

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MARY M.,

Claimant,

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH Case No. 2012070645

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Alhambra, California, on September 11, 2012.

Edith Hernandez, Fair Hearings Contractor, Eastern Los Angeles Regional Center (Regional Center or Service Agency), represented Regional Center.

Claimant was represented by her grandmother and legal guardian, Maria R.¹, and by her mother, Cynthia R.

Oral and documentary evidence was received at the hearing. The record was left open for Claimant's family to submit additional medical records and for Regional Center to respond to any records submitted. No records were submitted by the September 26, 2012, deadline, and the matter was submitted for decision on September 26, 2012.

¹ Initials have been used to protect the privacy of Claimant and her family.

ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant was born on December 11, 2007. No complications were reported at birth, although her mother may have consumed alcoholic beverages or ingested controlled substances. Cynthia R. was 16 years of age when she gave birth. Claimant and her younger brother were removed from the home in April 2010, apparently due to suspected child abuse. Claimant's father, who is five years older than Cynthia R., has been diagnosed with schizophrenia and bipolar disorder and was abusive toward Cynthia R. Claimant and her brother were briefly returned to their mother in the latter part of 2011, before being removed again in January 2012. Claimant resides with their maternal grandparents, her legal guardians, and has regular visits from her mother.

2. Claimant received services from the San Gabriel/Pomona Regional Center (SGPRC) under the Early Intervention Services Act, Government Code section 95000 et seq. (Early Start), as an individual at high risk of developing a developmental disability. She received infant stimulation, occupational therapy, and speech therapy services.

3. a. On October 12, 2010, Edward G. Frey, Ph.D. (Frey), as part of the transition planning from the Early Start Program, conducted a psychological evaluation at the request of SGPRC to determine Claimant's eligibility for services under the Lanterman Act after age three. Dr. Frey described Claimant as very active and difficult to understand. She was verbal and communicated with others, but presented with significant articulation and pronunciation difficulty.

b. Her cognitive level, as measured through the Wechsler Preschool and

Primary Scale of Intelligence, was in the average range and Dr. Frey concluded that mental retardation did not appear to be present. As assessed through the Vineland II Adaptive Behavior Scales, with Claimant's then foster parent, great aunt Maricela C., as reporter, mild deficits were present in overall adaptive functioning, with motor skills particularly weak.

c. Dr. Frey administered the Gilliam Autism Rating Scale II, a screening tool for autism, and obtained a score of 100, which is in the 85 to 100 range suggestive of autism. In addition, Maricela C. reported very poor eye contact, licking of objects, repetitive language, and spinning. Claimant reportedly did not initiate conversations and did not do very well in group situations. Direct play interaction was deemed suggestive of autistic features, but inconclusive. She did engage in interactive play, but for a short time and at a simplistic level. Much of her play was solitary with a near constant chatter of disconnected and random words. In Dr. Frey's opinion, "Overall, examiner believes there is credible evidence for the presence of autistic-like features." (Exh. 5, at p. 3.)

d. Dr. Frey made a provisional diagnosis of Pervasive Developmental Disorder, NOS, as Claimant presented with sufficient autistic-like features to be on the autism spectrum. He suggested additional testing in two years.

4. On November 11, 2010, SGPRC concluded Claimant was not eligible for services under the Lanterman Act. It agreed to provide transitional services through December 15, 2010, and referred Claimant to the Whittier City School District (District) for appropriate special education services after Claimant turned three and services terminated under Early Start.

5. a. On March 10, 2011, following a developmental evaluation, the District concluded that Claimant was eligible for special education services by reason of autism. In the evaluation, school psychologist Noell Scott, M.A., Ed.S., and speech and language pathologist Rebecca Steelman, M.A., C.C.C., concluded, in part based on a review of Dr. Frey's report, that Claimant met Education Code criteria for eligibility under autism because

she displayed the following impairments: inability to use oral language for appropriate communication; a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction; an obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects or both; and self-stimulating, ritualistic behavior.

b. Claimant receives special education at a local elementary school. She receives specialized academic instruction in a preschool special day class four hours per day, five days per week, which includes typical peers three days per week; 45 minutes of speech and language services per week; transportation to and from school; and extended school year services.

6. Claimant's social worker brought her to Service Agency for evaluation. Susana Gonzalez, Assessment Coordinator, met with Claimant and her maternal grandparents on April 10, 2012, and recommended assessment by a psychologist after obtaining information from the grandparents.

7. a. Larry E. Gaines, Ph.D. (Gaines), conducted the psychological evaluation on April 10, 2012. Dr. Gaines administered the Leiter International Performance Scale, Revised (Leiter), the Beery-Butkenica Development Test of Visual Motor Integration (Beery VMI), the Autism Diagnostic Observation Scale, Module Two (ADOS), and the Vineland Adaptive Behavior Scales, Second Edition (Vineland II), with the grandparents as reporters.

b. Claimant made good eye contact with Dr. Gaines, and cooperated in the testing. Dr. Gaines described her play as immature, but not idiosyncratic. She did not share her toys, and did not give or request help with play activities.

c. In the Leiter, a test of cognitive functioning, Claimant scored in the average range of intellectual ability, demonstrating consistent performance across all subtest tasks.

d. In her clinical interview, Claimant spoke in full sentences. She did not exhibit echolalic speech or make unusual noises. Her adaptive skills were in the average range, as measured through the Vineland. Visual-motor and perceptive skills were rated in the low average range of performance on the Beery VMI. Adaptive behavior skills fell within the average range of performance on the Vineland.

