BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2017100653

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on December 12, 2017, in Alhambra, California.

Jacob Romero, Fair Hearing Coordinator, represented Service Agency, Eastern Los Angeles Regional Center (Service Agency or ELARC). Claimant's mother represented claimant,[1] who was not present.

Oral and documentary evidence was received, and argument was heard. The record was held open until December 27, 2017, for claimant to submit letters from his teacher regarding his behavior at school, and until January 3, 2018, for Service Agency to raise any objections or to make any comments to claimant's evidence.

On December 18, 2018, claimant filed and served the following: (1) an undated letter from Elizabeth Salinas, which was marked as claimant's exhibit A; and (2) a calendar from November and December 2017 documenting claimant's falls, which was marked as claimant's exhibit B. On the same day, Service Agency filed and served objections, which

[1] Claimant and his mother are identified by titles to protect their privacy.

Accessibility modified document

were marked and lodged as exhibit 16, on the grounds that exhibits A and B were submitted in an untimely manner and that they are vague and lack foundation.

On December 28, 2018, claimant's mother filed an opposition to Service Agency's objections, which was marked and lodged as exhibit C. In her opposition, claimant's mother asserted that she is unfamiliar with hearing process but is willing to provide additional evidence regarding Ms. Salinas's credentials as her son's teacher.

On January 3, 2018, not having received any further rebuttals or comments from Service Agency, the ALJ, on her own motion, re-opened the record and allowed claimant to submit additional supporting evidence relating to exhibits A and B. This Order to Re-open the Record required claimant to submit any additional evidence by the close of business January 18, 2018, and Service Agency to raise any objections to the additional evidence by January 25, 2018.

On January 19, 2018, after the record had closed, claimant's mother filed and served the following documents: (1) a letter from claimant's mother dated January 19, 2018 (received and marked as exhibit D); (2) an email from claimant's day care center, Options for Learning, dated January 18, 2018, with attachments (received and marked as exhibit E); and (3) an email message from Ms. Salinas dated January 17, 2018, stating that she has been hospitalized and is unable to provide a letter to claimant's mother (received and marked as exhibit F). On January 23, 2018, claimant's mother filed and served an additional letter, dated January 22, 2018, in which she explained Ms. Salinas's role as her son's teacher and that Ms. Salinas is not able to provide a letter personally because she is on medical leave (received and marked as exhibit G).

Although claimant had submitted the additional supporting evidence late, on January 24, 2018, the ALJ, on her own motion, extended the time to keep the record open to consider the evidence. Additionally, Service Agency was granted leave until and including January 31, 2018, to file and serve a response, if any, to claimant's exhibits D

Accessibility modified document

through G.

On January 31, 2018, not having received any responses from Service Agency with respect to exhibits D through G, the ALJ overruled Service Agency's objections to exhibits A and B. Claimant filed exhibits A and B well within the timeframe provided for the submission of the documents post-hearing, and Service Agency was granted a sufficient amount of time for a response. Furthermore, exhibits D through G laid the foundation for the admission of exhibits A and B as evidence. Consequently, claimant's exhibits A and B, and D through G are all admitted. The record was closed and the matter was submitted for decision on January 31, 2018.

ISSUE

Is claimant eligible to receive regional center services and supports from Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as an individual with a condition closely related to intellectual disability, or a condition that requires treatment similar to that required for individuals with intellectual disability?

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-13, and 15; claimant's exhibits A and B, and D through G.

Testimony: Randi Bienstock, Psy. D.; claimant's mother; Thea Lincoln; Roy Ramirez.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 3-year-old boy. From May 2015 to October 2017, claimant participated in Service Agency's Early Start Program[2] and received early intervention

---

[2] "Early Start Program" is a common name for the California Early Intervention

Accessibility modified document

services. Upon claimant's termination from the Early Start Program due to his age, claimant's mother asked Service Agency to determine whether claimant is eligible for regional center services under the Lanterman Act.

2. By a Notice of Proposed Action and letter dated August 31, 2017, Service Agency notified claimant that he is not eligible for regional center services. Service Agency's interdisciplinary team had determined that claimant does not meet the eligibility criteria set forth in the Lanterman Act.

3. On September 27, 2017, claimant filed a fair hearing request to appeal Service Agency's determination regarding his eligibility. This hearing ensued.

Claimant's Background

4. Claimant lives at home with his parents.

5. In April 2015, when claimant was approximately six months old, he was diagnosed with bacterial meningitis. He was hospitalized for one month, during which time he suffered several seizures. Claimant is currently in good overall health and has been released from the care of all specialists, with the exception of an Ear, Nose, and Throat specialist who treats him for stridor.[3] Claimant does not require any medication other than

---

Services Act (Gov. Code, § 95000 et seq.). This early intervention program is separate from, and does not have the same requirements as, the Lanterman Act. The eligibility criteria for an infant or toddler to receive early intervention services under the Early Start Program do not require a developmental disability. To be eligible for the Early Start Program, an infant or toddler must have at least a 33 percent delay in one of the five following areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development. Eligibility for Early Start Program services ends at age three. (See Gov. Code, § 95014.)

