

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

SIMON D.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL

CENTER,

Service Agency.

OAH Case No. 2013110576

DECISION DENYING THE APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on March 14, 2013, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Simon D. (Claimant) was represented by his mother, who was assisted by a Spanish interpreter.¹ Claimant was also present.

The Eastern Los Angeles Regional Center (Service Agency) was represented by Edith Hernandez.

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

ISSUE

Does Claimant have a developmental disability making him eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on exhibits 1-10 submitted by the Service Agency, exhibits A-B submitted by Claimant's mother, and the testimony of Claimant's mother, his paternal grandmother, as well as family friends Guadalupe Mora and Patricia Garcia. Although Claimant was not sworn to testify, he did respond to questions posed by the ALJ at the conclusion of the hearing.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 10-year-old male on whose behalf regional center services were requested from the Service Agency on a date not established in 2013.
2. By a letter dated September 30, 2013, Claimant's parents were 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 November 1, 2013, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, by which the decision denying his eligibility was appealed.
4. This matter was initially scheduled to be heard on December 16, 2013. However, the hearing was continued at the request of Claimant's mother. In connection with her continuance request, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

CLAIMANT'S BACKGROUND

5. Claimant lives with his parents. He is their only child.

6. Claimant receives special education services from his local school district. He is currently in the fifth grade. He has been placed in a general education classroom, but he receives half an hour per week of speech and language therapy.

7. Claimant's parents have been concerned with their son's communication problems for several years. In 2009 they became alarmed that Claimant's speech and language delays were not resolving. By that time, their son was not doing well in school academically. Although he appeared to be interested in social engagement, Claimant had difficulty connecting with other children and he became isolated. He also became easily frustrated and had tantrums when things did not go his way. More recently, his parents report that Claimant is fidgety, has difficulty focusing or staying on task, is teased at school and does not have many friends, and that all he wants to do is watch TV and play video games.

THE SERVICE AGENCY'S PRIOR ASSESSMENT OF CLAIMANT

8. Claimant was previously referred by his local school district to the Service Agency for an eligibility evaluation in 2009, when he was five years old.

9. After an initial intake assessment, the Service Agency referred Claimant to psychologist Larry E. Gaines for a psychological evaluation, which was conducted in May 2009. Dr. Gaines reviewed Claimant's records, interviewed Claimant and his mother, and administered to Claimant a series of tests. Dr. Gaines made the following pertinent findings:

(A) Since Claimant performed in the normal range in cognitive intellectual testing, Dr. Gaines felt a diagnosis of mental retardation was not warranted.

- (B) Dr. Gaines 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 and keeping good eye contact, showing social interest, displaying emotional reciprocity, and lacking restricted and/or intense, idiosyncratic movements or preoccupations.
- (C) Dr. Gaines did note that Claimant had significant articulation problems, in that he omitted material sounds pronouncing words and replaced those sounds with his own, which made it hard to understand him. Claimant also displayed a limited vocabulary. Dr. Gaines noted that Claimant was fidgety or restless.
- (D) Dr. Gaines diagnosed Claimant with Mixed Receptive Expressive Language Disorder, Learning Disorder Not Otherwise Specified (NOS), and Attention Deficit Hyperactivity Disorder (ADHD).

10. A Service Agency psychologist, Dr. Randi E. Bienstock, reviewed Claimant's case file in July 2009, including Dr. Gaines' evaluation report. By that time, Dr. Bienstock was able to review school records that had not been available when Dr. Gaines evaluated Claimant. Dr. Bienstock ascertained from the school records that Claimant had been deemed eligible for special education services based on the category of Speech and Language Impairment, and that his services at school almost exclusively related to his speech and language delays. Based on Dr. Gaines' evaluation and the school records, Dr. Bienstock concluded that Claimant was not autistic and did not have any other condition making him eligible for regional center services.

11. The Service Agency denied the 2009 request for eligibility. Claimant's parents did not appeal.

THE SERVICE AGENCY'S RECENT ASSESSMENT OF CLAIMANT

12. As discussed in more detail below, Claimant's health care providers at Kaiser Permanente (Kaiser) are of the opinion that Claimant is exhibiting autistic behaviors. For that reason, Claimant's mother was re-directed to the Service Agency for an eligibility evaluation. She approached the Service Agency in 2013, as referenced in Factual Findings 1-2.

