

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2015071033

DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in Campbell, California, on September 4, 2015.

B.T. and A.T., claimant's legal guardians, represented claimant.

James F. Elliott, Special Projects Manager, Public Policy and Legal Affairs, represented San Andreas Regional Center.

The matter was submitted on September 4, 2015.

ISSUE

Whether claimant is eligible to receive services from the San Andreas Regional Center based on the qualifying condition of mental retardation/intellectual disability¹?

¹ The Lanterman Act and regulations refer to mental retardation. However, the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition refers to intellectual disability, rather than mental retardation.

FACTUAL FINDINGS

1. Claimant is a four year-old girl who lives with her legal guardians, B.T. and A.T. (who are married to each other) and two older biological siblings. She has another sibling who does not live in the family home.

2. Claimant applied for regional center service from San Andreas Regional Center (service agency). As a result, service agency staff completed assessments. Nancy Lee (Lee), a service agency intake coordinator, performed a social assessment of claimant; and, Faith Langlois-Dul, Psy.D. (Dr. Langlois-Dul), service agency psychologist, completed a psychological evaluation of claimant.

On June 18, 2015, the service agency conducted an interdisciplinary team conference. Present at the conference were Lee, Dr. Langlois-Dul and at least one, if not both, of claimant's guardians. Among other things, Dr. Langlois-Dul explained the results of the evaluation of information, assessments and documents collected for the purpose of determining eligibility. In addition, Dr. Langlois-Dul explained the criteria to receive regional center services. The service agency concluded that claimant is not eligible to receive regional center services. A.T. disagreed with the service agency's determination and explained the reasons that claimant would benefit from regional center services

The service agency sent a Notice of Proposed Action, dated June 19, 2015, denying eligibility for services. As the reason for its action, the service agency stated: "a clinical review has determined that at this time the applicant does not demonstrate the presence of a developmental disability and/or substantial handicap in three or more of the seven major life domains, as required and defined by law."

Claimant filed a Fair Hearing Request.

BACKGROUND

3. During her first two months of pregnancy, claimant's biological mother was

on psychiatric medications for bipolar, depression and anxiety. Claimant was delivered via C-section due to macrocephaly.

Claimant's birth mother had a history of incarceration, mental health problems and substance abuse. Her birth father had a history of manic depression and possible learning disability.

When she was 16 months old, claimant was removed from her biological mother's home due to severe neglect and her mother's drug abuse. It is reported that claimant may have observed domestic violence. It is unclear whether she was subjected to violence. Between November 2012 and February 2013, claimant was in foster care. Between February 2013 and August 2014, claimant lived with a relative until claimant's relative moved out of state. Since August 2014, claimant and two of her siblings have lived with her guardians.

MEDICAL HISTORY

4. Claimant has a history of ear infections, frequent colds, and failed hearing tests. She had ear tubes placed and adenoids removed in February 2015.

Claimant's vision acuity was within normal limits for a preschooler.

Claimant is under care at Lucile Packard Children's Hospital for her hearing deficits. The results of her hearing test on April 3, 2015 indicated moderate hearing loss in the right ear, and a moderate to mild hearing loss in the left ear.

CURRENT FUNCTIONING²

5. **Motor Domain:** Claimant is able to walk and run without difficulty. No fine motor issues were reported or observed by service agency staff. Claimant is diagnosed

² The source of this information is the intake assessment performed by the service agency's intake coordinator.

with delayed gross motor and fine motor skills.

Communication Domain: Claimant communicates using single or two word phrases. Just prior to April 2015, she began putting two words together. A.T. reported to the service agency that claimant is difficult to understand, and this frustrates claimant. She will pull an adult to or point to what she wants. Claimant is able to follow one-step directions and understands simple speech.

Social Domain/Emotional: Claimant is friendly and loving. She plays with her siblings and the children at preschool. She has a best friend at preschool.

In her free time, claimant likes to read books. She loves talking books and talking toys. She likes to watch A.T. when she cooks. At the time of the social assessment, there were plans for claimant to take swimming lessons and gymnastics at the YMCA.

