Asperger's syndrome. (Exhibit 2).

2. Claimant currently lives with his mother, sister (2 years old), and maternal grandmother. The Department of Children and Family Services (DCFS) removed Claimant from his mother's custody when he was six months old, after he was inadvertently injured while in his mother's care. Custody was then awarded to Claimant's father. Claimant lived with his father and paternal aunt until he was removed from his father's care when he was approximately two years old, due to charges of neglect. Claimant was then placed into foster care. However, his mother continued to have consistent contact with him while he was placed outside of her home and she regained full custody in January, 2013.

3. Claimant was referred to the Regional Center by DCFS to rule out a developmental delay or autism.

4. Rosalinda Mata, M.S.W. (Mata) is the Service Coordinator for the Regional Center's Intake and Assessment Unit. On January 3, 2013, Mata conducted a social assessment to determine Claimant's eligibility for services under the Lanterman Act. Mata noted that Claimant exhibits language delays (e.g., he makes consonant sound omissions), and he manifests behavioral issues that may be linked to a past history of neglect and DCFS removal. Mata observed that Claimant provided appropriate eye contact, responded to questions and appeared to enjoy the attention he received. However, he became easily bored and was not able to self-regulate unless he had the full attention of his mother and

Mata. Claimant was able to follow one-step directions, was able to speak in sentences of three to five words and had a vocabulary of 75-100 words. Mata recommended psychological testing to clarify Claimant's cognitive and adaptive levels and to rule out or confirm an intellectual delay. Mata suggested that all findings be presented to the Regional Center's interdisciplinary team for an eligibility determination (Exhibit 5).

5. a. Gabrielle du Verglas (du Verglas), Ph.D., is a licensed psychologist. On January 25, 2013 and February 11, 2013, du Verglas conducted a psychological evaluation, at the request of the Regional Center, to assess Claimant's cognitive and adaptive levels of functioning and to determine his diagnosis, in order to evaluate his eligibility for services under the Lanterman Act. Dr. du Verglas described Claimant as able to respond to tasks in an adequate manner. His eye contact was "appropriate," but was "sometimes fleeting due to high levels of activity.... He did not display any self-stimulatory behaviors." (Exhibit 4, p. 3.)

b. Claimant's cognitive skills, as measured through the Wechsler Preschool and Primary Scale of Intelligence, were in the low average range. His general language score was in the low average to borderline range of abilities.

c. Dr. du Verglas assessed Claimant's adaptive functioning by means of the Adaptive Behavior Assessment System-II (ABAS-II), with Claimant's mother reporting her observations. The ABAS-II is designed to evaluate whether an individual displays various functional skills necessary for daily living, without the assistance of others. As assessed through the ABAS-II, with Claimant's mother as reporter, his adaptive functioning was delayed.

d. To assess Claimant's socialization skills, Dr. du Verglas administered the Gilliam Autism Rating Scale- Second Edition (GARS-2), a screening tool for autism and other severe behavioral disorders. It is a questionnaire that is designed to be completed by a caregiver. Claimant's mother "produced a higher profile of concerns, possibly indicative of a diagnosis of Autism Spectrum Disorder." (Exhibit 4, p. 3.) As a result, Dr. du

Verglas saw Claimant for a second session to further assess his social emotional functioning.

e. During the second session, Dr. du Verglas administered the Autism Diagnostic Observation Schedule (ADOS) Module 2. The ADOS is an assessment of communication, social interaction, and play, or imaginative use of materials. Claimant was very enthusiastic about the toys presented to him and was fully cooperative. Dr. du Verglas concluded that Claimant's profile during administration of the ADOS, as well as her direct observation of his behavior, did not match his mother's responses on the GARS-2, where items were reported by the caregiver, but not observed by a trained professional.²

f. Dr. du Verglas concluded that Claimant does not show delays in cognition at this time and does not meet the criteria for diagnosis of intellectual disability. She concluded that Claimant's cognitive profile is indicative of a diagnosis of Mixed Receptive Expressive Language Disorder and that he is in need of speech and language therapy, due to delays in both receptive and expressive language. Dr. du Verglas also concluded that Claimant does not meet the criteria for Autistic Spectrum Disorder, based on direct

