

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**CLAIMANT**

**VS.**

**EASTERN LOS ANGELES REGIONAL CENTER,**

**Service Agency**

**OAH No. 2020050173**

**DECISION**

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 16, 2020.

Claimant's mother (Mother) represented Claimant.<sup>1</sup> Jacob Romero, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (Service Agency or ELARC). The hearing was held via videoconference. Mother and Service Agency's expert witness, Dr. Randi Bienstock, appeared telephonically only.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on the hearing day.

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<sup>1</sup> Claimant and Mother are identified by title to protect their privacy.

## **ISSUE**

Is Claimant eligible for services and supports pursuant to the Lanterman Developmental Disabilities Services Act?

## **EVIDENCE**

Documents: ELARC's Exhibits 1 through 15.

Testimony: On behalf of Service Agency, Dr. Randi Beinstock; on behalf of Claimant, Mother.

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. Mother applied to ELARC for supports and services pursuant to the Lanterman Act. In a letter dated April 3, 2020, ELARC's executive director, Gloria Wong, and assessment coordinator, Cindy Riu, notified Mother that its assessment process has been completed and determined Claimant was not eligible for services because he does not have autism or any other qualifying developmental disability.

2. Mother timely filed a Fair Hearing Request and this matter ensued.

### **Background Information**

3. Claimant is a five-year-old boy. He lives with his older sister, Mother, grandmother, aunt, uncle and two cousins. Mother is his primary caretaker.

4. A. Claimant experiences language delays and deficits, as well as behavioral issues and difficulties with social interactions. To address the language-related deficits, Claimant received Early Start infant and toddler development intervention services from ELARC until he turned three years old and aged out of the Early Start program.

B. On February 21, 2018, ELARC conducted an Early Start exit evaluation. Dr. Randi Bienstock performed that evaluation. In her report, Dr. Bienstock noted that Claimant greeted her with a smile, did not have difficulty transitioning to testing, and “exhibited age appropriate skills related to joint attention and shared enjoyment.” (Exh. 4, p. 2.) Dr. Bienstock also noted that Claimant did not exhibit self-stimulatory, stereotyped, or repetitive behaviors and “was attentive and cooperative during the structured activities and was responsive to praise.” (*Ibid.*) She did note, however, that, despite Early Start and other interventions, Claimant continued to exhibit significant deficits in expressive language and articulation skills, and she recommended that Claimant be assessed for special education services. Based on her observations and the results of various cognitive tests she administered, Dr. Bienstock concluded that Claimant did not have a disability qualifying him for continued regional center services under the Lanterman Act.

5. A. Approximately one month after the ELARC exit evaluation, Becky Heath, a speech and language pathologist and Jo-Ann Ogdon, school psychologist at the Whittier Area Cooperative Special Education Program (WACSEP) examined Claimant and issued their report. Dr. Ogdon administered cognitive tests and determined that Claimant fell within the average to above average range. She noted a 19-point difference between his verbal and nonverbal skills, a clinically significant

discrepancy, but concluded that, overall, “[s]tandardized assessment results do not indicate sub-average general intellectual functioning.” (Exh. 5, p. 23.)

B. Dr. Ogdon also concluded that adaptive behavior assessments established that Claimant had below average skills in communication; above average skills in self-direction (making choices, finishing and completing tasks, following directions); below average social skills, below average self-care skills; and average skills in all other practical skills such as doing chores, following safety rules, and demonstrating motor skills.

C. Consistent with earlier testing, Ms. Heath, the speech and language pathologist, and Dr. Ogdon found that Claimant exhibited deficits in expressive language and articulation, with test scores falling in the below average range. Based on these deficits, Ms. Heath and Dr. Ogdon recommended that Claimant be found to be eligible for special education and that the district’s Individualized Education Plan (IEP) team develop an IEP for him. In April 2018, an IEP was developed and Claimant began to receive special education services as part of his preschool curriculum.

6. A. An IEP progress report dated April 2019 reflected that Claimant made some progress in articulating words; however, he still had difficulty saying and producing certain letters in isolation and could not produce them when they appeared in a word. Overall, he continued to display speech deficits: “[Claimant’s] speech intelligibility remains very low and it is difficult to understand [Claimant] even when the context is known. Excessive drooling and a fast rate of speech exacerbate [Claimant’s] poor intelligibility.” (Exh. 6, p. 4.)

B. The April 2019 IEP Progress Report also addressed Claimant's behavioral limitations, noting that Claimant exhibits frustration and protestation when being given direction and sometimes needs incentives to coax him into cooperating.

7. In June 2019, Claimant began attending psychotherapy sessions at Pacific Clinic in Santa Fe Springs, California. Initial assessment notes reflect a diagnosis of unspecified disruptive, impulse control, and conduct disorder with functional impairment in the areas of completing tasks and following directions at home and day care. The assessment and each of the treatment notes over the next few months also stated that Claimant's behaviors interfere with his ability to maintain healthy interpersonal relationships. The goal established at the commencement of therapy was for Claimant to decrease his disruptive behavior, improve his ability to transition from activity to activity, and improve his ability to express himself. Notes from these sessions continuing through October 2019 reflect that Claimant's behavior did not substantially improve as a result of the therapy sessions, and that he has continued to be disruptive and aggressive, sometimes engaging in self-harm, and he had no playmates.

8. A. In November 2019, Mother arranged for Dr. Sammie Williams, clinical and forensic psychologist, to evaluate Claimant. Dr. Williams' evaluation consisted of clinical observations, review of parent questionnaires, and administering various psychological tests including the Adaptive Behavioral Assessment System, the Autism Diagnostic Observation Schedule, the Autism Spectrum Rating Scales, the Behavior Rating Inventory of Executive Functioning, and the Childhood Autism Rating Scale. Dr. Williams also administered the Primary Test of Nonverbal Intelligence (PTONI), an intelligence test which does not require oral responses, thus allowing for intelligence measures not impacted by speech deficits.

B. Dr. Williams summarized his impressions and determinations as follows:

[Claimant] cannot effectively express himself for his age and development, nor can he communicate the discomfort that he may experience (e.g. confusion) typically. [Claimant] is not able to understand when he is putting himself in a dangerous situation. [Claimant's] adaptive functioning also present with challenges in his reciprocal social communication abilities, self-direction, daily living and overall socialization skills which impair his ability to function across most psychosocial domains.

[Claimant] further lacks the necessary insight, awareness, and coping abilities that are required for him to understand the nature and extent of his psychological, emotional, behavioral, interpersonal, and social challenges. More importantly, although several scores were reported in the "Average" range, [Claimant's] adaptive functioning demonstrated various challenges in his reciprocal social communication abilities, daily living, self-help, awareness of safety, and overall socialization skills.

(Exh. 10, p.11.)

C. Dr. Williams determined that Claimant meets all diagnostic criteria for autism, noting that only six of 10 are required for a definite diagnosis.

## **ELARC Assessment**

9. A. In January 2020, Mother sought regional center services. As part of its evaluation of Mother's application, ELARC referred Claimant to Dr. Larry Gaines, a licensed psychologist. Dr. Gaines' evaluation consisted of clinical observations and a review of past records. Dr. Gaines also administered the Wechsler Preschool and Primary Scale of Intelligence (Wechsler); the Beery-Buktenica Development Test of Visual Motor Integration; the Autism Diagnostic Observation Scale; and the Vineland Adaptive Behavior Scales (Vineland).

B. Dr. Gaines observed that Claimant could make some eye contact and could transition from activity to activity on direction; however, he exhibited a very short attention span and had little impulse control. Claimant's scores on the Wechsler ranged from low average to borderline. Claimant's scores on the Vineland indicated his language skills fell within the borderline range of performance. The Vineland results also showed mild deficiencies in adaptive skills such as dressing and hygiene.

C. Dr. Gaines reported that Claimant's scores on the Autism Diagnostic Observation Scale did not clearly indicate Claimant fell within the autism spectrum. Specifically, Claimant, as observed by Dr. Gaines, did not exhibit the deficits in social and emotional reciprocity, communication, and the ability to develop and understand relationships commonly present in a clear autism diagnosis. Dr. Gaines did not observe Claimant engaging in stereotyped or repetitive motions, though he noted that Mother had seen Claimant do this. Dr. Gaines found that Claimant's impulse control deficits may be consistent with autism, that certain fixed interests Claimant exhibited were also consistent with a possible diagnosis of autism, and that Claimant had hypersensitivities to food tastes and certain sounds which are clearly associated with autism.

