

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MATEO C.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2013031129

DECISION

Administrative Law Judge Michael A. Scarlett, Office of Administrative Hearings, State of California, heard this matter on September 9, 2013, in Van Nuys, California. Rhonda Campbell, Contract Officer, represented North Los Angeles County Regional Center (Service Agency or NLACRC). Jenny C. (Mother) was present and represented Mateo C. (Claimant).¹ Bernadette Buckley, Court Interpreter, was present and provided Spanish interpretation of the proceedings for Mother. Oral and documentary evidence was received and the matter was submitted for decision on September 9, 2013.

ISSUE

Is Claimant eligible for regional center services?

FACTUAL FINDINGS

1. Claimant is a three year, 10 month-old boy who resides with his parents and two sisters, 13 and eight years-old. He was a twin who was born premature, but his twin brother died approximately two months after birth. Claimant received services through the Early Intervention Program (Early Start) at NLACRC. Claimant is reported to be in good physical health, although he suffers from asthma and is currently taking Albuterol to treat this condition. There is no medical evidence to support a determination that Claimant is

¹ Claimant's and Mother's last name initials are used in this Decision, in lieu of their surnames, in order to protect their privacy.

eligible for regional center service based on cerebral palsy or epilepsy. The primary language spoken in Claimant's home is Spanish but Claimant's two sisters are bilingual.

2. On November 27, 2012, Service Agency notified Claimant of its determination that he was not eligible for regional center services and issued a Notice of Proposed Action (NOPA) advising him of his rights to appeal. On March 18, 2013, Claimant submitted a request for fair hearing that was received by Service Agency on March 22, 2013. On May 2, 2013, after an informal meeting with Claimant, Service Agency again advised Claimant that he was not eligible for regional center services and that if she was not in agreement with the ineligibility determination, Claimant should proceed to fair hearing. All jurisdictional requirements were satisfied and this hearing ensued.

Early Start Evaluations

3. Claimant received Early Start services until November 2013, when he was transitioned into the Los Angeles School District's educational program. Three Early Start evaluations, two of which were Early Start discharge reports, were offered into evidence by the Service Agency.

4. On July 19, 2012, Total Educations Solutions (TES) performed an occupational/sensory integration evaluation on Claimant, who at the time was 32 months-old. Claimant had difficulty staying on task or following verbal directives during the evaluation and frequently fled the area where the evaluation was conducted. He had difficulty responding to his name and following instructions. Claimant was unable to maintain eye-contact and required moderate assistance and verbal prompting to look at the therapist. He bumped into toys and did not visually scan the testing environment. This was consistent with Mother's report that Claimant did not visually track objects or people as they moved around a room. Claimant was distracted during the evaluation by car and truck sounds from outside, which was consistent with Mother's report that he was sensitive to loud noises and covers his ears and startles to loud noises. Claimant was very hesitant to immerse his fingers in shaving cream, and he was observed to withdraw from the therapist when the "hand over hand approach" was used, signifying that Claimant may have had difficulty "modulating tactile input."² TES concluded that Claimant had difficulty with limited attention span tasks, auditory sensitivities, low registration of sensory input, and difficulty modulating tactile input. These deficiencies impacted Claimant's ability to engage in age-appropriate fine motor and gross motor activities, and activities that "require movement and use of his tactile system." Occupational therapy was recommended to address Claimant's sensory processing challenges.

5. Claimant received speech therapy services in Early Start from Exceptional Children's Foundation (ECF). ECF's September 16, 2012, discharge report indicated that

² TES's evaluation indicated that "tactile processing" involves a child's ability to interpret the sense of touch by receiving and interpreting sensation and stimuli through contact with the skin.

Claimant was functioning at the 30-month age level for receptive and expressive language and recommended that he continue to receive speech and language therapy. ECF noted that Claimant was cooperative and energetic and he remained focused and on task during therapy sessions. His eye-contact was “below age-appropriate expectations,” and he did not acknowledge adults speaking to him, whether familiar or unfamiliar, although he showed significant improvement in this area during the therapy sessions. Claimant could not have conversations with a familiar adult outside of the “environmental context.” He experienced difficulty with three-word utterances, with such phrases being described as significantly unintelligible. It was noted that Claimant enjoyed playing with cars and used them appropriately, but that he liked to stack blocks and build towers. Finally, ECF noted that Claimant was able to engage in symbolic play, describing an activity where Claimant was instructed by the therapists to feed different characters a variety of food.