[3] Stridor is noisy breathing that occurs due to obstructed air flow through a

Accessibility modified document

those for allergy and does not follow any specialized diet. He is monitored regularly by his pediatrician and his immunizations are reportedly up to date. He has not experienced any seizures since his illness in 2015. Claimant also has not required additional hospitalizations or any surgeries.

6. It is undisputed that claimant does not have cerebral palsy, epilepsy, autism spectrum disorder, or intellectual disability. At the hearing, the parties focused on whether claimant was eligible for regional center services as an individual with a condition closely related to intellectual disability, or a condition that requires treatment similar to that required for individuals with intellectual disability (commonly known as the "Fifth Category.")

CLAIMANT'S OCCUPATIONAL THERAPY EVALUATIONS

7. As a part of Service Agency's Early Start Program, claimant received one-hour sessions of occupational therapy twice a week from November 2015 to September 2017.

8. A. On March 1, 2017, when claimant was 28 months old, claimant's occupational therapist, Shelly Read of Read Pediatric Therapy, wrote a report regarding his progress. To assess claimant's developmental level, Ms. Read administered the Development Assessment of Young Children-Second Edition (DAYC-2). On the DAYC-2, in the cognitive domain, claimant performed at an age equivalency of 29 months. In the receptive and expressive language domains, claimant performed at age equivalencies of 28 and 29 months, respectively. In the social emotional domain, claimant performed at an age equivalency of 40 months. However, in gross motor skills, he obtained an age-equivalent score of 19 months, indicating a 32 percent delay. In fine motor skills, he obtained an age-equivalent score of 15 months, indicating a 46 percent delay. Finally, in

---

narrowed airway.

Accessibility modified document

adaptive behavior, he obtained an age-equivalent score of 18 months, indicating a 36 percent delay.

B. Although Ms. Read found that claimant showed good progress, she noted that claimant continued to experience difficulties with vestibular, proprioceptive and tactile processing. She recommended that claimant continue occupational therapy services twice a week to facilitate age-appropriate fine motor, gross motor, adaptive behavior, and sensory processing development.

9. A. On September 6, 2017, when claimant was 34 months old, Ms. Read wrote a discharge summary regarding his development level. Claimant was again administered the DAYC-2. In the cognitive domain, claimant performed at an age equivalency of 35 months. In the receptive and expressive language domains, claimant performed at age equivalencies of 38 and 32 months, respectively. In the social emotional domain, claimant performed at an age equivalency of 43 months. In gross motor skills, he obtained an age-equivalent score of 26 months, although Ms. Read did not note in her summary that this score was an indication of a delay. In fine motor skills, he obtained an age-equivalent score of 17 months, indicating a 50 percent delay. Finally, in adaptive behavior, he obtained an age-equivalent score of 34 months.

B. Again, Ms. Read found that claimant showed good progress during the last treatment period. Nevertheless, she recommended that claimant continue occupational therapy services to address specifically his delays in fine motor skills.

Claimant's Speech Therapy Evaluations

10. As a part of Service Agency's Early Start Program, claimant received one-hour sessions of speech therapy twice a week from August 2016 to October 2017.

11. A. On March 31, 2017, when claimant was 29 months old, claimant's occupational therapist, Wes Nicholson of Speech Guy LLC, wrote a speech and language progress report. To assess claimant's communication skills, Mr. Nicholson administered

Accessibility modified document

the Rossetti Infant-Toddler Language Scale (Rossetti). On the Rossetti, in the domain of language expression, claimant performed at an age equivalency of 18 to 21 months, indicating mild delays. In the domain of language comprehension, claimant performed at age equivalency of 24 to 27 months, which was appropriate to his age. Additionally, he demonstrated age-appropriate skills in the areas of play, gesture, pragmatics, and interaction-attachment, reaching the top of the scale in each of these areas.

B. Although Mr. Nicholson found that claimant made good progress over the last treatment period, he recommended that claimant continue speech therapy services twice a week, with a focus on expressive and receptive language skills.

12. A. On September 29, 2017, when claimant was 35 months old, Mr. Nicholson, wrote another speech and language progress report. The Rossetti was again administered to claimant. In the domain of language expression, claimant performed at an age equivalency of 33 to 36 months, which was appropriate to his age. In the domain of language comprehension, claimant performed at an age equivalency of 30 to 33 months, which was appropriate to his age. Additionally, he demonstrated age-appropriate skills in the areas of play, gesture, pragmatics, and interaction-attachment, reaching the top of the scale in each of these areas.