13. In addition to obtaining records from Claimant's local school district and Kaiser, the Service Agency referred Claimant to clinical psychologist Dr. Roberto De Candia for a psychological evaluation, which he conducted in June and July 2013. Dr. De Candia interviewed Claimant and his mother, reviewed available records, and administered to Claimant a number of tests. Based on his evaluation, Dr. De Candia made the following pertinent findings:

- (A) Overall, Claimant performed in the average range of the cognitive testing administered to him, which Dr. De Candia believed ruled out mental retardation. However, Claimant did display a significant delay in reading skills. Although Claimant also exhibited significant deficits in adaptive functioning in the domains of communication, daily living skills and socialization, Dr. De Candia did not associate those deficits with impaired intelligence.
- (B) The results from the Autism Diagnostic Observation Schedule (ADOS) test were significantly below the minimum cut-off necessary to signal the presence of an autistic spectrum disorder. Moreover, Dr. De Candia observed Claimant display behaviors inconsistent with autism; for example, Claimant made and maintained good eye contact, answered questions, cooperated with testing, and had no problem initiating or participating in reciprocal activity with Dr. De Candia. Based on the results of the ADOS test and Claimant's behavior during

two days of evaluation, Dr. De Candia felt there was no presence of an autistic spectrum disorder.

- (C) Dr. De Candia noticed that Claimant was initially shy and quiet, and that his speech and articulation were difficult to understand. Dr. De Candia confirmed that Claimant was restless and fidgeted a great deal. Claimant also seemed emotionally rattled over his parents' frequent arguments with each other.
- (D) As a result of the above, Dr. De Candia diagnosed Claimant with ADHD, combined type, due to the historical record of others having made that diagnosis, as well as Dr. De Candia's observations of Claimant's restlessness. Due to Claimant's speech and articulation delays, Dr. De Candia diagnosed him with a Phonological Disorder. Dr. De Candia also diagnosed Claimant with a Reading Disorder, due to his poor performance on the reading skills part of the cognitive testing. Finally, Dr. De Candia diagnosed Claimant with a Phase of Life Problem, due to his distress over his parents' arguing with each other in his presence.
- (E) Dr. De Candia made a number of recommendations for Claimant. First, Claimant should continue to receive special education services from school. Dr. De Candia suspects Claimant's speech and language problems interfere with his ability to socialize, which in turn may lead to other students teasing him, and Claimant isolating himself. Therefore, Dr. De Candia recommended that Claimant become involved in a socialization group. He also recommended that Claimant receive psychotherapy to address anxiety issues generated by his parents arguing. Dr. De Candia also recommended homework assistance or tutoring because Claimant's learning disorder relative to his reading skills may impact his ability to read and understand homework.

(F) Recognizing that this is indeed a fluid situation, Dr. De Candia finally recommended that Claimant be re-evaluated in three years in order to review Claimant's progress and the long-term validity of his aforementioned diagnoses.

14. In September 2013, a Service Agency psychologist, Dr. Heike Ballmaier, reviewed Claimant's case file. She reviewed available records from school and Kaiser, as well as Dr. De Candia's evaluation report. She noted that Claimant's school records did not reflect the presence of autistic behaviors in the classroom or at school, and that Claimant is not receiving any services typically provided to students suffering from an autistic spectrum disorder. Dr. Ballmaier also noted that Claimant is eligible for special education services based only on the category of Speech and Language Impairment. Dr. Ballmaier was not persuaded by Kaiser records indicating the presence of an autistic spectrum disorder, mainly because Kaiser did not perform any formal testing to confirm or validate such a diagnosis, and because Claimant's school records did not support Kaiser's findings. For these reasons, Dr. Ballmaier concluded that Claimant does not have an autistic spectrum disorder or an intellectual disability, and that he is not eligible for regional center services.

15. In February 2014, Dr. Bienstock similarly reviewed Claimant's case file. She reached conclusions similar to those of Dr. Ballmaier. In addition, Dr. Bienstock noted that although Kaiser's first notation of Claimant suffering from an autistic spectrum disorder was made in 2012, and that the note in question stated that Claimant had a history of "PDD NOS diagnosed two years ago," the only available Kaiser records for 2009 and 2010 indicated that Claimant had only then been diagnosed with ADHD and problems associated with articulation. Dr. Bienstock also noted that Kaiser records did not show that any formal testing had been done by Kaiser, and that Claimant's Kaiser

physician did not appear to be familiar with school district records or the above-described reports of Drs. Gaines and De Candia.

CLAIMANT'S EVIDENCE

16. Claimant's mother testified and established the following. Her son has always had problems speaking. His words were small and his sentences short. Since he was her only child, she did not know that was necessarily a problem. However, Claimant's pre-school teacher first alerted her to a potential developmental problem that she should have evaluated. That is why she first approached the Service Agency in 2009. She was initially reluctant to believe Claimant has autism. So she was relieved when the Service Agency told her Claimant did not have autism, which is why she did not appeal the initial denial of eligibility.