6. On October 9, 2012, when Claimant was 35 months-old, Buonora Child Development Center (Buonora) prepared a discharge report stating its concern that Claimant had language delays and a “high level of activity.” Buonora noted that Claimant had severe developmental delays when he transitioned out of Early Start, although he had made significant progress towards achieving his developmental goals. Claimant was performing at the 18-22 month-age-level in almost all areas of development when he was discharged from the Buonora. Claimant had a 25 word vocabulary, communicated using single words and he was able to sign and use gestures. He needed repetition and visual cues to follow simple commands and displayed frustration when he was not able to express his needs. Claimant experienced frequent tantrums and displayed aggressive behaviors such as throwing toys, hitting, pinching and biting his siblings. Claimant participated in parallel play but continued to need assistance when interacting with peers. There were no concerns regarding his gross and fine motor skills. Claimant was still in diapers at 35 months, and he showed no discomfort with a soiled diaper. Finally, Buonora indicated that in the “sensory area,” Claimant did not participate in messy activities such as painting or using shaving cream. Safety concerns were noted due to his tendency to place objects in his mouth and his unawareness of danger. Claimant needed to have specific items (cars) and routines to regulate him and reduce his high level of activity.

NLACRC Psychological Evaluation

7. On October 2, 2012, when Claimant was 35 months-old, Dr. John Lamont, Ph.D. performed a psychological evaluation on Claimant to determine whether he was eligible for regional center services. Dr. Lamont administered the following diagnostic tests: (1) Vineland Adaptive Behavior Scales – II; (2) Weschler Preschool and Primary Scale of Intelligence – III (Weschler); (3) Autism Diagnostic Observation Schedule, Module 1 (ADOS-1); and (4) Autism Diagnostic Interview – Revised (ADI-R). Claimant’s cognitive functioning as measured by the Weschler indicated a Full-Scale Intelligence Quotient (IQ) within the average range (Score 91), with a Verbal IQ in the low average range (Score 84) and the Performance IQ in the average range (Score 102). Claimant’s Vineland test results, which were derived from Mother as the informant, were as follows: Communication Domain (Score 74, borderline deficit range); Daily Living Skills (Score 78, borderline deficit range);

Socialization (Score 78, borderline deficit range); and Motor Skills (Score 84, low average range).

8. In evaluating whether Claimant had an Autistic Disorder using the ADOS-1 and ADI-R, Dr. Lamont applied the diagnostic criteria specified in the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR). On the ADI-R Claimant scored below the cut-off scores for Autistic Disorder in Reciprocal Social Interaction (score of “8”), Communication and Language (score of “5”), and Restricted and Repetitive Behaviors (score of “1”).³ On the ADOS-1, Dr. Lamont concluded that Claimant’s scores were below the autism cutoff scores that would be required for a diagnosis of an Autistic Disorder.⁴ Claimant had a total score of “8” on the ADOS-1, with the minimum autism cutoff score being “12” for a diagnosis of Autism. Claimant scored “4” on Language and Communication and “4” on Reciprocal Social Interaction. Dr. Lamont scored the ADOS-1 based on his observations of Claimant during the October 2, 2012 evaluation. Dr. Lamont concluded that Claimant only met two of the 12 diagnostic criteria specified for an Autistic Disorder in the DSM-IV-TR, the failure to develop appropriate friendships and delayed speech.

9. Dr. Lamont noted that despite Claimant’s language delay, “there is little evidence for the presence of autism.” He stated that Claimant made good eye contact, pointed to things in the room, shared interests with his mother, showed emotional reciprocity, “used jargon sometimes but does not echo,” imitated the examiner and engaged in imaginative play. Dr. Lamont also noted that although Mother reported that Claimant walked on his tip toes, he did not show such behavior during the evaluation. Mother also reported that Claimant lined up things at home, but this behavior was not observed during the evaluation despite the availability of Legos and blocks during the evaluation. Finally, Dr. Lamont noted that Claimant did not have difficulty with changes, and he had no encompassing preoccupations.

10. Dr. Lamont diagnosed Claimant with “Mixed Receptive-Expressive Language Disorder (315.32).” He also concluded Claimant did not suffer from Mental Retardation.

11. Dr. Lamont did not utilize a Spanish language interpreter to assist in

³ The ADI-R has established minimum cutoff scores for each of the three behavioral areas tested, Social Interaction, Communication and Language, and Restricted and Repetitive Behaviors, to establish a diagnosis of Autism. An autism diagnosis is indicated when the calculated scores derived from the parent’s interview answers exceed the specified minimum cutoff scores for behavioral area tested. The ADI-R specifies that the minimum cutoff score for each of the areas are: Social Interaction = 10; Communication and Language = 8; and Restricted Repetitive Behaviors = 3.

⁴ The ADOS-1 specifies that the minimum cutoff scores for a diagnosis of Autism are as follows: Total Autism Cutoff Score = 12; Language and Communication Autism Cutoff Score = 4; and Reciprocal Social Interaction Autism Cutoff Score = 7.

conducting Claimant's psychological evaluation. He did not indicate whether the evaluation was conducted in Spanish or English. However, Dr. Sandi Fischer Ph.D., the NLACRC Staff Psychologist who reviewed Dr. Lamont's psychological evaluation and testified at hearing regarding its results, stated that Dr. Lamont communicated with Claimant and his Mother in Spanish, which made an interpreter unnecessary. Mother testified that she did not understand Dr. Lamont's Spanish and she did not believe Dr. Lamont fully understood her questions and answers during the evaluation. Mother also testified that Claimant did not understand Dr. Lamont's Spanish. Because Dr. Lamont did not testify at hearing, his Spanish language proficiency or whether Claimant or Mother fully understood was not confirmed. Mother's testimony that she and Claimant did not understand Dr. Lamont's Spanish is credited.