B. In particular, Mr. Nicholson noted in his report:

> [Claimant] is an outgoing, creative, and sharp child. He learns quickly and enjoys engaging in a variety of play-based and/or structured tasks. [Claimant] especially enjoys symbolic play with toys as playmates. He is able to sustain his attention and will remain seated for an entire session on one activity. . . .
>
> (Ex. 10, p.1)

Accessibility modified document

C. Mr. Nicholson recommended that claimant "be discharged from speech and language services on his third birthday, due to demonstrating age-appropriate articulation, pragmatic, receptive, and expressive language skills as evidenced by parent report, clinical observation, and his performance on criterion-referenced assessment." (*Id.* at p.3.)

CLAIMANT'S INFANT DEVELOPMENT REPORTS

13. As a part of Service Agency's Early Start Program, claimant received one-hour sessions of in-home early intervention services once a week from June 2015 to October 2017.

14. A. On December 1, 2016, when claimant was 25 months old, claimant's early interventionist, Ruby Fletes of Life Steps Foundation, wrote a semiannual infant development report. Using the Hawaii Early Learning Profile (HELP), Ms. Fletes assessed claimant's development levels in various domains. On the HELP, in the area of cognition, claimant's developmental age approximation was 21 to 23 months. In the areas of receptive and expressive language, claimant's developmental age approximation was 20 to 21 months and 18 to 20 months, respectively. In gross motor skills, claimant's developmental age approximation was 16 to 18 months. In fine motor skills, claimant's developmental age approximation was 18 to 20 months. In social/emotional development, claimant's developmental age approximation was 24 to 26 months. And in self-help skills, claimant's developmental age approximation was 20 to 22 months.

B. Based on her findings, Ms. Fletes recommended that claimant continue in-home early intervention once a week in order to address his overall development.

15. A. On October 1, 2017, when claimant was 35 months old, Ms. Fletes wrote a termination infant development report. She again used HELP to assess claimant's development levels. In the area of cognition, claimant's developmental age approximation was 32 to 34 months, which met all goals set for him in this developmental domain. In the areas of receptive and expressive language, claimant's developmental age approximation

Accessibility modified document

was 31 to 33 months and 28 to 30 months, respectively. In gross motor skills, claimant's developmental age approximation was 27 to 29 months. In fine motor skills, claimant's developmental age approximation was 30 to 32 months. Claimant's social/emotional development was assessed using the DAYC-2, which yielded a score with an age equivalency of 32 months. And in self-help skills, claimant's developmental age approximation on the HELP was 32 to 34 months.

B. Based on her findings, Ms. Fletes recommended that claimant continue in-home early intervention once a week until he turned three years old.

CLAIMANT'S BEHAVIOR AND SOCIAL SKILLS REPORTS

16. As a part of Service Agency's Early Start Program, claimant received eight hours per month of behavioral intervention therapy from January 2017 to September 2017.

17. A. On April 15, 2017, when claimant was 29 months old, claimant's behavior and social skills therapy provider, CBC Education Inc. (CBC), prepared a progress report. This report noted that since claimant's first appointment on January 1, 2017, he has made progress. Claimant acquired the skill of gaining others' attention by saying "Hey" and "Look." He also showed progress in acquiring adoptive function skills by sitting on the toilet for one minute and taking off his pants with physical prompts. It was observed that claimant's tantrums increased in the month of February and that the tantrums consisted of screaming loudly, crying, dropping to the floor, slapping others on their hands or arms, or slapping claimant's own legs. However, the social and the physical impacts of these tantrums were considered moderate.

B. Based on these findings, CBC recommended that claimant continue behavior intervention therapy to maintain his current skill set and to develop new skills.

18. A. On September 30, 2017, when claimant was 35 months old, CBC prepared a closing report. It noted that all goals set for claimant were met in the domains of social skills, communication, adaptive life skills, and play skills. Specifically, claimant mastered the

Accessibility modified document

skill of gaining others' attention independently. He is able to transition from a preferred activity to another preferred activity without the need to return to the original activity. Additionally, he was observed to transition from a preferred activity to a non-preferred activity with very little redirecting. Claimant can also use the bathroom independently, and he is able to complete almost all the steps in the task of putting on his own shirt. According to the closing report, claimant's tantrums decreased by 30 percent, although regression was observed during the month of September, most likely because claimant had attended only one session in the month due to cancellations.

B. The closing report summarized claimant's progress as follows: "[Claimant] made significant gains during these months of services. His challenging behaviors continue to decrease and he showed independence across many skills." (Ex. 12, p. 17.) Moreover, behavioral intervention services were no longer recommended due to the fact that claimant no longer qualified for ELARC services.