17. Claimant's mother further testified that when her son's problems persisted, she sought help from Kaiser. Not only had Claimant's speech and language problems not resolved, but his restlessness increased. Claimant is teased at school by other kids and it is hard for him to make friends. He has a few friends in the neighborhood, but not many at school. Claimant mainly stays to himself while out on the school playground. Claimant's mother admitted during the hearing, however, that the school psychologist involved in crafting Claimant's Individualized Education Program (IEP) does not believe Claimant has autism.

18. Claimant's paternal grandmother, and two family friends, also testified. They echoed Claimant's mother's testimony. They confirmed that Claimant is easily distracted, quiet, hard to understand, and that he needs help.

19. Claimant's strongest evidence is from Kaiser. (Exs. 7, 8 & B.) Records from 2009 indicate that Claimant was initially diagnosed by Kaiser staff with ADHD and an articulation disorder. However, by May 2012, Claimant was being treated by Dr. Tad G. Traina of Kaiser. Dr. Traina described Claimant as being socially awkward, isolated, with

initial limited eye contact that improved over time, and trouble pronouncing words. Claimant's mother told Dr. Traina that her son was interested in video games, disorganized, but able to tolerate transition. No odd movements were observed. At that time, Dr. Traina diagnosed Claimant with Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS). Dr. Traina advised Claimant's school of this diagnosis by a letter dated December 4, 2012. Dr. Traina subsequently advised the Service Agency of Claimant's PDD NOS diagnosis by a letter dated March 12, 2013. At or about this time, Kaiser referred Claimant to Easter Seals Autism Services (Easter Seals) for an initial assessment and recommendation, which is discussed in more detail below.

20. By June 2013, Dr. Traina began describing Claimant in more drastic terms. He noted that Claimant quickly averted eye contact, and was always isolated at play. Dr. Traina also noted Claimant's mother's description that Claimant was becoming more rigid in his behaviors, such as being a picky eater, insisting on a certain bathing ritual, obsession with watching TV and playing video games, tantrums on occasion and rocking behavior while doing homework. At that time, Dr. Traina diagnosed Claimant with autism. By a letter dated April 11, 2013, Dr. Traina advised the Service Agency that he had diagnosed Claimant with "high-functioning autistic spectrum disorder." By a letter dated June 18, 2013, Dr. Traina advised the Service Agency that he had diagnosed Claimant with "autism spectrum disorder," and that Claimant was about to begin behavior therapy with Kaiser, presumably through Easter Seals.

21. Based on the totality of the evidence, Dr. Traina's diagnosis that Claimant has an autistic spectrum disorder is not as persuasive as the opinions to the contrary expressed by Drs. Gaines, De Candia, Bienstock or Ballmaier. For example:

- (A) Dr. Traina is a board-certified pediatrician. Generally, pediatricians do not have the type of training and experience to be qualified to make a developmental diagnosis such as PDD NOS or autistic spectrum disorder.

- Such is the domain of a psychiatrist or clinical psychologist. There is nothing in the record indicating that Dr. Traina has the training and expertise in this area as do Drs. Gaines, De Candia, Bienstock or Ballmaier.
- (B) Dr. Traina's initial chart note in 2012 erroneously indicates that Claimant had a PDD NOS diagnosis two years before he got involved in Claimant's treatment. Kaiser records indicate that Claimant only had an ADHD diagnosis and finding of an articulation disorder at that time. It was Dr. Traina who charted the first entry of a developmental disorder in 2012. This fact leads to a reasonable inference that Dr. Traina's initial assessment of Claimant was colored by a misunderstanding of Claimant's background.
- (C) Nothing in the Kaiser records suggests that Claimant was administered any of the cognitive, adaptive or autistic-related formal testing conducted by Drs. Gaines and De Candia. Making an autism diagnosis without such formal testing is problematic.
- (D) According to the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-V), which is the generally accepted tool for diagnosing mental and developmental disorders, a diagnosis of autism spectrum disorder is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition, the presence of restricted, repetitive patterns of behavior, interests, or activities is required. Although Claimant has had problems communicating, making friends, and socially engaging with others, Dr. Traina's reports do not clearly explain how those problems are related to an autistic spectrum disorder, as opposed to his simply being self-conscious of his speech and articulation

delays. In fact, the evidence indicates that Claimant has a desire to socialize and an ability to reciprocate, which are traits inconsistent with an autistic spectrum disorder. In addition, Dr. Traina's description of Claimant's interest in TV and video games, and his desire to maintain a certain bathing routine, do not rise to the level of persistent, repetitive interests or behaviors one typically associates with an autistic spectrum disorder.

