

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ALLEIA C.,

Claimant,

OAH No. 2011120208

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

DECISION

Susan Ruff, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Diego, California, on January 25, 2012.

Katrinka C., claimant's mother, represented Claimant Alleia C. Claimant was not present at the hearing.

Ronald House, attorney at law, represented the San Diego Regional Center.

On January 25, 2012, the matter was submitted.

ISSUE

Is Claimant eligible for Regional Center services?

FACTUAL FINDINGS

Jurisdictional Matters

1. Prior to November 2011, the parents of Alleia C. (Claimant or Alleia) contacted the San Diego Regional Center (SDRC) requesting an evaluation of Claimant to see if she was eligible for regional center services. On November 22, 2011, the SDRC notified Claimant's parents by certified mail that SDRC had found Claimant was not eligible

for regional center services. Claimant's parents timely filed a request for a fair hearing, and notice of the hearing was given.

2. On January 25, 2012, the fair hearing record was opened, documentary evidence was introduced, sworn testimony was given, the record was closed, and the matter was submitted.

Background and Prior Assessments

3. Alleia is a six-year-old girl who lives with her adoptive parents. It is believed that Alleia's biological mother (who is not Katrinka C.) may have used illegal drugs while she was pregnant with Alleia and also while nursing Alleia after the birth.

4. Alleia has exhibited developmental delays and problem behaviors over the years. She has been assessed on several occasions to determine the nature of her disability.

5. In March 2008, shortly before Alleia's third birthday, S. Ann Corrington, Ph.D., conducted a psychological evaluation of Alleia on behalf of the SDRC. The purpose of the evaluation was to determine Alleia's cognitive and adaptive functioning levels with respect to possible eligibility for regional center services. Dr. Corrington administered tests, including the Wechsler Preschool and Primary Scale of Intelligence – III (WPPSI-III), the Vineland Adaptive Behavior Scales – II (Vineland), the Gilliam Autism Rating Scale – 2 (GARS-2), and the Childhood Autism Rating Scale. Dr. Corrington also conducted a records review, interviewed Katrinka C., and made clinical observations.

6. Dr. Corrington's tests found Alleia to have a full scale IQ score of 88, in the low average range. Alleia's adaptive skills were in the average to borderline range. With respect to the autism rating scales, Dr. Carrington found some behavior that could be indicative of autism, including delayed language and sensory issues. However, Dr. Corrington did not make a diagnosis of autism. Her report noted that:

To receive a diagnosis of autism, an individual must exhibit 6 of 12 characteristics of autism. At this time, Alleia uses eye contact, facial expressions and gestures in social interactions although she will stare within social situations, as well. She is playing parallel with her peers. She does share activities and objects with others. She seems to do fairly well with social give-and-take.

Alleia's language has been quite delayed. Her play is noted to be imaginative and she does imitate others' behaviors.

Alleia is reported to organize some of her toys and line up objects but is not preoccupied with doing so.

At this time, Alleia's staring episodes may be related to a Processing Disorder or an Attention Deficit Hyperactivity Disorder. She is noted to be

very hyperactive at home. A diagnosis of autism does not appear to be appropriate at this time.

7. In February 2010, Alleia was evaluated by Melissa O'Connell, Ph.D., at the Rady Children's Hospital in San Diego. Alleia was four years and 11 months old at the time. Dr. O'Connell administered the Differential Abilities Scales, Second Edition, the Vineland, the Gesell Developmental Schedules, the Child Behavior Checklist (CBC), and the Social Communication Questionnaire (SCQ). On the Differential Abilities Scales, Alleia received a Global Conceptual Ability of 92, in the average range. However, Dr. O'Connell noted that her verbal ability score was in the below average range for her age. On the Gesell Developmental Schedules, an instrument which measures gross motor skills, Alleia came out solidly at the four year level.

8. On the Vineland, CBC and SCQ, Katrinka C. reported significant concerns in many areas of behavior and adaptive skills.

9. Dr. O'Connell concluded, among other things, that:

Alleia is a 4 year, 11 month old child who presents today with below average verbal ability and average non-verbal reasoning and spatial abilities in the average range. Gross motor skills are slightly immature for her age. Adaptive behaviors are also somewhat immature. Given Alleia's performance today it is believed that conceptually she should be able to keep pace with same aged peers within a classroom setting. However, she may have some difficulty given her immature social-emotional skills.