SERVICE AGENCY'S EVALUATION OF CLAIMANT

19. On August 16, 2017, at the request of Service Agency, Randi Elisa Bienstock, Psy.D., conducted a psychological evaluation of claimant to determine his eligibility for regional center services. Dr. Bienstock reviewed claimant's prior evaluations, interviewed claimant's parents, and administered standardized tests to complete her evaluation. She set forth her findings in a psychological evaluation report dated the same date.

20. In her record review, Dr. Bienstock reviewed claimant's March 1, 2017 occupational therapy report, the March 31, 2017 speech therapy progress report, the December 1, 2016 semiannual infant development report, and the April 15, 2017 behavior and social skills therapy report.

21. During her interaction with claimant, Dr. Bienstock made the following clinical observations:

Accessibility modified document

[Claimant] was a 2-year and 9-month-old boy at the time of the evaluation. He was well groomed and casually dressed. [Claimant] was fully ambulatory and he did not appear to have any obvious motor difficulties. [Claimant] did appear to be significantly overweight and it is not clear if this has been taken into account with regard to his reported motor related difficulties.

[¶]. . . . [¶]

During the free-play time, [claimant] played with the toys in a functional and pretend manner. He was not aggressive or destructive and no repetitive patterns of play were observed. [Claimant] also narrated during his play. He exhibited excellent skills related to joint attention and social reciprocity. . . .

[¶]. . . . [¶]

[Claimant] did not have any trouble with the transition to the structured testing activities. In fact, he cleaned up the free-play toys prior to the transition and did so without being prompted. During the formal testing, [claimant] continued to be quite engaging. He was also attentive and cooperative and did well with increased structure throughout the testing activities. [Claimant] also did not exhibit any repetitive, stereotyped or self-stimulatory behaviors.

(Ex. 8, p. 7-8.)

Accessibility modified document

22. A. In standardized tests, Dr. Bienstock administered the Mullen Scales of Early Learning (MSEL) to assess claimant's cognitive abilities. Claimant's overall performance on the MSEL yielded a learning composite of 90. Claimant's score on the visual perception subtest was 48, which fell into the average range with an age equivalency of 31 months. His score on the fine motor skills subtest was 46, which fell into the average range with an age equivalency of 30 months. His scores on both the receptive and expressive language subtests were 52, which fell into the average range with an age equivalency of 34 months. Given claimant's performance on the MSEL, Dr. Bienstock concluded that "the current overall results did not reveal any concerns related to DSM-5 [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition] diagnoses of Intellectual Disability or Global Development Delay." (Ex. 8, p. 9.)

B. Claimant's behavioral/emotional problems were assessed using the Achenbach Child Behavior Checklist (CBCL). On the CBCL, claimant's parents reported that while he is social and engaging, he has difficulties sharing toys with others. Claimant also has difficulties delaying gratification, demands a good deal of attention, and is rather strong-willed. Dr. Bienstock noted that based on review of prior reports from his treating therapists, there were indications that claimant can exhibit rapid shifts in his mood which result in non-compliant behaviors. He also recently tried to hit and bite his teacher for the first time. Otherwise, he has not been physically aggressive with others. In light of these reports, Dr. Bienstock found that overall, claimant does have trouble with emotional and behavior regulation.

C. The Autism Diagnostic Interview-Revised (ADI-R) was also administered to claimant's parents. On the ADI-R, claimant's scores in communication, reciprocal social interaction, and stereotyped behaviors were all zero, well below the cutoff range for autism spectrum disorder. In addition, Dr. Bienstock believed that current clinical observations as well as review of several prior reports did not warrant concerns related to a diagnosis of

Accessibility modified document

autism spectrum disorder.

D. With claimant's parents serving as informants, Dr. Bienstock administered the Vineland Adaptive Behavior Scales-Third Edition (VABS-3) to evaluate claimant's adaptive functioning. In the domain of communication, claimant performed at the age equivalent of two years, 10 months, with a score of 102. In daily living skills, claimant's score of 88 was the age equivalent of two years and seven months. In socialization, claimant's score of 86 was the age equivalent of two years and seven months. In motor skills, claimant performed at the age equivalent of two years and four months, with a score of 78.

23. Dr. Bienstock used the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) to reach her diagnosis. She wrote:

> The overall current findings indicate that [claimant] is a bright young boy and there are no clinical concerns related to diagnoses of Autism Spectrum Disorder, Global Developmental Delay or Intellectual Disability. While he appears to exhibit deficits related to his articulation skills, a definitive analysis will be deferred to his treating Speech therapists. [Claimant] also has trouble with emotional and behavior regulation. While continued Occupational therapy may be important to address underlying issues related to sensory processing, continued behavioral interventions are also recommended to address the subsequent tantrums and non-compliant behaviors.
>
> (Ex. 8, p.10.)