22. By March 2013, Claimant was referred by Kaiser to Easter Seals for an evaluation to determine his eligibility for intensive applied behavior analysis (ABA). Claimant was assessed by Ellen Slaton, a licensed clinical social worker (LCSW) who is also a board certified behavior analyst (BCBA). Ms. Slaton reviewed pertinent records, interviewed caregivers and evaluated Claimant by observation and administration of formal testing. Ms. Slaton found that Claimant demonstrated deficits in receptive and expressive communication and the ability to interact with others in unstructured social settings. He also demonstrated deficits in daily living skills, and engaged in excessive behaviors associated with tantrums and crying when he does not get what he wants. Ms. Slaton concluded that Claimant was an excellent candidate for ABA services, and she noted that such services are generally designed to remediate core deficits associated with autism spectrum disorders. Ms. Slaton recommended that Claimant receive eight hours per week of direct ABA therapy. Claimant has begun to receive those services.

23. The Easter Seals report is intriguing because ABA is commonly provided to those suffering from autism. However, the Easter Seals report does not establish that Claimant is suffering from autism, for several reasons. First, Ms. Slaton does not state in her report that she or anyone else at Easter Seals has diagnosed Claimant with autism. Second, by virtue of being an LCSW or BCBA, Ms. Slaton does not possess the requisite training or experience necessary to make such a developmental disorder diagnosis.

Third, Ms. Slaton does not address how Claimant's deficits are associated with autistic spectrum disorder versus a communication disorder.

24. The ALJ observed Claimant's behavior during the hearing. Although Claimant was fidgeting during the hearing, he did not otherwise misbehave or become unruly. The ALJ did not observe Claimant engage in any idiosyncratic behaviors, such as rocking, flapping or self-stimulation. At the end of the hearing, the ALJ asked Claimant a series of questions. Claimant initially appeared shy and quiet, but within a minute or two he became fully engaged, maintained eye contact with the ALJ at all times, and was responsive to all the questions. Claimant's voice was low and at times he was difficult to understand because of few of his words were uniquely pronounced and the acoustics of the hearing room in question were poor; however, Claimant was able to carry on the discussion and make himself understood. Overall, Claimant gave the appearance of a bright, polite young man, who is self-conscious about his speech.

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 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 1-4.)

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.*

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

(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 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. One 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.)

DOES CLAIMANT HAVE AUTISM?

4. 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. In 2009 and again in 2013, clinical psychologists evaluated Claimant and concluded that his communication and social deficits are related to speech and communication disorders, but not autism. The Service Agency’s in-house psychologists who have reviewed Claimant’s case agree. The school district Claimant attends has not found him eligible

for special education services under the category of autistic-like behaviors, but rather for a Speech and Language Impairment. In fact, the school psychologist told Claimant's mother that her son is not autistic. The only person to diagnosis Claimant with autistic spectrum disorder (the new diagnosis given in the DSM-V for what was formerly referred to as autistic disorder or autism) is Dr. Traina. Yet, Dr. Traina's diagnosis is unreliable for several reasons. The Easter Seals report, while intriguing, does not provide a diagnosis for Claimant. Under these circumstances, it cannot be concluded that Claimant's experts from Kaiser and Easter Seals sufficiently refuted the expert opinions offered by the Service Agency. (Factual Findings 5-24.)

IS CLAIMANT ELIGIBLE FOR SERVICES?

5. 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 1-24; Legal Conclusions 1-4.)

6. Some pause for concern is warranted, due to Claimant's age, Dr. Traina's diagnosis, and the fact that Claimant is receiving a service (ABA) usually provided to those suffering from autism. As Dr. De Candia noted in his report last year, a re-evaluation in three years is warranted. The ALJ agrees that Claimant's continuing development should be closely monitored for the presence or emergence of more suspect behaviors or deficits. Claimant's mother is strongly encouraged to seek such a re-evaluation at that time, particularly if Claimant is diagnosed with a qualifying developmental disorder by a qualified health care professional.

ORDER

Claimant Simon D.'s appeal of the Eastern Los Angeles Regional Center's determination that he is not eligible for regional center services is denied.

DATED: March 24, 2014

A handwritten signature in black ink, appearing to read 'ES', is positioned above a solid horizontal line.

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.