² The Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision, 2000, American Psychiatric Association; also known as DSM-IV-TR) is a well-respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. The language used in the DSM-IV-TR section on autistic disorders requires some of the factors listed to be "gross and sustained," meaning that it is obvious and noticeable over time. The behavior must be of clinical importance. The DSM-IV-TR specifically states that some behaviors must be a "qualitative impairment" or a "marked impairment." Therefore, behaviors must be evaluated by those who, by their training and experience, are qualified to determine whether those behaviors are clinically significant and would or would not support the diagnosis.

observation of his behavior, as well as administration of the ADOS. She suggested that Claimant's cognitive abilities should be formally reassessed by the age of five to trace his progress. She also recommended a referral for mental health services and suggested that "any concerns related to his social emotional functioning merit reassessment after he has the opportunity to participate in preschool programming, receives speech and language therapy, as well as play therapy due to previous instability in his upbringing." (Exhibit 4, p. 11.)

6. In March and April 2013, the Los Angeles Unified School District (LAUSD), Division of Special Education, conducted a Psycho-Educational Assessment and a Language and Speech Assessment of Claimant. (Exhibits A and B.) These assessments were undertaken based upon a referral from the Regional Center and due to the concerns of Claimant's mother as to his speech delays and his ability to focus, remain seated, and answer questions on topic.³ The purpose of the LAUSD evaluations was to determine Claimant's relative learning strengths and his areas of need and to guide the Individual Education Plan team in the process of decision-making and program development.

7. a. The criteria related to eligibility for special education services from a school district under the category of autistic-like behaviors are found in the Education Code and related regulations. Under California Code of Regulations, title 5, section 3030,

³ The LAUSD Psycho-Educational assessment report states that the suspected eligibility addressed in the assessment is autism in that Claimant "was reported to have a diagnosis of Autism from SCLARC [Regional Center] and DCFS." (Exhibit A, p.1.) This was erroneous, in that no diagnosis of autism had been made by the Regional Center and there was no evidence of a diagnosis by DCFS. LAUSD's incorrect assumption that an autism diagnosis had already been made by two other entities may have skewed the conclusion reached by LAUSD.

subdivision (g), eligibility for special education services exists if a pupil exhibits "*any combination* of the following *autistic-like* behaviors:" (Emphasis added.)

- "1. An inability to use oral language for appropriate communication.
- "2. A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- "3. An obsession to maintain sameness.
- "4. Extreme preoccupation with objects or inappropriate use of objects or both.
- "5. Extreme resistance to controls.
- "6. Displays peculiar motoric mannerisms and motility patterns. "7. Self-stimulating, ritualistic behavior."

b. This regulation contains substantially fewer requirements to be satisfied (i.e., any two or more of the seven listed) for someone to receive special education services for exhibiting autistic-like behaviors as compared to the number of requirements under the DSM-IV-TR to be diagnosed as autistic (i.e., six of the 12 listed) and receive services from a Regional Center.

8. a. In April 2013, following these evaluations, LAUSD concluded that Claimant was eligible for special education services by reason of autism. In the evaluation, school psychologist Michelle Quiroz, M.A., and speech and language pathologist Laurent Girard, M.A., C.C.C.-S.L.P., concluded that Claimant met Education Code criteria for eligibility under autism. Mr. Girard found that Claimant met eligibility requirements for Speech and Language Impairment because of an articulation disorder, but showed age-appropriate fluency and voice and was cooperative and able to follow one-step directions. (Exhibit B.) Ms. Quiroz noted that Claimant had several autistic-like behaviors, because he displayed or was reported to display: delays in expression and receptive language; inconsistent eye contact and lack of peer relationships; resistance to change in his routine; and his mother's reports that he wiggles his fingers on occasion, leans forward when

running, and appears clumsy at times. On the other hand, Ms. Quiroz did note that Claimant demonstrated an appropriate attention span and engaged in most directed activities; remained on task for over 30 minutes; did not appear to have difficulties with transitions; and demonstrated short topic maintenance skills. She stated that the Claimant's verbal and non-verbal cognitive skills and school readiness skills appear to be scattered, with relative strengths and weaknesses. (Exhibit A.)

b. Claimant now receives special education services, has a one-on-one teacher and is provided with speech therapy and extended school year services.