Claimant's School Evaluation

24. On October 24, 2017, when claimant was three years old, his school

Accessibility modified document

psychologist conducted an evaluation to determine claimant's eligibility for special education services and his current levels of performance. Claimant's cognitive functioning, communication development, gross/fine motor development, social, emotional, and behavioral development, and adaptive/daily living skills were assessed by the school's Individualized Education Program (IEP) team, which consisted of the school psychologist, speech, a language pathologist, special and general education teachers, an occupational therapist, a physical therapist, and a school nurse. Their findings were summarized in an IEP information report dated the same date.

25. According to the report, the school psychologist found that claimant scored in the average range on two separate tests of cognitive abilities. On the Differential Abilities Scales, Second Edition, claimant's overall intellectual functioning measured in the average range for his age with a general conceptual ability standard score of 98, which fell in the 45th percentile. His verbal reasoning and nonverbal reasoning scores also fell in the average range. Based on these scores, delays in problem solving were not suspected in claimant. On the Battelle Developmental Inventory, Second Edition, Normative Update, claimant's overall score in the cognitive domain was in the high average range, with a score of 111 that fell in the 77th percentile. Due to his performance on the these standardized measures, teacher ratings and classroom observations, the IEP team determined that claimant's academic skills were not currently an area of educational need.

26. In the area of communication development, claimant was administered the Preschool Language Scales, Fifth Edition. On this test, claimant obtained scores in the average range on subtests of auditory comprehension and expressive communication, which indicated that he presented with receptive and expressive language skills within the normal limits for his chronological age. The IEP concluded that "[t]he criteria for Language or Speech Disorder does/does not apply to [claimant] at this time. His receptive language, expressive language, pragmatic skills, and articulation are not areas of educational need."

Accessibility modified document

(Ex. 13, p. 4.)

27. A. In the areas of gross/fine motor development, claimant was assessed by both a physical therapist as well as an occupational therapist. The physical therapist found that "[claimant] was an active participant and demonstrated many functional skills including: sitting, standing, positional transitions, ambulation, negotiating surface transitions, accessing stairs, and climbing ladders. He performed age-appropriately on standardized testing in the area of overall gross motor development. Although he demonstrated increased lower extremity range of motion and mildly decreased muscle tone, he presents with adequate skills to access his educational environment with supervision." (*Id.*)

B. The occupational therapist administered to claimant the Peabody Development Motor Scales, Second Edition. On this test, claimant achieved average scores on subtests of grasping, visual motor integration, and fine motor skills. By contrast, on the Sensory Process Measure Preschool Home Form, claimant's parents reported "definite dysfunction" with claimant's vision, hearing, planning and ideas, and total sensory system. Nonetheless, the occupational therapist determined that claimant demonstrated adequate motor planning skills, fine motor skills, and visual motor skills within the educational environment.

28. In the area of social, emotional, and behavioral development, claimant was administered the Behavior Assessment System for Children, Third Edition (BASC-3) and Autism Diagnostic Observation Schedule, Second Edition (ADOS-2). On the BASC-3, claimant's parents reported at-risk level of externalizing behavioral symptoms and adaptive skills and average level of internalizing behavioral symptoms. Per claimant's teachers' ratings, claimant's overall externalizing, internalizing, adaptive skill and behavioral symptoms were average compared to same-age peers. Of the 30 observations made of claimant in the classroom, he was only observed to demonstrate positive adaptive behaviors. On the ADOS-2, claimant's score on the social affect domain and on restricted

Accessibility modified document

and repetitive behaviors did not meet either the autism cutoff or the autism spectrum disorder cut-off. His ADOS-2 comparison score fell within the "minimal to no evidence" of autism range.

29. A. Claimant's adaptive and daily living skills were assessed using the Adaptive Behavior Assessment System, Second Edition (ABAS-3), with his teachers and parents as informants. Per parent ratings on the ABAS-3, claimant's overall adaptive skills as measured by the General Adaptive Composite (GAC) was in the extremely low range compared to his peers, while his social skills, conceptual skills, and practical skills are in the low range. Scores obtained on the ABAS-3 Parent/Primary Caregiver Form suggest that in the home environment, claimant required considerable support to meet daily environmental demands in the home setting.

B. Notably, ABAS-3 parent scores varied significantly from the teacher ratings. The ABAS-3 Teacher/Daycare Provider Form completed by two of claimant's teachers indicated that claimant's ability to meet the environmental demands in his current classroom was average compared to his peers. Per teacher ratings on the ABAS-3, claimant's overall adaptive skills as measured by the GAC were in the average range. Specifically, they reported that he uses the toilet on his own, that he pulls his own pants and underwear down, and that if he is unable to perform a task, he asks for help. Claimant's standard scores in conceptual skills, social skills, and practical skills, according to the teachers' ratings, were either in the average or above average range.