Alleia does present at this time with a number of behavioral difficulties at home, however similar reports of behavioral difficulties are not evident at either her current Head Start placement or her prior Head Start placement. With supervision and consistent activity, she is reported to do well within the classroom setting and is able to follow the limits set by her classroom teachers. There are no reports of any atypical or strange behaviors in the classroom, only pouting when she does not get her way.

Given Alleia's propensity for shredding clothing and stockings and pulling at strings, interest in smearing lotions, soaps, liquids and saliva, eating non-edible items and pushing against things, such as the window, she may have some sensory difficulties. Given the composite list of behavioral difficulties at home, but lack of such difficulties at school, the best descriptor of her behaviors at this time would be Disruptive Behavior Disorder, NOS.

10. Dr. O'Connell also noted in her recommendations: "As Alleia is generally doing well cognitively at this time, there is no need for her to return for follow-up developmental evaluation. However, her development and behavior should continue to be monitored through the school system." Dr. O'Connell did not diagnose Alleia with either autism or mental retardation.

11. In June 2011, Alleia was examined by Ernesto Tiznado-Garcia, M.D., a pediatric neurologist, because of a possible seizure that she had suffered. On June 22, 2011, Dr. Tiznado-Garcia wrote Alleia's name on a prescription pad followed by the words "Diagnosis: autistic spectrum disorder" and signed the prescription pad. He also mentioned "autism" and "autism spectrum" in physician notes for the appointments on June 8, 2011, June 22, 2011, and July 19, 2011.

12. According to Katrinka C., Dr. Tiznado-Garcia came to the conclusion that Alleia had autism based on his observations of Alleia's conduct during her medical appointments with him. In particular, Alleia did not make eye contact with him during the three appointments, did not speak to him, and was overly absorbed by the snow globes in his office. However, Dr. Tiznado-Garcia did not conduct any specific testing related to autism or prepare a detailed report of his rationale and findings related to the autism diagnosis. The medical reports in the file related to the possible seizure, because that was the purpose of his medical assessment. Dr. Tiznado-Garcia did not testify at the hearing.

13. On June 29, 2011, at the end of Alleia's Kindergarten year, the San Diego Unified School District held an individualized education program (IEP) team meeting to evaluate a three-year (triennial) assessment conducted of Alleia, and to review her ongoing eligibility for special education. The IEP team found her eligible for special education under the eligibility category of autism.

14. The school district assessor reviewed Alleia's past assessments, observed her in class, and conducted testing. Alleia was observed to turn her body away from the teacher during a lesson, and at times she would either "stare off" or daydream. She looked at her peers or their work for support.

15. To determine Alleia's cognitive functioning levels, the assessor gave her a series of developmental tasks. Her performance on those tasks indicated she was in the normal range of development and had learning ability appropriate for her age. Alleia scored well below average in the Test of Auditory Processing Skills – 3, in the average range on the visual processing tests, and in the low average to average range on the visual-motor integration tests. Alleia also scored in the average range on achievement testing. The assessment found that: "Alleia is able to participate fully in general education with separate time for Speech and Language services and direct small group instruction in written language." She had met or was making good progress on her IEP goals.

16. With respect to autism, the school district assessment noted:

Initially, this current evaluation did not list autism as a suspected disability because on 3 previous evaluations,¹ it had been ruled out and Alleia has been

¹ According to the reports, there may have been another evaluation done of Alleia prior to Dr. Corrington's assessment, but no report for that evaluation was moved into evidence by either party. Based on the references in later reports, that evaluation apparently did not diagnose Alleia with either autism or mental retardation.

making academic gains. [Katrinka C.] has discussed her concerns that Alleia may have autism and if so, would like to have the appropriate services for Alleia. Alleia was taken to Pediatric Neurologist, Dr. Ernesto Tiznado-Garcia in order to rule-out seizure disorder. The Dr., after observing Alleia in his office and speaking with [Katrinka C.], diagnosed autistic spectrum disorder. He, according to [Katrinka C.], will provide a report to support the diagnosis.