Claimant is described as happy but gets easily frustrated when she has to wait. A.T. reported that if claimant does not get what she wants quickly, she cries. A.T. reported that claimant puts her hands in her mouth and recently got over a phase of smearing feces. She likes to touch her food. She does not have aggressive or self-injurious behavior. She does not destroy property. Her temper tantrums are infrequent and short in duration. Claimant requires supervision when outside. She will follow someone and wander away from home or into the street.

Cognitive Domain: A.T. reported that claimant can count to five but does not recognize letters yet. She learns well through music. It is reported that claimant has an attention span of one to five minutes.

Independent Living Domains/Self Help Skills: Claimant requires assistance to dress, bathe and brush teeth. She is toilet trained and does not have accidents during the day. She wears a pull-up at night but wakes dry almost every morning. She uses a fork and spoon to eat. She has a tendency to want to touch her food. She receives full assistance with taking medications.

Claimant does not prepare food, perform household tasks or use the telephone. She helps by putting toys away and her dirty clothes in the hamper. She does not use the telephone, does not understand emergency procedures and has limited safety awareness in the community. She is supervised to ensure that she does not follow someone she does not know, run into the street, or run away.

EDUCATIONAL

6. Claimant attends private preschool. Although she is four years old, she is in the two year old class so that she fits in with her classmates.

The San Jose Unified School District (SJUSD) evaluated claimant to determine eligibility for special education services.

PSYCHOLOGICAL ASSESSMENT

7. Dr. Langlois-Dul performed the service agency's psychological assessment and testified as a witness in this proceeding. She holds a doctorate in psychology and has been licensed as a psychologist for more than 20 years. She has a specialty in neuropsychology. She has had more than 20 years experience evaluating adults and children in a variety of scenarios. She has been a service agency intake psychologist for four years during two separate periods of time; most recently, she has served in this capacity for the last year.

Dr. Langlois-Dul described the procedure that she followed to evaluate claimant. Dr. Langlois-Dul reviewed documents provided by claimant, administered the Adaptive Behavior Assessment Systems – Second Edition (ABAS-II) test and interviewed A.S., claimant's guardian, and claimant's preschool teacher; in addition, she observed claimant on the playground at school and in her classroom. Thereafter, Dr. Langlois-Dul issued a report of her findings.

8. Prior to rendering her opinion regarding eligibility, Dr. Langlois-Dul reviewed

the following documents:

- Integrated Psycho-Educational Report performed by SJUSD, dated April 30, 2015 [Draft] (Exhibit 1);
- Santa Clara County Individualized Program, dated April 30, 2015 [Draft] (Exhibit 3);
- Diagnostic Assessment Report performed by KidScope Assessment Center for Developmental Behavioral Health (Kidscope), dated January 22, 2015 (Exhibit B);
- Santa Clara County Early Start Program, Individualized Family Service Plan, dated June 25, 2013 (Exhibit C);
- Health & Education Passport, dated February 2013 (Exhibit D);
- Outpatient Occupational Therapy Evaluation, dated August 3, 2015 (Exhibit E);
- Outpatient Speech Pathology Evaluation, dated April 17, 2015 (Exhibit F)

Prior to testifying in the hearing, Dr. Langlois-Dul also reviewed the following additional documents:

- Integrated Psycho-Educational Report performed by SJUSD, dated April 30, 2015 (Exhibit G);
- Santa Clara County Individualized Program, dated April 30, 2015 (Exhibit H)

Exhibits 2 and 3 are draft documents but Exhibits G and H are the final copies of the documents, and claimant's guardians intend to sign the final documents. There are no significant differences between the draft and final copies of the documents. Dr. Langlois-Dul's review of the final documents did not change her opinion about claimant's eligibility.

9. Dr. Langlois-Dul explained that she did not administer an intelligence test but instead relied on the assessment completed by KidScope and an evaluation completed by SJUSD³ regarding claimant's cognitive abilities. These assessments were performed

³ Claimant was evaluated by the SJUSD on April 6, 2015, and a report and

within four months of each other. Had she not had these reports, Dr. Langlois-Dul would have administered an intelligence test.

