

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CHASTITY H.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL  
CENTER,

Service Agency.

OAH No. 2011110071

**DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 10, 2012, in Alhambra.

Chastity H. (claimant) was present and was represented by her mother, Yessenia H.<sup>1</sup>

Edith Hernandez, consultant, represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 10, 2012.

**ISSUE**

Is Claimant eligible under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to receive services from the Service Agency?

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<sup>1</sup> Initials are used to protect the privacy of claimant and her family members.

## EVIDENCE RELIED UPON

*Documents:* Service Agency's exhibits 1-14; claimant's exhibit A.

*Testimony:* Randi E. Bienstock, Psy.D.; Yessenia H.; Marissa S.

## FACTUAL FINDINGS

### *Parties and Jurisdiction*

1. Claimant is a three-year-old girl. She lives at home with her parents and her one-year-old sister.

2. By letter dated October 27, 2011, the Service Agency notified claimant's mother that claimant, who had been receiving services through the Early Intervention Program,<sup>2</sup> would no longer qualify for that program as of December 18, 2011, claimant's third birthday. The letter continued:

The multidisciplinary team has determined that there is no evidence of a developmental disability, therefore, [claimant] will also not be eligible for Regional Center services in accordance with the Lanterman Act.

(Ex. 1.)

3. On November 1, 2011, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding eligibility, writing that "[m]y daughter does have autism and does need help." (Ex. 2.)

4. Randi Elisa Bienstock, Psy.D., conducted a psychological evaluation of claimant on behalf of the Service Agency, meeting with claimant on September 21, 2011, interviewing claimant's mother, and spending additional time reviewing claimant's records. Dr. Bienstock is a clinical psychologist licensed in California with expertise in neurodevelopmental disabilities. She has provided psychological testing and evaluations for autism and mental retardation for the Service Agency since 1999, and has consulted for the Service Agency regarding eligibility and appropriate services for the Service Agency's consumers since 2006.

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<sup>2</sup> The federal Early Intervention Program for Infants and Toddlers with Disabilities, known in California as the "Early Start Program," applies only to infants and toddlers under the age of three. (Cal. Code Regs., tit. 17, § 52100 et seq.)

5. The records Dr. Bienstock reviewed in evaluating claimant included the following:

a. An Occupational Therapy Developmental Evaluation report dated February 7, 2011, prepared by Carol Suzuki, O.T.R./L SWC, Registered Occupational Therapist. Suzuki reported that claimant smiled, focused on tasks, interacted nicely, demonstrated low average cognitive skills and anxiety when separated from her caregiver, laughed at incongruous events, and had strong food preferences. She noted some behavioral issues reported by claimant's mother, and recommended occupational therapy.

b. A Speech and Language Evaluation report dated February 11, 2011, prepared by Carrie Ortiz, M.A., CCC-SLP, a speech-language pathologist. Ortiz reported that claimant made eye contact, smiled, established a rapport, engaged in joint referencing, and played with toys. She noted that claimant's mother reported that claimant spun and stared at toys, but that behavior was not observed by Ortiz. Ortiz diagnosed claimant with expressive language and receptive language deficits and recommended speech therapy.

c. An Individualized Family Service Plan from the WACSEP Infant-Family Program, Leffingwell School, an Early Intervention program, dated September 14, 2011, prepared by Christy Gonzales-Aden, M.A., infant-family specialist, and Laurie W. Peel, M.A., CCC-SLP, speech pathologist. Gonzales-Aden and Peel reported that claimant did not demonstrate characteristics of autism in class and performed at class level except in the area of expressive language. They noted that claimant's mother reported that claimant did not play with others and needed intervention by teachers, and that there were behavioral issues at home.

d. Another Leffingwell School report describing claimant as being socially connected, making good eye contact, using words, not tantruming, and acting in an age-appropriate manner socially. Dr. Bienstock found this earlier report consistent with the later, September 2011 report, and again not consistent with claimant's mother's reporting.

e. A Providence Speech and Hearing Center Audiological Evaluation, dated July 29, 2011, prepared by Nicholas J. Benson, RPE. (Ex. 11). Based on test results, Benson wrote that claimant's hearing "is adequate for speech and language development," and recommended an additional audiological evaluation and a speech and language evaluation. (Ex. 11.) Dr. Bienstock, who is not a physician or an audiologist, recommended that an audiologist review this report, noted that claimant's school also reported that claimant's hearing was within normal limits, and further noted that claimant's mother's report that claimant is partially deaf in her right ear is inconsistent with these results.

f. A Center for Behavior Medicine psychological care memo dated February 2, 2011, written by Herbert Blaufarb, Ph.D. Dr. Blaufarb wrote "to whom it may concern" that he saw claimant and her parents and that "[t]he child shows clear signs of Autistic Disorder (299.00)." (Ex. 6.) Dr. Bienstock noted that no testing results, evaluative data, supporting documentation, or report of Dr. Blaufarb in support of this conclusory memorandum was made available to Dr. Bienstock. None was produced at hearing.