17. Based on the information regarding possible autism, the school district assessor administered the GARS-2 and the Behavior Assessment System for Children – 2 (BASC-2). The responses of Alleia’s teacher to the assessment questions indicated a very likely probability of autism. The teacher noted that Alleia avoided eye contact, stared at objects for at least five seconds, made high-pitched noises, repeated unintelligible sounds, and answered questions inappropriately.

18. Katrinka C. reported problem behaviors to the assessor, such as Alleia running away from her family in public places, focusing on things such as snails, putting inedible items in her mouth, pulling strings on her clothing and eating them, an unusually high tolerance for pain, and squeaking or repeating inappropriate phrases.

19. The school district’s assessment concluded:

Based on current assessments, Alleia exhibits the following Autistic-Like Behaviors: an impaired ability to use language to communicate appropriately and impairment in social interaction continuously from early childhood; inappropriate use of objects; and avoidance of eye-contact; as well as other behaviors consistent with symptoms of autism listed above.

Alleia’s IEP should be changed to reflect AUT as her Federal Handicapping Condition to better describe the disability impacting her academic performance.

20. In November 2011, Beatriz Netter, Ph.D., conducted a psychological evaluation of Alleia to assist in determining whether Alleia qualified for regional center services due to autism.

21. Dr. Netter interviewed Katrinka C., reviewed the past assessments, including the school district assessment, reviewed a video recording that Katrinka C. had made of Alleia, observed Alleia, and conducted testing.

22. The testing included the WPPSI-III, the Vineland, the GARS-2 and the Autism Diagnostic Observation Schedule (ADOS). On the WPPSI-III, Alleia scored in the borderline range for verbal IQ (75) and in the average range for performance IQ (93). She obtained a score of 85 in the Processing Speed Index, and a full scale IQ score of 80, in the low average range. On the Vineland, Alleia’s composite score indicated “mild deficits in level of adaptation.”

23. Netter administered the GARS-2 through an interview with Katrinka C. The responses provided by Katrinka C. indicated a very likely probability of autism.

24. The ADOS consists of a set of semi-structured play-based activities that allow for the observation of behaviors characteristic of autism. It provides a score that may be classified as “autism spectrum” or “autism.” According to Netter’s findings, Alleia met the classification for “autism spectrum” on the ADOS, but not for “autism.” Netter noted that Alleia:

offered spontaneous information in conversation but with little sense of reciprocity. She demonstrated some degree of understanding of emotions, and of insight into typical social relationships, but this was limited. The overall quality of rapport was somewhat comfortable but slightly inappropriate in her responses and with very few social overtures. She did not demonstrate any echolalia or repetitive patterns of speech and spontaneously offered information about her thoughts or experiences although she did not express any interest in the examiner’s thoughts or experiences. She used appropriate eye contact and used facial expressions and gestures to facilitate communication. She demonstrated appropriate pleasure in interactions or conversations.

25. Dr. Netter concluded that Alleia fell within the autism spectrum and met the criteria for pervasive developmental disorder -- not otherwise specified (PDD-NOS). However, Dr. Netter found that Alleia did not meet the DSM-IV criteria for autistic disorder.

26. According to Dr. Netter’s report, in order to meet the DSM-IV² criteria for autistic disorder an individual must exhibit characteristics from three different categories of impairment. In particular, an individual must exhibit two or more of the characteristics in the category involving “qualitative impairment in social interaction.” With respect to that category, Dr. Netter reported the following:

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures and gestures to regulate social interactions; **Alleia does not meet this criterion**

(b) failure to develop peer relationships appropriate to developmental level **Alleia has reportedly not been able to develop friendships with peers and therefore appears to meet this criterion**

² Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition.

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g. a lack of showing, bringing or pointing out objects of interest) **Alleia does not meet this criterion**

(d) lack of social or emotional reciprocity **Alleia does not meet this criterion as she demonstrates some social and emotional reciprocity; however, it is limited³**

27. On January 13, 2012, Joan Reese, M.D., reviewed Dr. Tiznado-Garcia's medical records on behalf of the SDRC and concluded that Alleia does not have a diagnosis of epilepsy.