10. Claimant participated in the Early Start Program. Claimant's annual (Individualized Family Service Plan [IFSP]) assessment occurred on May 28, 2013, and a report was issued on June 25, 2013. Findings from the Battelle Developmental Inventory, 2nd Edition indicated claimant's abilities as follows:

- Gross motor = 4% delayed
- Fine motor = 33% delayed
- Self-care = 50% delayed
- Cognitive = 21% delayed
- Communication/receptive = 46% delayed
- Communication/expressive = 42% delayed
- Social/Emotional = 67% delayed

These scores represent the percentage below age level. At the time of the assessment, claimant presented as delayed in all areas.

11. The staff of KidScope completed a multidisciplinary assessment of claimant, and thereafter issued a report. The assessment included evaluations by a developmental behavioral pediatrician, a licensed clinical psychologist, an occupational therapist, and a licensed marriage family therapist. Among other things, the assessment included taking a history, performing a physical examination, administration of physical and psychological tests, review of documents and observations of claimant. Among the documents reviewed by KidScope staff was the IFSP report, dated June 25, 2013.

Among other things, the staff of KidScope administered the Developmental Profile, 3rd Edition (DP-3). The DP-3 parent/caregiver form is a standardized questionnaire that

Individualized Education Plan were issued on April 30, 2015.

utilizes input from parents/caregivers and is designed to assess the development and functioning of children from birth to age 12 years. It evaluates five areas of development: physical, adaptive behavior, social emotional, cognitive, and communication. On this test, as rated by her guardian, claimant's scores were as follows:

- Physical SS = 59 <1st %ile
- Adaptive behavior SS = 62 1st %ile
- Social-emotional SS = 69 2nd %ile
- Cognition SS = 66 1st %ile

Under Diagnostic Findings in its report, KidScope staff stated, in part:

[Claimant] is a sweet 3-year, 8-month-old girl referred for a targeted diagnostic assessment due to concerns about potential developmental delays, problems with receptive and expressive communication, difficulties with same-aged peers, and to gain clarification on her current level of functioning. In the clinic setting, [claimant] presents with significant delays across all areas of development, including receptive and expressive communication, nonverbal preacademic skills, adaptive functioning, and motor skills. **These difficulties meet criteria for Intellectual Disability (Mental Retardation), Severity Unspecified (319), per the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR).** Due to [claimant's] young age and a lack of intervention services, it is difficult to determine the level of delays; her cognitive and adaptive functioning should be monitored closely as she grows to determine her level of functioning. ... [Claimant] will

benefit from services to improve her receptive and expressive language, to help build and solidify foundational preacademic concepts, to improve her motor skills, to build emotional regulation skills and to practice social skills. ...

Under Recommendations in its report, KidScope staff stated, in part:

[Claimant's] cognitive and adaptive abilities should be monitored carefully over the next few years to re-assess [claimant's] level of functioning, for diagnostic clarification, and to gain updated treatment recommendations.

12. Four months later, SJUSD performed a psycho-educational evaluation and thereafter issued a report. This assessment included taking a history, performing a pre-academic assessment and performing a speech and language assessment; in addition, among other things, the evaluation included a review of the prior reports from the KidScope assessment and the speech and language evaluation performed at Stanford in April 2015. Finally, the SJUSD's evaluation included behavioral observations of claimant in the SJUSD's testing center and claimant's preschool classroom.

Among other things, SJUSD's assessment included administration of the Leiter International Performance Scale – Third Edition (Leiter-3). The Leiter-3 is designed to assess cognitive function in children and adolescents and adults (ages three to 75 years). The test includes measures of nonverbal intelligence in fluid reasoning and visualization, as well as appraisals of nonverbal memory, attention, and cognitive interference. Claimant's performance on the Leiter-3 revealed an IQ of 77 (6th %ile), which is in the borderline range.

In addition, SJUSD staff administered the Developmental Assessment of Young Children-Second Edition (DAY-C-2). Based on interview of guardian, the DAY C-2 resulted

in cognitive score of 67 (1st %ile).

Vineland-II ratings and DAY-C-2 ratings of adaptive behavior are as follows:

Vineland-II

- Communication Domain SS=67 1st %ile Impaired
- Socialization Domain SS=88 21%ile Low average
- Daily Living Skills Domain SS=83 13%ile Low average
- Motor Skills SS = 67 1%ile Impaired

DAY-C-2

- Social Emotional SS=88 21st %ile Low average\
- Adaptive Behavior SS=90 25th %ile Average
- Gross Motor SS=88 21st %ile Low Average
- Fine Motor SS=75 5th %ile Poor

13. In the psycho-educational report, SJUSD staff evaluated whether claimant is eligible to receive special education services based on intellectual disability and speech or language impairment. As required by the regulation, SJUSD relied on data obtained during the evaluation alongside the language of California Code of Regulations, title 5, section 3030⁴.

