

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2016021048

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 11, 2016, in Bakersfield, California.

Mark E. Meyer, Fair Hearing Officer, represented Kern Regional Center (service agency).

Claimant's mother represented claimant, who was present.<sup>1</sup>

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on April 11, 2016.

ISSUE

Whether claimant is eligible to receive services from the service agency under the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act).

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<sup>1</sup>Family and party titles are used to protect the privacy of claimant and his family.

## FACTUAL FINDINGS

1. Claimant, three years old, was in the service agency's Early Start Program. He lives with his mother, father, and two sisters. Claimant's parents asked the service agency to determine whether claimant is eligible for its services. The service agency determined that claimant was ineligible.

A. Claimant's medical and school records were reviewed by four persons serving as the service agency's Diagnostic Team for Eligibility: (i) Fidel Huerta, M.D., (ii) Kimball Hawkins, Ph.D., a psychologist, (iii) Jennifer Mullen, Assessment Program Manager, and (iv) Albert Melendez, Service Coordinator. After reviewing claimant's school records, medical records, and records from the Early Start Program, including the records set out below, the Diagnostic Team for Eligibility concluded on February 11, 2016 that claimant was not eligible for services because he did not have a developmental disability as defined by pertinent law. They found that claimant's condition, X-linked myotubular myopathy<sup>2</sup> and chronic respiratory failure, is not intellectual disability and is not closely related to intellectual disability and does not require treatment similar to that required for individuals with intellectual disability. (Exhibit D.)

B. By a February 18, 2016 Notice of Proposed Action (NOPA) and a February 19, 2016 cover letter, Albert Melendez notified claimant of the service agency's

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<sup>2</sup> According to the National Institutes of Health website, X-linked myotubular myopathy is a condition that primarily affects muscles used for movement (skeletal muscles) and occurs almost exclusively in males. People with this condition have muscle weakness (myopathy) and decreased muscle tone (hypotonia) that are usually evident at birth. (<https://ghr.nlm.nih.gov/condition/x-linked-myotubular-myopathy>, accessed April 21, 2016.)

determination that he was not eligible for services because he did not meet the eligibility criteria set forth in the Lanterman Act and in California Code of Regulations, title 17, sections 54000 and 54001. That is, claimant was not an individual in one of five specified categories of developmental disability: (i) intellectual disability, (ii) autism, (iii) cerebral palsy, (iv) epilepsy, or (v) "a disabling condition closely related to [intellectual disability] or that requires treatment similar to that required by an individual with [intellectual disability]." The cited sections of the California Code of Regulations were enclosed with the letter and NOPA. (Exhibit A3.)

2. On February 23, 2016, claimant's parents filed a fair hearing request (FHR) to appeal the service agency's determination regarding claimant's eligibility. They wrote in the FHR that they disagreed with the determination in light of claimant's "medical condition and care and treatment needed." (Exhibit A2.) This hearing ensued.

3. Exhibit H is a January 13, 2016 psychological evaluation of claimant by Nancy S. Applegate, M.S., F.F.S., a school psychologist in the office of the Kern County Superintendent of Schools.

A. Ms. Applegate was asked to evaluate claimant's "levels of intellectual and adaptive functioning for educational planning and placement." The results were to be presented to an Individualized Education Program (IEP) Team to determine eligibility for and placement in special education in the school district.

B. Using "parental report, review of records, observation, interview, etc.," Ms. Applegate noted that claimant was intubated at birth and hospitalized for three months. He had surgery to place a tracheostomy and gastric tube, which he continues to have. He was diagnosed with myotubular myopathy. He suffers from muscular weakness and diminished muscle tone. He is unable to swallow normally. His tracheostomy must be suctioned about six to 10 times per hour. At night he breathes by means of a ventilator. When fitted with a Passy-Muir valve, he is able to use a few words. He is able to follow

simple verbal directives from his mother. His voice is weak, but he can raise it somewhat when trying to catch another person's attention. He also communicates by pointing and gesturing. He socializes with family members and enjoys playing with his six-year-old sister. He has some toys he likes and plays with on his own. He does not stand or walk. He has limited mobility, having learned to move himself about in a sitting position. He has recently been provided a wheelchair, but is unable to move the chair on his own.

C. Ms. Applegate administered several tests:

(i) The Differential Ability Scales: Second Edition (DAS-II), which compares a preschooler with others of the same age range on tasks requiring verbal, non-verbal, and spatial skills. "On this particular administration of the DAS[-II], [claimant] obtained Nonverbal Reasoning score in the range of 84-99, which resulted in a prorated General Conceptual Ability score of 96. Using the DAS classification system, this would identify [claimant's] present level of cognitive ability as being in the Average range. [Claimant] did not complete all the tasks presented to him as he has limited dexterity and mobility due to his medical condition."

(ii) Two related tests, the Vineland Adaptive Behavior Scale, Second Edition (VABS-II), "a standardized and norm referenced measure of social and adaptive behavior," and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), which "measures an individual's adaptive behaviors . . .[,] those day-to-day activities that are necessary for individuals to get along with others and take care of themselves. . . . [A]bilities in the Communication domain were average for Hearing and Understanding and below average for Talking. In the Daily Living domain, [claimant's] abilities in the Caring for Self subdomain were low, in Caring for Home they were average, and in Living in the Community they were average. [Claimant's] abilities in the Social Skills and Relationships domain were average for Relating to Others, average for Playing and Using Leisure Time, and average for Adapting. In the Physical Activity domain

[claimant's] development was in the low range for Gross Motor skills and in the below average range for Fine Motor skills." His Adaptive Behavior Composite, which takes all of the scores into account, was in the seventh percentile, classified as "Moderately Low."