28. During the hearing, Katrinka C. played a video she had made to demonstrate Alleia's problem behaviors. Based on the comments in Dr. Netter's assessment report, it appeared to be the same video that Dr. Netter reviewed. In the video, Alleia exhibited behaviors, including but not limited to, making high-pitched noises, having a toileting accident and then stepping in the liquid with no concern, toe-walking while standing in line at school, eating non-edible objects such as mud, running away from her mother in a store, insisting that she walk in front of her sister and insisting on crossing the street at only one location, rewinding a particular scene in a cartoon over and over on a video player, and trying to turn up the hot water in the tub with no concern that it might burn her. At one point while her mother was shopping, Alleia sat down on the floor next to a display of jewelry and stared in fascination at the necklaces for a long time, touching them and moving them, with apparently little or no regard for their actual function.

29. Harry Eisner, Ph.D., testified as an expert witness on behalf of SDRC. Dr. Eisner is the Coordinator of Psychology Services for the SDRC and has worked for the SDRC for 23 years. He has been a psychologist for over 30 years and has evaluated thousands of cases on behalf of the regional center to determine eligibility for regional center services. Although he did not personally assess Alleia, he was familiar with the various assessments of Alleia and was involved in the decision by SDRC to deny eligibility.

30. Dr. Eisner was also familiar with the requirements for finding an individual eligible for regional center services in California. In order to find an individual eligible under the category of mental retardation, the individual must have a full scale IQ score below 70 and deficits in adaptive functioning. In his opinion, Alleia did not meet the eligibility criteria for mental retardation because her full-scale IQ test scores were consistently higher than 70. In forming his opinion, he also noted her academic score in math on the school district's assessment, which was in the average range.

31. Dr. Eisner testified that the SDRC relies upon the definitions in the DSM-IV to determine whether an individual meets the eligibility criteria for autism. In Dr. Eisner's opinion, based on the various assessment reports done of Alleia over the years, she did not meet the criteria for eligibility for regional center services under the category of autism.

³ All emphasis (underlining and bold text) was contained in Dr. Netter's report.

32. He explained that the symptoms of autism generally appear in a child by age three, but no assessment done of Alleia prior to age three determined that she had autism. Dr. Eisner relied upon Dr. Netter's report which concluded that Alleia exhibited some symptoms of autism, but not enough to meet the DSM-IV criteria for autism. Under the DSM-IV criteria, a child such as Alleia may have symptoms that place the child on the autism spectrum, but not meet the criteria for a diagnosis of autistic disorder. Dr. Netter diagnosed Alleia with PDD-NOS, not autistic disorder.

33. Dr. Eisner reviewed the documentation from Dr. Tiznado-Garcia, but felt that Dr. Tiznado-Garcia's office observations of Alleia were not an assessment and were not sufficient for SDRC to find eligibility based on autism. Likewise, in Dr. Eisner's opinion, the school district's determination that Alleia was eligible for special education under the eligibility category of autism did not automatically mean that she was also eligible for regional center services. A school district can make a special education eligibility determination based on a list of symptoms that might not meet the DSM-IV criteria for autistic disorder.

34. Dr. Eisner also opined that Alleia did not meet the eligibility criteria under the "fifth category" reserved for individuals who have disabling conditions closely related to mental retardation or require treatment similar to that required for individuals with mental retardation. He explained that Alleia had average range nonverbal skills according to IQ testing and the school reported some average range academic skills. In order for the regional center to find "fifth category" eligibility, they must expect the individual to be disabled throughout his or her lifetime. Given Alleia's young age and her average skills in some areas, he did not feel that they could say, at this point, that she would be disabled throughout her lifetime.

35. During her testimony, Katrinka C. disagreed strongly with Dr. Eisner's opinion. She believes that Alleia's autistic behaviors started well before age three and that Alleia needs supervision 24 hours a day, seven days a week. Alleia is not fully toilet trained, has no concept of danger from strangers or the environment, will cover her ears or place blankets around her when noises disturb her, exhibits behaviors such as licking windows, and requires assistance of instructional aides in order to function in her classroom at school. Katrinka C. testified that during the current school year, Alleia has had behavioral problems. For example, Katrinka C. brought to the hearing a "red card" that she received from Alleia's class on January 24, 2012. The card indicated that Alleia was "not following directions."