⁴ California Code of Regulations, title 5, section 3030, subdivision (a) states, in part:

(a) A child shall qualify as an individual with exceptional needs, pursuant to Education Code section 56026, if the results of the assessment as required by Education Code section 56320 demonstrate that the degree of the child's impairment as described in subdivisions (b)(1) through (b)(13) requires special education in one or more of the program options authorized by Education Code section

Regarding eligibility for intellectual disability, SJUSD relied on section 3030, subdivision (b)(3)⁵. In the psycho-educational evaluation, SJUSD staff stated:

Per review of records, interviews, observations, and overall assessment, [claimant] does not meet the Intellectual Disability special education criteria. Although [claimant's] performance yielded to below average cognitive skills, [claimant] also presented decreased attention and impulsive behavior, which may have negatively impacted her performance. Per review of her background information,

56361. The decision as to whether or not the assessment results demonstrate that the degree of the child's impairment requires special education shall be made by the IEP team, including personnel in accordance with Education Code section 56341(b). The IEP team shall take into account all the relevant material which is available on the child. No single score or product of scores shall be used as the sole criterion for the decision of the IEP team as to the child's eligibility for special education.

⁵ California Code of Regulations, title 5, section 3030, subdivision (b)(6) states:

Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. ...

[claimant's] environmental situation and exposure during the first 16 months of her development are unknown. Therefore environmental factors cannot be ruled out at this time.

Although [claimant] does present with developmental delays in the areas of communication and weaknesses in fine motor skills, weaknesses do not concurrently exist with a significant below average intellectual functioning.

Regarding eligibility based on speech or language impairment, in addition, to California Code, title 5, section 3030, subdivision (a), SJUSD staff considered Education Code section 56333⁶ and determined that claimant was eligible to receive special

⁶ Education Code section 5333 states:

A pupil shall be assessed as having a language or speech disorder which makes him or her eligible for special education and related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. In order to be eligible for special education and related services, difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from any of the following disorders:

education services on the basis of speech and language impairment.

However, in its psycho-educational report, SJUSD staff stated: "The final decision as to whether or not claimant meets special education eligibility will be made by the individualized education program team, including assessment personnel, and will take into account all relevant material which is available on claimant ... "

14. The IEP team determined that claimant was eligible to receive special education services on the basis of speech-language impairment.

15. Dr. Langloi-Dul agreed with the conclusion that claimant has a speech-language impairment. During the hearing, she explained the basis for this opinion.

As part of the SJUSD's assessment, the Preschool Language Scale (PLS-5) was administered. The PLS-5 is a test used to identify children who have a language disorder or delay. On this test, Claimant's Auditory Comprehension (SS = 67; 1stile) and Expressive Communication (SS = 68, 2ndile) were deficient, with a note of caution that decreased

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- a. Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.
 - b. Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. An appropriate medical examination shall be conducted, where appropriate.
 - c. Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.
 - d. Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.
 - e. Hearing loss which results in a language or speech disorder and significantly affects educational performance.

language stimulation from birth to three and one-half years of age and conductive hearing loss are considered “significant contributing factors”. These scores are consistent with speech language impairment.

16. Dr. Langlois-Dul described her observations of claimant on the playground and in the classroom. Dr. Langlois-Dul noted that claimant smiled, waved while on the playground, interacted with peers and ate a snack, and she observed no significant difficulties in mobility.