C. The IEP team concluded, "[a]t this time, the adaptive delays reported by parent in the home setting are not observed by his teachers and current assessors. Educational needs are not identified in the area of adaptive skills. [Claimant's] self-care skills are reported to be above average range and an area of relative strength according to ratings provided by both of his teachers." (Ex. 13, p. 6.)

30. Based on these findings, the IEP team determined that claimant was not

Accessibility modified document

eligible for special education services through his school district. The IEP team meeting notes indicated that "claimant does not demonstrate any needs that impact his ability to access his educational program. He demonstrated age-appropriate skills across areas." (*Id.* at p. 13.)

TESTIMONY OF DR. BIENSTOCK

31. Dr. Bienstock, Service Agency's contracting psychologist, testified at the hearing. She received her master's degree in psychology from the California School of Professional Psychology in 1994 and her doctor of psychology degree from the same school in 1996. She has been a licensed psychologist for the past 19 years.

32. At the hearing, Dr. Bienstock testified regarding the contents of her August 16, 2017 psychological evaluation and provided a more detailed explanation about the use of the MSEL as a standardized test of a child's cognitive functioning. Under the MSEL, a child is required to complete certain skills. For example, with respect to problem-solving skills, a child must match shapes without prompting or cues. Overall, claimant's learning composite score on the MSEL was 90, which is in the average range and comparable to his peers. In all of the subtests of the MSEL, claimant also obtained scores in the average range. In particular, Dr. Bienstock pointed out that claimant's scores in receptive and expressive language were in the average range, which were consistent with the findings of Mr. Nicholson, claimant's speech therapist. Dr. Bienstock also noted that in fine motor skills, claimant performed at an age equivalent of 30 months, which is slightly below his chronological age of 31 months at the time of the evaluation. However, she attributed these slight variations in age equivalency to standard error of measurement. Overall, she believed that the claimant's scores on the MSEL are valid and appropriate measurements of his cognitive functioning.

33. Dr. Bienstock opined that claimant's scores on the MSEL were not indicative of a child with intellectual disability. For a child with intellectual disability, she would

Accessibility modified document

expect subtest scores in the 20's to 30's and a learning composite score of 50 or less. She would also expect to see significant delays across domains and across contexts, which were not present in claimant's case. In support of her opinion, Dr. Bienstock cited to claimant's results on the VABS-3, which assesses claimant's adaptive functioning. She noted that claimant's scores on the VABS-3 were generally in the 80's, ranging across domains from 78 to 88. These scores are within the low average to average range. For a child with intellectual disability, she would expect adaptive functioning scores below 70's on the VABS-3.

34. Based on her findings, Dr. Bienstock opined that claimant does not suffer from intellectual disability. She also emphasized that she "would strongly state" (her words) claimant does not function in a manner similar to someone with intellectual disability, or requires treatment similar to an individual with intellectual disability.

35. Dr. Bienstock conducted her psychological evaluation on August 16, 2017. At that time, the September 6, 2017 occupational therapy discharge summary, the September 29, 2017 speech therapy progress report, the October 1, 2017 termination infant development report, the September 30, 2017 behavior and social skills therapy report, and the October 24, 2017 IEP evaluation from claimant's school district were unavailable. Before her testimony at the hearing, however, Dr. Bienstock reviewed these documents. According to Dr. Bienstock, these reports show that claimant still suffers from some deficits, but they did not change her opinion regarding his eligibility for regional center services. Indeed, they tended to confirm her opinion that claimant does not function similar to a child with intellectual disability or requires treatment similar to a child with intellectual disability.

TESTIMONY OF THEA LINCOLN

36. Thea Lincoln, a friend of claimant's family for seven years, testified at the hearing on behalf of claimant. Ms. Lincoln has a Master of Arts degree in early childhood

Accessibility modified document

development, and she works with children with autism as well as adults with disability. As a family friend, she has had the opportunity to observe claimant at family parties, most recently at Thanksgiving. In her testimony, Ms. Lincoln described some of the issues that she has observed in claimant. She reported that claimant experienced trouble going down the stairs on his legs and used his buttocks to reach the bottom of a staircase. Claimant also has difficulties with communication, in that unfamiliar listeners often have a hard time understanding him. According to Ms. Lincoln, claimant also has tantrums like a typical three-year old child because he either cannot communicate or does not get his way. In terms of daily living skills, claimant has difficulty putting on his pants and does not like to wear pants, socks, or shoes. Ms. Lincoln believed that claimant is falling behind developmentally.