36. The testimony of Katrinka C. was sincere and heartfelt. She clearly cares deeply about her adopted daughter and wants Alleia to receive the services she needs in order to develop to her greatest possible potential.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act or Act) is set forth at Welfare and Institutions Code section 4500 et seq.

2. Under the Lanterman Act, the state of California recognizes its responsibility to provide for persons with developmental disabilities. (Welf. & Inst. Code § 4501.) It is the intent of the Legislature that services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. (*Ibid.*) However, not every disability is considered a developmental disability for purposes of the Act. There are only five categories of disabilities that are considered “developmental disabilities” under the Act.

3. The Act defines a “developmental disability” 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. 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).)

4. A “substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity: 1) self-care; 2) receptive and expressive language; 3) learning; 4) mobility; 5) self-direction; 6) capacity for independent living; and 7) economic self-sufficiency. (Welf. & Inst. Code § 4512, subd. (1).)

5. In making an eligibility determination a 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 and evaluations that have been performed by, and are available from, other sources. (Welf. & Inst. Code § 4643, subd. (b).)

6. As set forth in Factual Findings 1 – 36 above, the evidence does not show that Alleia meets the criteria for eligibility for regional center services under the category of mental retardation. At no point has Alleia’s full-scale IQ score on any of the assessments been measured at 70 or below. Her last IEP from school indicated that she was meeting her goals and participating in the general education classroom environment.

7. Likewise, the evidence does not show that Alleia has a condition closely related to mental retardation or that requires a similar treatment to that required for individuals with mental retardation. To the contrary, in many respects she is able to function in the manner of an individual with normal cognitive abilities.

8. During the hearing, Katrinka C. objected to the introduction of evidence by the regional center which contains the results of IQ testing for Alleia. She argued that case law prevents a school district from conducting IQ testing of African-American children using standardized testing. (See *Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969 (*Larry P.*))

9. However, the *Larry P* case dealt solely with school districts and is not applicable to regional center determinations of eligibility. The concern in the *Larry P* case was over inclusion of African-American children in special education due to low cognitive test scores. The rationale of that case does not apply in the current circumstances, in which Alleia scored in the average range. Finally, even if the standardized IQ tests were invalid for Alleia, the cognitive determination done by the school district in its most recent assessment did not rely upon a standardized IQ test, but still found Alleia's abilities to be in the average range.

10. The more difficult question in this case is whether Claimant is eligible for regional center services based on autism. Alleia exhibits many behaviors also exhibited by autistic children, including language delays, difficulty with social situations, sensory issues, and some repetitive behaviors. Those behaviors, and the results of rating scales such as the GARS-2, led the San Diego Unified School District to conclude that Alleia was eligible for special education under the category of autism. The regional center's own assessor placed her on the autism spectrum, although the assessor did not find sufficient severity of behaviors to warrant a diagnosis of autistic disorder under the DSM-IV.

11. However, autistic-like behaviors do not automatically lead to eligibility under the Lanterman Act. Instead, to be eligible for regional center services, a child must have autism as defined in the DSM-IV. Neither the regional center assessments of Alleia nor Dr. O'Connell's assessment done at Rady Children's Hospital found that Alleia met the DSM-IV criteria for an autistic disorder. Dr. Tiznado-Garcia's notation on a prescription pad does not constitute a full assessment, nor is there any indication that he conducted a full assessment to determine if Alleia met the DSM-IV criteria for autism.

12. Likewise, the school district's finding of eligibility based on autism is not controlling. A school district's uses a different standard for determining eligibility than the regional center uses. Under special education law, a child only needs to exhibit a combination of certain "autistic-like behaviors" to be found eligible for special education. (Cal. Code Regs., tit. 5, § 3030, subd. (g).)

13. Under these circumstances, there is insufficient evidence in the record to show that Alleia currently qualifies for regional center services under the category of autism. Claimant has the burden of proof in this case to show eligibility and she has not met that burden.⁴

⁴ Claimant's appeal raised only the eligibility categories of mental retardation, autism or the "fifth category" as potential bases for eligibility, so this Decision has focused on those three eligibility categories. Claimant presented no evidence that she qualified under the other two categories (epilepsy or cerebral palsy).

ORDER

Claimant is not currently eligible for regional center services. The regional center's decision to deny eligibility is upheld.

NOTICE

This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5. Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: February 6, 2012

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings