

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2013090222

ALASTER P.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on October 24, 2013, in Los Angeles, California. Alaster P. (Claimant) was represented by his parents, Robert and Lisa P.¹ San Gabriel Pomona Regional Center (SGPRC or Service Agency) was represented by Gabriela Santana.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on October 24, 2013.

ISSUE

Does Claimant have a developmental disability under the "fifth category" entitling him to regional center services?

¹ Claimant's and his parent's last initials are used in lieu of their surnames in order to protect their privacy.

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FACTUAL FINDINGS

1. Claimant is three years old (born October 6, 2010). He claims to be eligible for regional center services based on a condition similar to mental retardation or requiring services similar to persons with mental retardation (otherwise known as the "fifth category" of eligibility for regional center services).

2. The Service Agency determined that Claimant is not eligible for regional center services because he does not suffer from any qualifying developmental disability. Based on this determination, the Service Agency denied services to Claimant, and Claimant submitted a request for fair hearing. (Exhibits 1 and 7.)

3. Claimant had been receiving services from the Service Agency under the Early Start Program, based on developmental delays.² (Exhibit 1.) These services included

² "Early Start" is the name used in California to refer to a federal program for children under age three who are at risk for certain disabilities. The governing law for Early Start is The Individuals with Disabilities Education Act (IDEA), Subchapter III, Infants and Toddlers with Disabilities (20 U.S.C. §§ 1431-1445) and the applicable federal regulations found in Title 34, Code of Federal Regulations (C.F.R.), section 303, et seq. Each state was given the opportunity to receive federal funds for providing services to eligible children 36 months of age and younger if the state complied with federal rules and regulations. California chose to participate, and the Legislature passed legislation necessary for that participation. The California Early Intervention Services Act is found at Government Code

occupational therapy (OT), physical therapy (PT), and speech therapy. (Exhibit 4.)

4. Claimant was born with 22q11 deletion syndrome, also known as DiGeorge Syndrome or Velocardiofacial Syndrome. This genetic disorder carries with it the potential for a lengthy list of anomalies (at least 188), none of which have been found to occur with 100 percent frequency, but all of which occur with sufficient frequency to warrant assessment. (Exhibit A.)

5(a). According to a Children’s Hospital of Los Angeles Craniofacial Team Report, dated July 18, 2013, Claimant has been followed by an Otolaryngologist for Eustachian tube dysfunction; a gastroenterologist for constipation and failure to thrive; a cardiologist for a history of mild pulmonic stenosis; and an immunologist for low T-cells. He had also been followed by an ophthalmologist, but was discharged.

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5(b). The team’s findings included:

[M]ildly delayed receptive and expressive language, and severe phonological disorder[; and]

Patient is currently in the process of transitioning to school district from the Regional Center. Has been receiving infant stimulation, OT/PT, and speech. Graduated from all services

section 95000, et seq. California also adopted regulations to implement the statutory scheme. (Cal. Code Regs., tit. 17, sections 52000-52175.)

except speech and are planning to have him continue through the school district for one hour a week. He will be attending Preschool three days a week. Parents stated behavior concerns. (Exhibit A.)

5(c). The team's recommendations included annual reassessment of Claimant's speech and "continue to follow psychologist in Team to monitor for psychosocial concerns and receipt of appropriate services. Recommend that patient continue to have an open Regional Center case given his 22q11.2 deletion syndrome diagnosis." (Exhibit A.)

6(a). On July 17, 2013, at the request of the Service Agency, a clinical psychologist, Pean Lai, Ph.D., performed a psychological assessment of Claimant to assist in determining his continued eligibility for regional center services. Claimant was two years, nine months old at the time of the evaluation. (Exhibit 5.)

6(b). As part of Claimant's evaluation, Dr. Lai administered several tests, the results of which are reported below:

- (1) Dr. Lai administered the Wechsler Preschool and Primary Scale of Intelligence – Fourth Edition (WPPSI-IV). Claimant did not obtain a Full-Scale IQ score on the WPPSI-IV. However, Dr. Lai estimated that Claimant's overall cognitive abilities were in the average range. No significant discrepancy was found between his verbal and nonverbal abilities. Dr. Lai noted that Claimant's Verbal Comprehension IQ score of 100 fell in the average classification, with his relative weaknesses in retrieval of factual knowledge and in expressive language ability. (Exhibit 5.)
- (2) Dr. Lai also administered the Vineland Adaptive Behavior Scales - II (Vineland II). Claimant's Adaptive Behavior Composite score was 87, which Dr. Lai noted was in the "adequate range of adaptive functioning." In the Communication domain, Claimant obtained a score of 86; in the Daily Living Skills domain, Claimant

obtained a standard score of 89; in the Socialization domain, Claimant obtained a standard score of 95; and in the Motor Skills domain, Claimant obtained a score of 88. All of these scores were in the "adequate range." (Exhibit 5.)

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6(c). Dr. Lai's observations of Claimant's behavior included the following:

[Claimant] was well aware of his surroundings, often engaging those around him. He always established good eye contact. [Claimant] responded to his name when called. He frequently asked others to play with him, such as throwing a ball and batting with his hands. . . . He showed a range of expressions. He pouted when angry. He showed delight when he liked something. [Claimant] used word approximations when verbalizing his needs. He often used gestures and sign language to express himself. . . . [Claimant] was helpful, such as spontaneously throwing trash in the receptacle after eating his snack. (Exhibit A.)

6(d). Dr. Lai's Evaluation Summary stated:

[Claimant was] first referred to the regional center due to overall developmental delays. Medical history is positive for DiGeorge Syndrome, which affects his overall development and immune system. [Claimant] has been receiving several intervention services, including occupational, physical, and speech therapy. In addition, he attends preschool three times a week. He has made tremendous progress. However, he

continues to struggle with vocalization of words. On the other hand, he has several sign language words, used in a consistent basis.