TESTIMONY OF ROY RAMIREZ

37. Roy Ramirez, claimant's godfather, also testified at the hearing on claimant's behalf. Mr. Ramirez lives across the street from claimant and sees him on a daily basis. He expressed concerns that claimant often falls and drags one of his legs. On at least five different occasions, Mr. Ramirez caught claimant falling before he hit the ground. Although Mr. Ramirez knows his godson well, he is unable to comprehend claimant at all times because claimant cannot put an entire sentence together and often pauses awkwardly between words. Mr. Ramirez has also observed claimant exhibit behavioral issues. He reported that claimant once had a tantrum for approximately 31 to 33 minutes, during which time he froze, in Mr. Ramirez's words, "like a statue." In school, claimant has hit his teacher as well as other students.

TESTIMONY OF CLAIMANT'S MOTHER

38. Claimant's mother testified at the hearing regarding her observations and concerns of claimant's behavior. She noted that claimant has performed well with the

Accessibility modified document

assistance of early intervention services. However, since the services stopped when he became three years old, claimant's behavior has regressed. Claimant exhibits behavior problems when told that it is not his turn, and he throws tantrums by hitting and screaming. Claimant also falls often, which his mother attributed to either an asymmetry in his legs or an inability to bend one of his legs. Claimant's mother reported that her son's school has an aide who watches him because he falls so much. She also testified that her son's teachers have expressed concerns about his communication skills and that his teachers sometimes have difficulties comprehending him. Claimant's mother was concerned that her son is not developing as he should and would like him to continue to receive intervention services.

39. In support of her testimony, claimant's mother submitted an undated letter from Elizabeth Salinas, claimant's teacher at Options for Learning. Ms. Salinas has been claimant's day care teacher since he was three years old, and she is his caregiver from Mondays through Fridays, from 8 a.m. to 5 p.m. In her letter, Ms. Salinas wrote:

> [Claimant is involved in the classroom daily activities. He particularly enjoys working in the sensory areas which include the water table and slimes. [Claimant] does have difficulty expressing himself amongst peers and occasionally will use others [sic] methods to communicate which include hitting, pushing, and taking items from peers. When speaking, [claimant's] speech is clear however it takes him a while to express and communicate. When speaking [claimant] will take pauses in between words as it does not come naturally which becomes difficult when communicating with peers. At times his speech is not as clear as we have to ask [claimant] to repeat himself in order for us

Accessibility modified document

> (teachers/staff) to understand. He is able to follow routine and simple directions. He does have difficulties with redirection and will become visibly upset when provided with assistance in leaving an area. [Claimant] joins small group with teacher but will become easily distracted soon after instructions are provided. His small group teacher must have him nearby in order to maintain focus on task. Most of the falls that [claimant] has is due to his coordination. He will fall whether he is walking or running in and outside the classroom. Surface changes can be difficult for him as he is following the class during transitions and play. [Claimant] enjoys the climber, as he climbs different sections which include rock walk, the metal bars and stairs. He demonstrates determination and excitement when he reaches the top of the structure.
>
> (Ex. A.)

40. In addition, Ms. Salinas provided a calendar for the months of November and December 2017 which showed that claimant fell between five to seven times per week while he was in day care.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Because claimant is the party asserting a claim, he bears the burden of proving, by a preponderance of the evidence, that he is eligible for government benefits or services. (See Evid. Code, §§ 115 and 500.) He has not met this burden.

Accessibility modified document

2. Claimant did not establish that he suffers from a developmental disability entitling him to receive regional center services, as set forth in Factual Findings 1 through 40, and Legal Conclusions 1 through 15.

Applicable Law

3. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) Eligibility for regional center services is limited to those persons meeting the criteria for one of the five categories of developmental disabilities set forth in Welfare and Institutions Code section 4512, subdivision (a), as follows:

> "Developmental disability" means 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 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 intellectual disability ["Fifth Category"], but shall not include other handicapping conditions that are solely physical in nature.

4. The qualifying conditions must also cause a substantial disability. (Welf. & Inst. Code, § 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) A "substantial disability" is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary

Accessibility modified document

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.[4]

CLAIMANT IS NOT ELIGIBLE UNDER THE FIFTH CATEGORY

5. In this case, the parties do not dispute that claimant does not suffer from intellectual disability, cerebral palsy, epilepsy, or autism. Thus, the sole question is whether claimant qualifies for regional center services based on a disabling condition that is closely related to intellectual disability or requires treatment similar to that required for individuals with intellectual disability.

6. The DSM-5 describes Intellectual Disability as follows:

> Intellectual disability . . . is a disorder with onset during the developmental period that includes both intellectual and

[4] Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" similar to that of California Code of Regulations, title 17, section 54001, subdivision (a)(2).

Accessibility modified document

adaptive functioning deficits in conceptual, social and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

(DSM-5, p. 33.)