g. Handwritten notes provided by claimant's mother, from Adrienne Shut, behavior specialist, undated, and from Carlos Galvan, behavior specialist, dated November 2, 2011." (Ex. 6.) Dr. Bienstock noted that these therapists did not work directly with claimant, but appeared to work with claimant's uncle, and concluded that for them to provide a professional evaluation of claimant was questionable ethically and as to validity. Even given what is reported to have been their observations, Dr. Bienstock saw no grounds to change her diagnostic findings.

h. A letter dated August 2, 2011, from Michael J. Davis, Ph.D., audiologist. Dr. Davis wrote that "[b]ased on [claimant's] distraction with sounds and her previous use and benefit from an FM device at her school she is being fit with hearing aids on a trial basis." (Ex. 12.) Dr. Bienstock noted that the Leffingwell School reports did not indicate the use of an FM device in the classroom, another discrepancy between the records and what was reported by claimant's mother. Dr. Bienstock recommended that a physician review the issue of claimant's hearing.

6. Dr. Bienstock observed claimant while at play and in formal evaluative tasks. She noted that claimant was initially quiet; she went to the toys in the room and played appropriately, showing no repetitive patterns of play. After 20 minutes, claimant began to make eye contact, though she appeared shy. Then claimant approached Dr. Bienstock, engaged her, made good eye contact, and responded to her name. Claimant displayed joint attention, engaged in reciprocal interactions, and pointed out things to her mother and to Dr. Bienstock. She demonstrated no self-injurious or idiosyncratic behaviors, no self-stimulation, and nothing indicative of autistic spectrum disorder. She showed some issues with expressive communication, though she showed an intention to communicate. She responded to directives. She did not exhibit any echoing. Claimant was cooperative; she smiled and giggled, and seemed to enjoy the interaction with Dr. Bienstock.

7. In addition to her observations, clinical interview with claimant's mother, and records review, Dr. Bienstock administered the Gilliam Autism Rating Scale–2nd Edition (GARS-2) and the Autism Diagnostic Interview–Revised (ADI-R) to claimant's mother, and the Autism Diagnostic Observational Schedule, Module 1 (ADOS, Module 1) to claimant, "to rule out a diagnosis related to an Autistic Spectrum Disorder." (Ex. 4.) She also administered the Mullen Scales of Early Learning to claimant, and the Vineland Adaptive Behavior Scales, 2nd Edition (Vineland-II), Achenbach Child Behavior Checklist, and Temperament and Atypical Behavior Scales.

8. Dr. Bienstock reported Axis I diagnoses of Factitious Disorder by Proxy (Provisional) and Expressive Language Disorder (Provisional). Dr. Bienstock testified that Factitious Disorder by Proxy involves intentionally feigning symptoms and indirectly assuming a sick role. She noted that it was not claimant reporting the symptoms but claimant's mother, and that those symptoms were not substantiated by any source other than claimant's mother. The diagnosis was provisional because Dr. Bienstock believes it should be reviewed by a physician; similarly, she believes her diagnosis of Expressive Language Disorder should be reviewed by a speech therapist.

9. In her report, Dr. Bienstock wrote that claimant's mother provided information during her interview that was inconsistent with claimant's records in many respects, and that with respect to autism,

There were also many discrepancies with regard to reports of behaviors and characteristics related to Autism which [claimant] reportedly displays at home versus current clinical observations and observations reported by her school teacher and speech therapist. In fact, [claimant's mother] reported that [claimant] exhibits almost every clinical symptom related to a diagnosis of Autistic Disorder as specified by the DSM-IV-TR. However, [claimant] presented as a sweet, social, interactive and bright little girl who did not display any behaviors or characteristics that were clinically indicative of a diagnosis related to an Autistic Spectrum Disorder.

[Claimant] does appear to exhibit continued deficits in her expressive language skills. However, clinical observations as well as the results from the standardized measures and information obtained from recent progress reports from her school indicate no other developmental deficits.

In fact, the overall findings resulted in a considerable concern with regard to a possible diagnosis related to a Factitious Disorder by Proxy. [Claimant's mother's] view and report of her daughter's daily functioning was not only completely opposite of what was observed during the clinical evaluation, but the lack of praise for [claimant's] accomplishments and efforts was disturbing as well. Diagnostic concerns related to a Factitious Disorder by Proxy is rather significant and one that was not considered lightly and without consultation. Given the significant implications of such a diagnosis, it will be offered on a Provisional basis at this time with the recommendation that a second opinion be obtained.

(Ex. 4.)

10. Among her recommendations, Dr. Bienstock wrote that "[i]f all clinical and medical evidence support a diagnosis related to Factitious Disorder, consideration of reporting this to DCFS is also recommended." (Ex. 4.)

