

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KEVIN G.,

Claimant,

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH Case No. 2012070700

DECISION

This matter was heard by Mark Harman, Administrative Law Judge, Office of Administrative Hearings, in Alhambra, California, on September 5, 2012. Felipe Hernandez, Chief of Consumer Services, represented Eastern Los Angeles Regional Center (Service Agency). Claimant's mother, Angelica C.¹ (Mother), represented Claimant. Mother was assisted by her friend, Karina Lopez, and a Spanish Language interpreter.

Oral and documentary evidence was received at the hearing. The record was left open until September 12, 2012, to allow Mother to submit a speech and language therapy progress report. No report was received. The record was closed on September 12, 2012.

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 Code² section 4500 et seq. (Lanterman Act)?

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

² All further statutory references are to the Welfare and Institutions Code.

FINDINGS OF FACT

1. Claimant is 10 years old, and resides with his Mother, step-father, and 16-year-old brother. He has frequent visits with his natural father. Mother is concerned because he has had difficulty establishing and maintaining friendships with peers. Claimant has reported incidents at school in which he is being “bullied” and often gets his feelings hurt. Mother expresses concerns about his behaviors, including his restlessness, his inability to maintain his attention when performing non-preferred tasks or when he does not understand a school assignment, his unusual sensitivities to certain foods and textures, and his fearful responses that arise for no apparent reason. Claimant also is reported to engage in some repetitive behaviors with his hands, and to rock back and forth while standing or sitting. He becomes angry when he does not get his way or when he must wait for something promised to him.

2. Claimant attends 4th Street Elementary School within the Los Angeles Unified School District (District). He attends a general education fifth grade classroom. He has received special education services since age four on the basis of a “speech and language impairment.” In 2010, his eligibility for special education was amended to “specific learning disability” (SLD). In 2011, the District and Mother agreed for the District to fund a series of evaluations to get a better understanding of Claimant’s strengths and weaknesses.

3. In November and December 2011, Chris Coyle, M.A. – CCC SLP (Coyle), a speech and language pathologist employed by Total Education Solutions, performed a speech and language evaluation in both English and Spanish. Mother again reported her concern that Claimant did not initiate communication events with peers and adults in the school. She feared that Claimant was socially withdrawn. At the time, Claimant was receiving 120 minutes per month of pull-out school based speech and language interventions. He also was pulled out of the classroom on a daily basis to receive Resource Support Program (RSP), primarily in language development, and he was pulled out 30 minutes per week for pupil counseling.

4. Coyle concluded that Claimant presented with severe receptive language disorder and moderate expressive language disorder. Claimant also exhibited a mild fluency disorder marked by phrase, whole word repetitions, blocks, and sound repetitions. He observed that Claimant frequently engaged in tangential off-topic conversation, but was easily redirected. Complainant did not refuse to perform any tasks during the assessment; however, as the testing increased in difficulty, he became noticeably frustrated and discouraged. No articulation problems were noted. Coyle also found that Claimant’s dominant language was English. His first language, Spanish, did not significantly impact his overall ability to communicate.

5. Coyle also interviewed Claimant’s teacher, Ms. Sandoval. Ms. Sandoval reported that Claimant was more verbal during non-academic activities, that he did well socially, and that he was rarely involved in conflicts. Ms. Sandoval said that Claimant exhibited better attention and participation in a small group. Ms. Sandoval noted that Claimant could become emotional and nervous if he could not meet his teacher’s expectations or felt like something “unfair” was happening to him.

6. The District also funded an independent psychological assessment conducted by licensed clinical psychologist Valerie Benveniste, Ph.D., in December 2011. Dr. Benveniste offered the following diagnoses:

Axis I	299.8	Pervasive Developmental Disorder – Not Otherwise Specified ^[3] (PDD-NOS)
	307.0	Stuttering (moderate)
	315.39	Phonological Disorder
Axis II	V62.89	Borderline Intellectual Functioning
Axis III		Obesity Astigmatism corrected by prescription lenses

To assess Claimant’s cognitive abilities, Dr. Benveniste administered the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV). The WISC-IV is a well-accepted measure and consists of four indices, which are combined to yield a Full Scale Intelligence Quotient (FSIQ). On the WISC-IV, Claimant obtained a FSIQ of 83, which was in the low average range of cognitive ability. Only his score on the working memory index was borderline (his scores on the matrix reasoning and vocabulary subtests also were low). Claimant’s standard scores on each of the four indices were as follows:

Verbal Comprehension: 83
Perceptual Reasoning: 90
Working memory: 71
Processing speed: 100

7. Dr. Benveniste administered an additional measure of cognitive functioning, the Kaufman Brief Intelligence Test, Second Edition (K-BIT-2), to be able to report more comprehensively on Claimant’s typical functioning. The administration of the two instruments yielded moderately discrepant results in the area of verbal comprehension, so a third instrument was administered, the Slosson Intelligence Test - Third Revised Edition (SIT-R3) to measure verbal abilities only. On the K-BIT-2, Claimant obtained the following standard scores: Verbal: 63; Nonverbal: 84; and IQ composite: 69. On the SIT-R3, Claimant obtained a standard score of 63. Dr. Benveniste stated:

“Though the K-BIT-2 and the SIT-R3 yielded an estimated I.Q. in the Intellectually Disabled range, as measured by the WISC-IV Kevin demonstrates some abilities that fall in (or approach) the average range. Therefore, a diagnosis of Intellectual Disability does not appear appropriate. Thus, a diagnosis of

³ Dr. Benveniste wrote in a footnote: “This diagnosis subsumes other diagnoses that Kevin shows symptoms of including: 315.32 Mixed Receptive-Expressive Language Disorder (Dysphasia), 300.12 Overanxious Disorder of Childhood, and 314.01 Attention Deficit Hyperactivity Disorder – Combined Type.”

Borderline Intellectual Functioning will be offered at this time as it most accurately represents Kevin's general intellectual abilities. **However, as most school tasks require language and verbal expression, teachers should be aware that Kevin has significant verbal challenges and in such tasks often functions in the Intellectually Disabled range.** (Bold in the original.)

8. Dr. Benveniste administered the Wechsler Individual Achievement Test – III (WIAT-III) to assess levels of academic performance. His “standard scores were exceptionally and atypically variable with scores ranging from the mildly (to moderately) subnormal range to the above average (to superior) range.” (Exhibit 8.) Claimant had very low scores on the listening language scales, low scores in math problem solving and reading comprehension, and low average scores in sentence and essay composition. He demonstrated strength in math, obtaining a score on multiplication within the 95th percentile. Based on the reported scores from the administration of the California Achievement Test, Claimant, as of the third grade, was not keeping pace with his peers in either English language or math. His third grade resource specialist teacher reported that, “When asked a question about a text or something that is happening in the moment, Kevin has difficulty with responding correctly . . . hesitates to respond and becomes a bit nervous causing him to become unintelligible . . . Kevin was having difficulty staying on topic when writing . . . [he] is having difficulty with classroom reading comprehension.” (*Id.*)

9. Dr. Benveniste obtained information from Mother, the resource specialist teacher, and the general education teacher to rate the likelihood of autistic disorder. Their responses suggested Claimant had issues with anxiety, attention, learning, leadership, and functional communication. On the Gilliam Autism Rating Scale – Second Edition, Claimant scored in the clinically significant range in all areas, with an index score of 89; however she believed his symptoms at this time were “subthreshold,” resulting in a diagnosis of PDD-NOS.

10. Dr. Benveniste also reported on Claimant's stuttering problem, which most often was typified, based on reports of others, by abnormal hesitation or pausing before speech, which is referred to as silent block. She described Claimant's displays of episodic speech as dysfluencies, which included motor behaviors, word repetitions, and sound repetitions. She noted that the silent blocks were accompanied by facial-motor tics/blocks and were most apparent when Claimant was confronted by challenging tasks, particularly language related tasks. She concluded that Claimant would benefit from, among other things, ongoing speech and language therapy with an emphasis on language development, pragmatics, and fluency.

11. Mother and District reviewed the recent reports and considered Claimant's educational needs at an Individualized Education Program (IEP) meeting in February 2012. The IEP team changed Claimant's eligibility for special education from SLD to autism. The District also referred Claimant to the Service Agency to determine whether he was eligible for services under the Lanterman Act. Maria Garcia, a Service Agency counselor, interviewed Mother and Claimant on February 23, 2012. The Service Agency referred Claimant for a psychological evaluation.

12. Larry E. Gaines, Ph.D., performed the psychological evaluation on February 23, 2012. He observed that Claimant had language difficulties. Claimant “was able to make eye contact and a greeting. He was observed to answer questions, but consistent with parental reports, they had to be repeated for him to understand and respond to the questions. [Claimant] did exhibit very restricted language. He did not provide a lot of detail. [¶] No behavior issues were noted with the exception of his language confusion.” On the WISC-IV, Claimant’s scores indicated that he was functioning within the average range of intellectual ability. There was no discrepancy between verbal and nonverbal problem solving skills. His subtest scores were also fairly consistent across subtest areas. On the Vineland Adaptive Behavior Scale, Second Edition (VABS-II), Claimant’s language skills fell within the borderline range of performance. He was able to talk in simple sentences. He required time to express his ideas. It was difficult for him to hold and maintain an ongoing conversation. Claimant’s social skills fell within the low-average range of performance on the VABS-II. He was described as having a lot of different emotional experiences and reactions.

13. According to Dr. Gaines, Claimant has good social intent but his language issues appear to interfere with his social relationships and he tends to play with younger children. There are no children in his neighborhood to play with and, thus, social activities are limited to school. He can use his imagination. Dr. Gaines noted Claimant had a short attention span and appeared rather distracted. He had difficulties waiting his turn and was very fidgety. Dr. Gaines stated that none of these behaviors were observed to a significant extent to suggest aspects of an Attention Deficit/Hyperactivity Disorder. Dr. Gaines administered the Autism Diagnostic Observation Scale (ADOS), Module 2, and aspects of Module 3. In his view, Claimant did not sufficiently elevate any clinical scales to warrant a diagnosis of an autistic spectrum disorder. Claimant was able to respond to questions pragmatically and did not display any idiosyncratic language. Claimant was able to identify some friends and play activities. Although he showed limited social understanding, he was able to describe basic emotional experiences and “some of it was human-based. . . . He could not provide metaphor. . . . It was felt that these difficulties, though, may reflect basic language problems rather than autistic aloofness.” Dr. Gaines observed no unusual body mannerisms.

14. Dr. Gaines concluded that Claimant was currently functioning within the average range of intellectual ability. “He primarily presents with language delay, which may affect aspects of his social functioning. Kevin was observed to show good communication and social intent.” Dr. Gaines offered the following diagnoses:

Axis I	307.9 Communication Disorder NOS
Axis II	V71.09, No diagnosis or condition

15. Randi Bienstock, Psy.D. (Bienstock), is a consultant to the Service Agency. In May 2012, she reviewed records, reports, and other information provided by Mother, school personnel, test results, psychologists, therapists, and others. In her opinion, Claimant does not have a developmental disability that would make him eligible under the Lanterman Act. She cited the majority of Claimant’s scores on both administrations of the WISC-IV (Dr. Benveniste and Dr. Gaines), which were in the average or low average range of intellectual functioning.

On the K-BIT-2, Claimant's scores revealed significant deficits in verbal processing skills, yet Claimant's scores also showed low average nonverbal skills. Claimant's composite IQ of 69 on the K-BIT-2 "should be interpreted with caution given the 21 point difference between his verbal and nonverbal scores." (Exhibit 11.)

16. In Dr. Bienstock's opinion, the data also did not support a diagnosis of autism. She noted that Dr. Benveniste had diagnosed PDD-NOS because the symptomatology was subthreshold for autistic disorder. Dr. Gaines noted good communicative and social intent during his evaluation of Claimant. Claimant's scores on the ADOS administered by Dr. Gaines were not indicative of an autistic spectrum disorder. Dr. Bienstock cited Dr. Gaines' finding that language delays could be affecting aspects of Claimant's social functioning. Dr. Bienstock further referred to a draft of the February 2012 IEP document, in which Claimant was described as a "friendly, polite and cooperative boy who presented with emotional immaturity." Problems with attention, concentration and language functioning were noted yet there was no report of symptoms or characteristics indicative of an Autistic Spectrum Disorder described by his teachers." (Exhibit 11.) Finally, Dr. Bienstock concluded by stating that, "based on the overall information, Claimant did not present with a substantially disabling condition which would require interventions that would be similar to or closely related to individuals with mental retardation. Therefore he is not considered eligible for Regional Center Services at this time." (*Id.*)

17. On May 23, 2012, the Service Agency sent a letter to Mother informing her that Claimant was not eligible for services under the Lanterman Act. Mother filed a Fair Hearing Request on July 10, 2012.

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." (§ 4512, subd. (a).)

2. In this case, no evidence was presented to establish that Claimant has cerebral palsy or epilepsy, and there is no contention that he has either condition. Claimant does present with some symptoms and characteristics associated with an autistic spectrum disorder, as noted in Dr. Benveniste's report; however, these did not rise to the level required for a diagnosis of Autistic Disorder. Rather, Dr. Benveniste diagnosed Claimant with PDD-NOS, which generally is not an eligible condition under the Lanterman Act. The evidence

from Dr. Gaines' evaluation provides further support for finding that Claimant does not have an autistic spectrum disorder that would qualify him for services under the Lanterman Act. The scores Claimant obtained on tests of cognitive functioning demonstrated that he does not have mental retardation, or a condition closely related to mental retardation or requiring treatment similar to that required by individuals with mental retardation (the so-called "fifth category"). The opinions of the psychologists were in sync regarding Claimant's language disorders and their impact on his social functioning; however, the evidence of these disorders does not establish the presence of a developmental disability. In sum, Claimant has not been diagnosed with an eligible condition nor met the requirements under the fifth category.

3. By reason of the foregoing factual findings and legal conclusions, Claimant did not establish that he has a developmental disability that makes him eligible for services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

DATED: December 5, 2012



MARK HARMAN
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.