7. The DSM-5 notes the need for assessment of both cognitive capacity and adaptive functioning to determine the presence of intellectual disability and that the severity of intellectual disability is determined by adaptive functioning rather than intelligence quotient score. (*Id.* at 37.)

8. In addressing eligibility under the Fifth Category, the Appellate Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated in part:

> The fifth category condition must be very similar to mental retardation [now, intellectual disability[5]], with many of the

[5] The DSM-5 changed the diagnosis of mental retardation to intellectual disability.

Accessibility modified document

same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

9. Thus, to be "closely related" to intellectual disability, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with intellectual disability. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability (e.g., reliance on intelligence quotient scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation/intellectual disability.

10. Furthermore, determining whether a claimant's condition "requires treatment similar to that required" for persons with intellectual disability/mentally retardation is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people, including those who do not suffer from intellectual disability, or any developmental disability, could benefit from the types of services offered by regional centers (e.g., counseling, vocational training, living skills training, speech therapy, or occupational therapy). The criterion is not whether someone would benefit from the provision of *services*, but whether that person's condition requires *treatment*, which has a narrower meaning under the Lanterman Act than *services*. (*Ronald F. v. Dept. of Developmental Services*, (2017) 8 Cal.App.5th 94, 98.)

11. Here, claimant's cognitive scores on standardized measures, such as on the MSEL as assessed by Dr. Bienstock, were all in the average range. His adaptive functioning,

Accessibility modified document

as measured by the VABS-3 was also in the low average to average range and was roughly equivalent to his peers. Dr. Bienstock's findings were consistent with the scores that claimant obtained during his evaluation for special education services conducted by his school district in October, 2017. The school psychologist found that claimant scored in the average range on two separate standardized tests of cognitive ability and that his intellectual functioning and academic skills were commensurate with his peers. In the area of adaptive and daily living skills, two of claimant's teachers rated claimant's abilities as either in the average or above average range. Specifically, they reported that he uses the toilet on his own, that he pulls his own pants and underwear down, and that if he is unable to perform a task, he asks for help. Therefore, there is little evidence that claimant's general intellectual functioning is significantly sub-average in a manner that is similar to an individual with an intellectual disability, and there is little evidence that claimant's adaptive functioning is significantly sub-average in a manner that is similar to an individual with an intellectual disability.

12. Claimant's school district found that he did not qualify for special education services, whereas eligibility for special education services is generally more inclusive than eligibility for regional center services. Moreover, Dr. Bienstock opined that claimant does not have intellectual disability. She was also emphatic that claimant does not function in a manner similar to a child with intellectual disability nor requires treatment similar to that required by an individual with intellectual disability. Dr. Bienstock's testimony was unrefuted, credible, and consistent with the evidence in the case. Therefore, it was given significant weight.

13. Reports from claimant's occupational therapist, speech therapist, early interventionist and behavioral therapist further support this conclusion. These reports indicate that while claimant may have initiated these therapeutic services due to delays, he made significant progress during the treatment period. In occupational therapy, by the

Accessibility modified document

time of his discharge in September 2017, claimant had acquired skills commensurate with his age group in most skill sets. His occupational therapist recommended continuing therapy based only on delays in fine motor skills. In speech therapy, claimant was discharged because he demonstrated age-appropriate articulation, pragmatic, receptive, and expressive language skills, and no delays were noted. By October 2017, when claimant's early interventionist assessed him, claimant had reached age-appropriate development levels in cognition, receptive language, fine motor skills, social/emotional development, and self-help skills, even though some delays in gross motor skills and expressive language were found. Finally, claimant was also discharged from behavioral therapy at the end of September 2017 after showing significant progress in decreasing challenging behaviors.

14. Claimant's mother, in her testimony, expressed concerns mostly with her son's gross motor skills and expressive language skills. The letter from claimant's teacher, Ms. Salinas, also seems to indicate some problems with motor coordination and articulation. However, little evidence was presented that these functional deficits are related to any cognitive problem. The treatment recommendations made by claimant's occupational therapist and early interventionist were based on the belief that claimant has delays related to motor skills and speech. None of the recommendations were premised on a belief that claimant suffered from a condition closely related to intellectual disability, and little evidence was presented that any of the recommended treatments are similar to those required for an individual with intellectual disability. Therefore, under these circumstances, claimant does not fall under the Fifth Category.

15. While claimant's diagnosis for bacterial meningitis as an infant clearly caused some early developmental delays, his current developmental level is commensurate with his peers across many areas. Claimant does not have a developmental disability under the Lanterman Act, and he is not eligible for regional center services at this time.

Accessibility modified document

ORDER

Claimant's appeal from the Eastern Los Angeles Regional Center's denial of eligibility for services is DENIED. Claimant is not eligible to receive regional center services under the Lanterman Act at this time.

DATE:

____

JI-LAN ZANG
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.

Accessibility modified document