17. Dr. Langlois-Dul administered the ABAS-II. In order to do so, she interviewed claimant’s guardian and claimant’s preschool teacher. In her report, scores significant to this proceeding are the following:

Score Summary – Teacher Report

- Communication RS = 47 SS = 5 Borderline
- Functional
- Pre-Academics RS = 31 SS = 7 Low Average
- Self-Direction RS = 47 SS = 6 Low Average
- Leisure RS = 50 SS = 5 Borderline
- Social RS = 51 SS = 6 Low Average
- Self-Care RS = 67 SS = 9 Average

Score Summary – Guardian Report

- Communication RS = 39 SS = 3 Extremely Low
- Functional
- Pre-Academics RS = 21 SS = 5 Borderline
- Self-Direction RS = 51 SS = 6 Low Average
- Leisure RS = 48 SS = 7 Borderline
- Social RS = 54 SS = 7 Low Average
- Self-Care RS = 55 SS = 5 Borderline

18. In Dr. Langloid-Dul's opinion, claimant is not eligible to receive regional center services.

In order to have an intellectual disability, she must have a cognitive score of 70 or below and have deficits in adaptive functioning. When evaluated by KidScope, claimant achieved a score of 67; and, when evaluated by SJUSD, her score was 77, a difference of 11 points, clearly significant. According to Dr. Langlois-Dul, the difference is explained by the disadvantaged history and by her current environment in which she receives attention and support. There is no dispute that claimant has deficits in receptive and expressive language; however, Dr. Langlois-Dul questioned whether her language deficits might be impacted by her hearing loss.

Based on the foregoing, Dr. Langlois-Dul concluded that claimant does not have the qualifying condition of intellectual disability. Further, she does not have a substantial disability. She has a functional limitation in receptive and expressive language, but not in self-care, learning, mobility or self-direction. Finally, it cannot be said that her disabilities are continuing and indefinite, considering the improvements/gains that she has made since her evaluation in 2013 by the IFS team.

CLAIMANT'S POSITION

19. Claimant's guardians disagree with the service agency's determination. In their opinion, claimant has deficits in all domains and has an intellectual disability; and their opinion is supported by the thorough evaluation completed by KidScope. Claimant's guardians question the 11-point increase in her cognitive scores over the four-month period of time. In their opinion, Dr. Langlois-Dul should have administered an intelligence test. Claimant is in a classroom with children who are two years younger than she is. They questioned the amount of time that Dr. Langlois-Dul spent with claimant in order to make her determination. Claimant's guardians requested that, after an evaluation of the evidence, the administrative law judge order an independent evaluation.

20. The daughter of claimant's guardians is a client of the service agency. So, they understand the services available through the service agency. A.T. is 60 years old, and her husband is 55 years old. She and her husband will not live forever. They are concerned that if something happens to them that claimant will not be taken care of without regional center services. They are not sure how long claimant may need services but want the services available if claimant should need them.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4512 states, in part:

(a) "Developmental disability" means a disability that originates before an individual attains 18 years of age; 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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

[¶] ... [¶]

(I) "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...

2. California Code of Regulations, title 17, section 54000 states:

- (a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
- (b) The Developmental Disability shall:
 - (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
- (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.
- 3. California Code of Regulations, title 17, section 54001, states in pertinent

part:

(a) "Substantial disability" means:

- (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
- (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
 - (A) Receptive and expressive language;
 - (B) Learning;
 - (C) Self-care;
 - (D) Mobility;
 - (E) Self-direction;
 - (F) Capacity for independent living;
 - (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist. ...

4. As claimant seeks eligibility, she bears the burden of proof by a preponderance of the evidence. (Evid. Code, §§ 500, 115.)

5. Claimant is a four-year old girl who had a devastating beginning in life. Since August 2014, she has been in stable, loving and nurturing environment, both at home and in school. At different stages in her young life, claimant's cognitive and adaptive skills have been evaluated.

Claimant questions the adequacy of Dr. Langlois-Dul's evaluation. However, considering her education, training and experience, the statute and regulations governing the determination of eligibility, her evaluation was proper. Complainant offered no evidence to refute her evaluation or to justify further evaluation at this time. As such, there is no dispute that claimant has a functional limitation in expressive and receptive language. However, it was not established that she had functional limitation in learning, self-care, mobility, or self-direction. Insufficient evidence was offered to establish that she has an intellectual disability (mental retardation), or any other qualifying condition that is likely to continue indefinitely at this time.

Claimant is not eligible to receive regional center services at this time.

ORDER

The appeal of claimant is denied. Claimant is not eligible to receive regional center services from the San Andreas Regional Center.

DATED: September 14, 2015

VALLERA J. JOHNSON

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.