[Claimant's] overall cognitive abilities were evaluated in the average classification. Both nonverbal and verbal abilities are in the average classification. His overall adaptive skills fell in the adequate range of functioning. He is not suspected of mental retardation. [Claimant] will likely continue to benefit from speech/language therapy services, due to articulation difficulties. (Exhibit 5.)

6(e). Dr. Lai found no diagnosis on Axis II. (Exhibit 5.)

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7(a). In an October 16, 2013 letter, Alessia Johns, Ph.D., a psychologist with the Craniofacial and Cleft Center of Children's Hospital Los Angeles, noted:

In addition to [Claimant's] medical needs, as a child with 22q11 deletion syndrome, [Claimant] has ongoing needs to support his cognitive, behavioral, and language

development. As noted on the National Institutes of Health Genetics Home Reference . . . :

“Many children with 22q11.2 deletion syndrome have developmental delays, including delayed growth and speech development, and learning disabilities. Later in life, they are at an increased risk of developing mental illnesses such as schizophrenia, depression, anxiety, and bipolar disorder. Additionally, affected children are more likely than children without 22q11.2 deletion syndrome to have attention deficit hyperactivity disorder (ADHD) and developmental conditions such as autism spectrum disorders that affect communication and social interaction.” (Exhibit A.)

7(b). Dr. Johns recommended:

[Claimant should] continue with an open Regional Center case as he transitions services to his school district as he is at high risk for both global cognitive delays and autism spectrum as a child with 22q11 deletion syndrome. He has a history of demonstration of both language delays and behavioral issues that may be consistent with an autism spectrum diagnosis. (Exhibit A.)

7(c). Dr. Johns opined:

[Claimant] fits within the fifth category with needs that are closely related to mental retardation, or what is now termed

intellectual disability. As a child with 22q11 deletion syndrome, an open Regional Center case will allow for his needs beyond those provided by his school district to be evaluated and treatment plans formed without a break in services that would be required through reestablishing him as a client. (Exhibit A.)

8. At the fair hearing, the Service Agency noted that the evidence did not support maintaining an open case with the Regional Center. The Service Agency maintained that, given Claimant's average cognition and adaptive skills levels, Claimant is not currently functioning like someone with mental retardation / intellectual disability. Although Claimant may be at risk for significant delays, such delays do not currently exist. The Service Agency noted that it cannot make Claimant eligible for continued regional center services based on possible future deficits.

9(a). At the fair hearing, Claimant's parents stated that, while Claimant's cognitive ability is currently "on target," his diagnosis puts him at high risk, and his condition can change instantaneously. Additionally, Claimant's parents noted that his current ability level is due to the fact that necessary services were funded by the Service Agency for the first three years of his life. Claimant's parents argued that it is imperative that Claimant continue to receive ongoing care, and that without intervention, he will regress and suffer from significant delays. They want to be "proactive" because his diagnosis is life long, and if they have to later contend with the lengthy process of getting a regional center case opened, this delay will be harmful to him. (Testimony of Robert and Lisa P.)

9(b). Claimant's parents also asserted that his condition is a disabling condition which requires the same treatment as children with mental retardation or autism, thus placing him in the fifth category of eligibility. They did not elaborate on how Claimant's

current services (speech and language services) are services similar to those required by persons with mental retardation /intellectual disability. (Testimony of Robert and Lisa P.)

LEGAL CONCLUSIONS

1. Claimant has not established that he suffers from a developmental disability under the "fifth category" entitling him to regional center services. (Factual Findings 3 through 9.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512 defines "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, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4(a). To prove the existence of a developmental disability within the meaning of

Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability."

4(b). California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

5(a). In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512.)

5(b). Whereas the first four categories of eligibility are very specific, the disabling

conditions under this residual, fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them.

5(c). The Legislature required that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (Welf. & Inst. Code, § 4512.) The definitive characteristics of mental retardation /intellectual disability include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. 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. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training, speech therapy, occupational therapy). The criterion is not whether someone would benefit. Rather, it is whether someone's condition *requires* such treatment.

6. In order to establish eligibility, a claimant's substantial disability must not be

solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512, and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does *not* have a developmental disability, would not be eligible.

7. Claimant demonstrates average IQ and adequate adaptive functioning. Claimant does not demonstrate significant deficits in cognitive functioning or in adaptive functioning. The totality of the evidence did not establish that Claimant currently suffers from a condition similar to mental retardation/ intellectual disability. The evidence also did not establish that Claimant currently requires treatment similar to that required for mentally retarded individuals. Although Dr. Johns opined that Claimant "fits within the fifth category with needs that are closely related to mental retardation, or what is now termed intellectual disability," she did not provide any bases for this opinion, and it was not substantiated by the evidence (i.e. Claimant's current functioning and treatment/service needs). Based on the foregoing, Claimant has met not met his burden of proof that he currently falls under the fifth category of eligibility.

8. Based upon the evidence presented, Claimant has also not met his burden of proof that he currently has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001. Claimant does not suffer from impairment of cognitive or social functioning.

9. The weight of the evidence supports a finding that Claimant is not currently

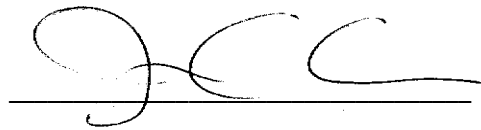
eligible to receive regional center services under the Lanterman Act.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Service Agency's determination that Claimant is not eligible for regional center services is upheld, and Claimant's appeal of that determination is denied.

DATED: November 7, 2013

A handwritten signature in black ink, appearing to read 'JCO', is written over a horizontal line.

JULIE CABOS-OWEN

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.