9. Claimant's case was reviewed by the Regional Center's interdisciplinary core staff eligibility team, which reviewed the assessments completed by Ms. Mata and Dr. du Verglas. (Exhibits 4 and 5.) On April 10, 2013, the Regional Center concluded that Claimant was not eligible for services under the Lanterman Act. (Exhibit 1.) Claimant's mother then filed a Fair Hearing Request. (Exhibit 2.)

10. Michelle Cuevas, Psy.D., a psychologist employed by the Regional Center, reviewed all the documents submitted at the hearing, and concluded that Claimant does not have autism or any other diagnosis which would make him eligible for Regional Center services. Dr. Cuevas noted that the District's designation of Claimant as having autism for the purpose of special education services does not constitute a formal diagnosis. With respect to the school evaluation itself, Dr. Cuevas pointed out that Claimant's behaviors, which were indicated as being consistent with autism, were based upon reporting by Claimant's mother, but were not observed by Ms. Quiroz, and were inconsistent with Ms. Quiroz's direct observations of Claimant, and with the tests administered by LAUSD, Dr. du Verglas, and Ms. Mata. She pointed out that the ADOS, which she described as the "gold standard" of autism testing, did not indicate a diagnosis of autism. In agreement with Dr. du Verglas, Dr. Cuevas opined that Claimant's presentation was better explained by Mixed Receptive Expressive Language Disorder and the psycho-social stressors Claimant experienced when he was removed from his mother's custody.

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....[T]his 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." (Welf. & Inst. Code, § 4512, subd. (a).)

2. Implementing regulations issued by the Department of Developmental Services contain the following exclusions from the definition of developmental disability:

"[(c)] Developmental Disability shall not include handicapping conditions that are:

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

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

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

treatment similar to that required for mental retardation.” (Cal. Code of Regs., tit. 17, § 54000.)

3. 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.

4. No evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that he has either condition. He has not received a diagnosis of mental retardation or of any condition related to mental retardation, and the evidence of cognitive functioning and adaptive skills received at the hearing tends to rule out the presence of mental retardation, a condition closely related to mental retardation, or one requiring treatment similar to that required by individuals with mental retardation. Claimant’s cognitive skills have been consistently measured by different evaluators in the low average range.

5. Claimant has not received a diagnosis of autism, and the evidence adduced at the hearing is insufficient to support such a diagnosis. Although behaviors that may be consistent with autism were reported by Claimant’s mother and a LAUSD evaluator, Dr. du Verglas administered a recognized diagnostic tool, the ADOS, and concluded that Claimant did not present with autism. Rather, she opined that Claimant’s primary presentation was that of a child with Mixed Receptive Expressive Language Disorder and the psychosocial stressors Claimant experienced when he was removed from his mother’s custody, an opinion that was shared by Dr. Cuevas. In these circumstances, it has not been established that Claimant has autism.

6. The reports of Ms. Mata and Dr. du Verglas are comprehensive and utilize tests that are well accepted by professionals in the field. Neither Ms. Mata nor Dr. du

Verglas found that Claimant met the diagnostic criteria for Autistic Disorder. The other diagnoses that they made are well supported by the testing. These other diagnoses do not constitute developmental disabilities that would render Claimant eligible for Regional Center services under the Lanterman Act.

7. The preponderance of the evidence supports the Regional Center's decision to deny eligibility for Claimant to receive services. The Regional Center's interpretation of the laws and regulations regarding eligibility, and application of them to Claimant, was not proven to be unreasonable or arbitrary.

8. It was not established that Claimant has a developmental disability within the meaning of the Lanterman Act, and he is not eligible to receive Regional Center services, by reason of factual finding numbers 1 through 10 and legal conclusion numbers 1 through 7.

ORDER

Claimant's appeal of the Service Agency's determination that he is not eligible for Regional Center services is denied.

DATED: June 25, 2013



LAURIE R. PEARLMAN

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.