(iii) The Beery-Buktenica Developmental Test of Visual-Motor Integration, which requires the subject to copy in pencil on paper a sequence of 24 geometric forms. Claimant "obtained a standard score of 86 . . . [which] falls within the Below Average range."

(iv) The Developmental Profile-3 (DP-3). The DP-3 measures development and functioning, using information provided by parents or caregivers, in this case by claimant's mother. On three of the DP-3's scales claimant's score was Delayed: claimant's age equivalent, on the Physical scale, was six months, on the Adaptive scale, one year and two months, and on the Communication scale, one year and six months. On two scales claimant's score was Average. Age equivalents were, on the Social Emotional scale, two years, nine months, and on the Academic scale, two years, two months.

4. Exhibit G is a January 29, 2016 speech and language evaluation which Sandra E. McMahon, M.A., CCC-SLP (Certificate of Clinical Competence for Speech-Language Pathologists from the American Speech-Language Hearing Association), performed at the request of the Kern County Superintendent of Schools. The evaluation stated:

[Claimant's] ability to respond appropriately may have been affected by his weakened muscles and compromised breath support. Completion of standardized assessment as well as client-centered alternative measures were used to evaluate communication. These measures can include language sampling, informal assessment, observation of

communication interactions, search of developmental, medical, and educational records, interview with caregivers, and interpretation of standard test results in a non-standard way. [Italics omitted.]

Ms. McMahon administered (i) the Goldman-Fristoe Test of Articulation-Second Edition (not completed), (ii) the Preschool Language Scales-5, (iii) the Pre-Verbal Checklist, (iv) the Receptive-Expressive Emergent Language Test-Third Edition, and (v) the Communication and Symbolic Behavior Scales Developmental Profile. She also obtained or conducted (vi) a spontaneous language sample, (vii) an orofacial examination, and (viii) a review of records pertinent to claimant's speech ability. She summarized the results:

[Claimant] seems to understand much of what goes on in the family routine. He turns his head and eyes toward a nearby speaker, especially his dad's voice, and shows signs of interest when he hears his name. [¶] . . . [¶]

Both Auditory Comprehension and Expressive Communication skills were delayed, with comprehension skills slightly higher. Combined scores yield a Total Language standard score of 70 . . . with an age equivalency of 1 year 7 months. Although [claimant] is interested and interacts, his physical limitations, may interfere with responses. Reported levels may be a low estimate of actual knowledge.

[Claimant] demonstrates significant deficits in communication secondary to his medical diagnosis and

orthopedic delays. Because he seems to demonstrate adequate motor control for use of a device, it is recommended that augmented communication options be explored. It is imperative [claimant's] language and vocabulary skills continue to develop despite poor verbal skills. Use of an augmentative communication device would enable [claimant] to perform specific communication functions to initiate and respond to a communication partner.

5. His mother believes that claimant has lost progress in mobility and in verbalizing because of a cold or flu he had in December 2015. She agreed, however, that evaluations of claimant in 2016, including Exhibit H, by Ms. Applegate, and Exhibit G, by Ms. McMahon, are accurate.

6. The evidence shows that claimant will benefit, or continue to benefit, from services from Kern County schools to help him with muscle weakness. This weakness, secondary to the myotubular myopathy diagnosed soon after he was born, is the cause of physical limitations that affect his development in a multitude of ways, including his ability to communicate.

7. It was not established by a preponderance of the evidence, however, that claimant has a condition that makes him eligible for services from the service agency: autism, intellectual disability, epilepsy, or cerebral palsy, or that he has a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability.

## LEGAL CONCLUSIONS

1. Cause does not exist to grant claimant's request for regional center services, as set forth in Findings 1 through 7, and Conclusions 7 through 10.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for the services of the service agency. (Evid. Code, § 115.)

3. The Lanterman Act governs this case. To establish eligibility for regional center services under the act, claimant must show that he suffers from a certain type of developmental disability that "originate[d] before [he] attain[ed] 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for [him]." (Welf. & Inst. Code, § 4512, subd. (a).) There are five categories of developmental disability that may be used to establish eligibility for regional center services. (*Ibid.*; see Finding 1B.)

4. California Code of Regulations, title 17, section 54000, provides:

(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.

5. California Code of Regulations, title 17, section 54001, provides:

(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.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

6. A group of the service agency's professionals of differing disciplines duly performed an assessment of claimant's substantial disability, in particular under California Code of Regulations, title 17, section 54001, subdivision (b)(2).

7. The service agency's assessment correctly concluded that claimant does not have a developmental disability as defined in the Lanterman Act and in California Code of Regulations, title 17, section 54000, subdivision (a).

8. Claimant did not establish by a preponderance of the evidence that he has a developmental disability that is not solely a learning disability as set out in section 54000, subdivision (c)(2), or solely physical in nature, as set out in section 54000, subdivision (c)(3), of California Code of Regulations, title 17.

9. Claimant did not establish by a preponderance of the evidence that he is eligible for services of the service agency under the Lanterman Act based on a diagnosis of any category of eligibility.

10. Myotubular myopathy and associated muscular weakness affecting aspects of claimant's development do not satisfy the requirement of an eligible diagnosis of intellectual disability under section 4512, subdivision (a). Claimant did not establish by a preponderance of the evidence that he qualifies for services under the fifth category of eligibility, or any other category. (Findings 3 through 7.) Claimant will likely benefit from services, medical and educational, to mitigate the effects of his disabilities. Because claimant's disabilities are not any of the five developmental disabilities qualified for regional center services, however, the service agency is not required to provide services to claimant.

## ORDER

Claimant's appeal is denied.

DATE: April 22, 2016

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THOMAS Y. LUCERO

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.