D. Dr. Gaines' results were reviewed and evaluated by ELARC psychologist, Dr. Heike Ballmaier. Dr. Ballmaier's report concluded that, given Claimant's presentation of only partial symptoms of autism and generally normal cognitive skills, he was not eligible for regional center services but recommended that he be reevaluated in two to five years. Regarding Dr. Williams' findings, Dr. Ballmaier wrote: "**Results and observations are grossly inconsistent with results and findings offered in previously discussed psychological and school records.**" (Exh. 9, p. 2 [bold text in original].)

E. Dr. Bienstock testified at the administrative hearing. She reviewed the reports by Drs. Gaines and Ballmaier, as well as all documentation provided by Mother, including Dr. Williams' report and the assessments and notes from Claimant's special education evaluators and his behavioral therapists. Taking all this information as a whole, Dr. Bienstock opined that Claimant did not exhibit any qualifying diagnoses for regional center services. Dr. Bienstock emphasized that she especially agreed with Dr. Ballmaier's characterization of Dr. Williams' conclusions as an outlier and disconnected from other observations and assessments of Claimant.

## **Analysis**

10. Claimant has been evaluated by a number of professionals from various disciplines. There is clear consensus among these professionals that Claimant had speech and language deficits for most of his young life and these deficits continue. There is also consensus that Claimant often cannot regulate his behavior and that he has deficits in certain adaptive skills, relative to his age. Dr. Williams made a diagnosis of autism based on these symptoms. Contrary to Dr. Ballmaier's assertions, Dr. Williams' conclusions are entirely inconsistent with other assessors. Dr. Gaines, ELARC's chosen specialist, agreed that Claimant exhibited at least some indicia of autism. The



overall picture from the different assessments is that there is at least a possibility that Claimant is autistic; however, Claimant does not exhibit all of the deficits typical to a diagnosis of autism and has certain strengths also not typical of autistic individuals.

## **LEGAL CONCLUSIONS**

1. The Lanterman Act (Welf. & Inst. Code, § 4500 et seq.)<sup>2</sup> provides services and supports to individuals with qualifying developmental disabilities.

2. Section 4512, subdivision (a) defines a developmental disability as: "...a disability which originates before an individual attains age 18; continues or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." It includes "intellectual disability, cerebral palsy, epilepsy, and autism. . . [and] 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."

3. California Code of Regulations, title 17 (Regulation), section 54000 further defines "developmental disability" and requires that the disability originate before age 18, be likely to continue indefinitely, and constitute a "substantial handicap." Regulation section 54001, subdivision (a), defines "substantial disability" to mean:

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<sup>2</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise designated.

(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.

4. Regulation section 54000, subdivision (c), provides that a qualifying developmental condition shall not include the following:

(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 psychosocial 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. Section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability." Regulation 54001 provides:

(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.

6. A. Pursuant to section 4710.5, subdivision (a), "[a]ny applicant for . . . , or authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interests, shall . . . be afforded an opportunity for a fair hearing."

B. A party seeking to establish eligibility for government benefits or services has the burden to prove by a preponderance of the evidence that he meets the criteria for eligibility. (*Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; Evid. Code, §§ 115, 500.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations] . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

C. In determining eligibility, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of

Developmental Services) and regional center professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.)

## **Conclusion**

7. Applicants seeking to overturn regional centers' findings of non-eligibility face significant procedural challenges as well as substantive law deferring to the regional centers' expertise. Here, Mother has presented important evidence from her chosen psychologist, Dr. Williams, supporting a finding that Claimant is autistic and therefore eligible for service; however, this report is not enough to meet Claimant's burden of providing a preponderance of the evidence establishing Claimant's eligibility. Specifically, Mother has not controverted Dr. Gaines' findings of social skills and engagement and lack of stereotypic or repetitive behavior, all of which are contraindicative of autism.

8. While the record does not justify reversing ELARC's determination that Claimant is not eligible for services, Claimant may be reassessed at a later time when his condition may present more clearly.

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## **ORDER**

Claimant's appeal of ELARC's determination that he is not eligible for regional center supports and services is denied.

DATE:

DEENA R. GHALY

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.