11. Dr. Bienstock also concluded that claimant does not have mental retardation or any condition closely related to mental retardation, or that claimant requires treatment similar to that required for individuals with mental retardation. Claimant only exhibits an expressive language disorder.

12. After preparing her report, Dr. Bienstock received and reviewed clinical psychotherapy notes dated February 2, 2011. Dr. Bienstock noted that the document used was a standard adult evaluation form, not appropriate for use with claimant in that it asks irrelevant questions (e.g., concerning marital status) and does not inquire into relevant areas (e.g., developmental history). Although the form reports “History of Present Illness, autism—child autistic,” and that claimant is sensitive to loud noise, it is accompanied by and references no supporting documentation and no clinical observations. (Ex. 6.) Dr. Bienstock did not change her conclusions based on this report, as she could not ascertain from the report how long the session with claimant was, where the information came from, or what testing, if any, was conducted.

13. Dr. Bienstock also received and reviewed a Whittier Area Cooperative Special Education Program Individualized Education Program (IEP) dated December 14, 2011. That IEP reflects that the school district conducted its own psychoeducational evaluation to determine whether special education services were appropriate for claimant. The IEP reports that claimant met the criteria for special education services only on the grounds of a speech and language impairment. The IEP addressed parental concerns about autistic-like characteristics or behaviors, but did not make a clinical diagnosis of autism using the DSM IV. The psychoeducational evaluation reflects that the CARS was administered, with results in the non-autistic range, but shows some concerning behaviors, including growling, jargon, and lining up items. The school psychologist concluded that “an eligibility of Autism is not appropriate in this case.” (Ex. 7.) Although the school district found claimant to be eligible for special education services under the category of speech and language impairment, claimant’s mother requested a special day class; the district explained that that would not be appropriate because it would be more restrictive than required and would have harmful effects.

14. Claimant’s mother testified that claimant did not demonstrate autistic-like behaviors when she was evaluated by the school district because claimant’s mother accompanied her. The CBM diagnosis should be determinative; they saw claimant twice, once for four hours and once for two hours. They conducted several tests and concluded that claimant was autistic. Dr. Blaufarb, however, provided her with no evaluation report. According to claimant’s mother, claimant’s pediatrician, Dr. Chanchal Dewan, who works with autistic children and who referred claimant to the Service Agency, also says claimant is autistic; no documentary evidence was introduced in support of this testimony, however. Claimant’s mother testified that claimant is more comfortable with adults than with peers and does not like playing with other children; she was asked to leave Mommy and Me in August 2011 because she bit two children. Dr. Bienstock did not observe claimant with other children. According to claimant’s mother, claimant lines up toys, tantrums, bites herself, and pulls out her own hair when other children try to interact with her. Claimant’s mother is very concerned about claimant harming herself and others.

15. Marissa S., claimant’s grandmother, testified that she is the caregiver for her autistic son, claimant’s uncle, and that she takes claimant on outings with her son. But taking claimant out is difficult; for example, claimant will not enter the door to Chuck E. Cheese if

other people are there. She escalates, hits herself, and bites other children. Claimant plays with her baby sister and is very affectionate, but they cannot be left alone because claimant will hit her sister if her sister has something claimant wants.

## LEGAL CONCLUSIONS

1. Cause exists to deny claimant's request for regional center services, as set forth in Factual Findings 1 through 15, and Legal Conclusions 2 through 5.

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

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) To establish eligibility for regional center services under the Lanterman Act, claimant must show that she suffers from a developmental disability that "originate[d] before [she] attain[ed] 18 years old, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for [her]." (Welf. & Inst. Code, § 4512, subd. (a).) "Developmental disability" is defined to include 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 individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (*Id.*)

4. The determination of eligibility for services under the Lanterman Act is initially made by the regional center. "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

5. Claimant did not establish by a preponderance of the evidence that she has a qualifying diagnosis of autism or of any other eligible condition. (Factual Findings 1 through 15.) The Service Agency's evidence, primarily the testimony of and the psychological evaluation performed by Dr. Bienstock, was persuasive in establishing that claimant does not have a qualifying condition under the Lanterman Act. (Welf. & Inst. Code, § 4512, subd. (a).) No qualifying developmental disability was established by any report submitted by claimant at hearing or submitted to Dr. Bienstock for her review; rather, the records further evidence the lack of a qualifying diagnosis. Claimant's mother's reports of claimant's behaviors and challenges are of concern, for the reasons identified by Dr. Bienstock. They do not establish grounds for a finding of eligibility, as they are not substantiated and are contradicted by available documentary evidence.

ORDER

Claimant Chastity H.'s appeal is denied; Eastern Los Angeles Regional Center's decision denying claimant's request for regional center services is affirmed.

DATE: January 25, 2012

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HOWARD W. COHEN  
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.