e. Claimant's social skills fell in the low-average range of performance in the Vineland. Although described as a typically happy child, she at times has temper tantrums. Claimant was reported by her grandparents to be social, but was not reported to engage in much imaginative play. Both Dr. Gaines and the grandparents reported on behavior consistent with attention deficit disorder. She has a short attention span and is extremely distracted. She is impulsive and constantly interrupts others. In the testing, Claimant grabbed test material without waiting for instruction and could not sit still for even a short period of time. Dr. Gaines administered the ADOS, a diagnostic test for autism, and she did not have any elevated scores indicative of autism on any of the clinical scales.

f. Dr. Gaines issued a provisional diagnosis of attention deficit hyperactivity disorder, combined type, and wanted to rule out learning disorder, NOS. In his opinion, Claimant's primary presentation was that of a child with impulse control problems, in part resulting from prenatal exposure to drugs. She presented with some unusual behaviors, which he interpreted as part of the impulse control problems. For example, during an exercise in the ADOS involving play with cars, Claimant lined them up, which Dr. Gaines interpreted as done in a rush to push them off the table rather than as exhibiting an inflexible, rigid pattern indicative of autism.

8. a. Since May 24, 2012, Claimant has been receiving mental health services from Marisela Rosales, L.C.S.W. (Rosales), with the agency The Whole Child. Claimant attends two hours once per week, and is working with the therapist on

decreasing nightmares and risky behaviors, such as running away when in the community with her grandparents. Rosales submitted a letter containing her observations and reported conduct that she believes are consistent with autism disorder. Rosales has not diagnosed autism and is not working with Claimant to address the condition.

b. Rosales made the following statements based on her personal observations. Claimant seems to have very poor social boundaries. She lacks appropriate social behaviors and cannot read social cues. She is unable to make eye contact on a consistent basis without prompting, and once she establishes eye contact, cannot sustain it. She lacks age appropriate emotional reciprocity, and does not engage in meaningful or sustained interactions. Rosales has not observed Claimant display affection toward her grandmother or to seek comfort from her. Rosales described Claimant as verbal, but unable to sustain conversation with her grandmother. Claimant often repeats phrases from television shows or phrases that others have made, such as "this is my jewel," which Rosales characterized as echolalia.

9. Claimant's grandmother testified about Claimant's behaviors and challenges, and her concerns about them. Claimant still drinks from a baby bottle, and kicks and screams to get it and keep it. She likes certain routines, like watching specific television channels at specific times. In activities involving others, such as going to swimming classes or at her birthday party, Claimant does not follow directions or wait her turn; she jumps in the water or grabs cake from any table without regard for others. She is aggressive toward other children.

10. Her mother testified that Claimant is never quiet. She moves excessively, bites objects and people, and grabs objects and people. Claimant does not respond to her directions unless she gets really close to the child and repeats her directives.

11. Randi E. Bienstock, Psy.D., (Bienstock), a psychologist employed by Service Agency, reviewed all the documents submitted at the hearing, and concluded that

Claimant does not have autism. Dr. Bienstock noted that the District's designation of Claimant as having autism for the purpose of special education services does not constitute a formal diagnosis. With respect to the school evaluation itself, Dr. Bienstock pointed out that some of the reported observations, which can be consistent with autism, such as references to idiosyncratic or stereotypical behavior, were insufficient to establish the presence of autism without ruling out other conditions, some in the autism spectrum and others, including possible medical diagnoses, outside the spectrum. She pointed out that the school evaluators also referred to other symptoms involving impulsive and hyperactive behavior that may be inconsistent with autism. In agreement with Dr. Gaines, Dr. Bienstock opined that Claimant's presentation was better explained by impulsivity and learning disability issues.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is specifically defined as "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. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).) Implementing regulations issued by the Department of Developmental Services contain the following exclusions from the definition of developmental disability:

"[(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." (Cal. Code of Regs., tit. 17, § 54000.)

2. No evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that she has either condition. She has not received a diagnosis of mental retardation or of any condition related to mental retardation, and the evidence of cognitive functioning and adaptive skills received at the hearing tends to rule out the presence of mental retardation, a condition closely related to mental retardation, or one requiring treatment similar to that required by individuals with mental retardation. Claimant's cognitive skills have been consistently measured by different evaluators in the average range. Dr. Frey described mild adaptive functioning deficits, and Dr. Gaines' measured Claimant's adaptive skills in the average range five months later.

3. Claimant has not received a diagnosis of autism, and the evidence adduced

at the hearing is insufficient to support such a diagnosis. Behaviors that may be consistent with autism were reported by Rosales, Claimant’s family, and District evaluators, but no clinician concluded that the behaviors were sufficiently pronounced to result in a diagnosis of autism. Dr. Frey was also concerned about “autistic-like” features, but did not feel those warranted a full diagnosis of autism, opting instead for a provisional diagnosis in the spectrum. Dr. Gaines, the clinician who most recently met with Claimant, administered a recognized diagnostic tool, the ADOS, and concluded that Claimant did not present with autism. Rather, he opined that Claimant’s primary presentation was that of a child with impulse control problems and possible learning disabilities, an opinion that was shared by Dr. Bienstock. In these circumstances, it has not been established that Claimant has autism.

4. It was not established that Claimant has a developmental disability within the meaning of the Lanterman Act, and she is not eligible to receive Service Agency services, by reason of factual finding numbers 1 through 11 and legal conclusion numbers 1 through 3.

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ORDER

Claimant's appeal is denied.

DATED: October 5, 2012

/s/

SAMUEL D. REYES

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.