12. The reliability of the tests and assessments administered by Dr. Lamont depends significantly upon his ability to communicate with Claimant and Mother, and their ability to respond effectively to questions he posed. The ADI-R Autism test scores are derived from an interview with Mother, which necessarily required that the examiner be proficient in Spanish because Mother does not speak English. The ADOS, although primarily based upon observations of Claimant by the examiner, necessarily requires communication between the examiner and the subject to elicit the necessary responses to be observed. The ADOS considers the subjects' social interaction, communication, interactive play, and imaginative use of materials employed during the assessment. Dr. Lamont's inability to clearly articulate his requests and questions to Claimant, and Claimant's ability to understand, are essential to the reliability of the ADOS test results. Service Agency chose not to employ a Spanish language interpreter during Claimant's psychological evaluation. Because Claimant and Mother did not understand Dr. Lamont's Spanish, the results of the psychological examination performed by Dr. Lamont are not reliable, specifically the ADOS and ADI-R test results for an Autistic Disorder. Thus, Dr. Lamont's psychological evaluation is not given any weight for purposes of determining Claimant's eligibility.

LAUSD Psycho-Education Evaluation and Assessments

13. Los Angeles Unified School District (LAUSD) conducted a Language and Speech Evaluation (L & S Evaluation) in November and December 2012, when Claimant was 36 and 37 months-old respectively. Mother's interview, evaluation observations, and standardized tests (The Preschool Team Assessment Experimental III (PTA-III) and the Preschool Language Scale – 4 Spanish) were used to conduct this evaluation. Regarding Claimant's developmental milestones, Mother reported that he did not babble, he spoke his first words ("Daddy") 6 or 7 months prior to the assessment (April or May 2012), he had a 100 word vocabulary, he did not use two-word phrases. The evaluator observed that Claimant played appropriately with toys, he talked and jargoned and used echolalia⁵ while playing with toys and kept his milk bottle in his mouth and did not point to or name pictures of objects presented to him, and he was self-directed, rigid and responded to his name inconsistently. When a sound went off in the room, Claimant said "ready done!"

⁵ Echolalia is the automatic repetition of vocalizations made by another person.

14. The LAUSD L & S Evaluation showed that Claimant's receptive language fell in the "low average range" (standard score 60) and his expressive communication fell in the "average range" (standard score 104) It was noted that Claimant did ask questions, but that he did not consistently answer questions asked of him using 2 to 4 word phrases. Claimant was heard to talk, use jargon and echo words during the assessment. The evaluation concluded that Claimant did not meet the eligibility requirements for Speech and Language Impairment because his voice, fluency, expressive, receptive, and pragmatic language skills were within his age limits.

15. On January 14, 2013, the Los Angeles Unified School District (LAUSD) performed a Psycho-Education Evaluation (LAUSD Evaluation) of Claimant to transition Claimant from the NLACRC's Early Intervention Program to LAUSD. Katheryn Oster (Oster), MA, School Psychologist, performed the LAUSD Evaluation, with the assistance of Ester Tashejian, MS CCC-SLP, a Speech and Language Pathologist. Mother informed Oster that Claimant had been denied eligibility by the NLACRC. She expressed her disagreement with the regional center's psychological evaluation because she believed Claimant did not understand Dr. Lamont's Spanish. For the LAUSD Evaluation, Claimant was assessed using a Spanish interpreter and a Spanish speaking speech pathologist. LAUSD determined that Claimant was qualified for Special Education as a child with autism, as defined by California Education Code section 3030, subdivision (g), in that Claimant exhibited "autistic-like behaviors."⁶ LAUSD also determined that Claimant was not eligible on the basis of "intellectual disability."

16. The testing instruments used for the LAUSD Evaluation were the Preschool Team Assessment III (PTAIII), the Developmental Profile 3 (DP 3), and the Gilliam Autism Rating Scale-2 (GARS-2). The evaluation also included evaluator observations, reviews of records, and student, parent and staff interviews.

17. The LAUSD Evaluation indicated that Claimant made poor eye contact and did not react when the evaluator called his name. Claimant's activity level was high, his attention span was limited - often requiring redirection to remain focused, and he wandered around the room, needing gestures and physical guidance to get him to sit at the assessment table. Claimant showed interest in the play area and the assessment toys presented to him, commenting about toys he wanted and building a structure from blocks, but he did not direct his gaze or conversation at a specific person. Claimant was rigid and self-directed. When the speech pathologist spoke near him, he placed his fists over his ears. Claimant made growling sounds when he pretended to fly a helicopter and also pretended to take a picture of the evaluator. He enjoyed pushing cube chairs around the room and placed them into lines. Claimant grabbed a toy from the speech pathologist and she pretended to cry. Claimant

⁶ A diagnosis of Autism under the Education Code requires that the child only exhibit "autistic-like behaviors." This is different than the criteria for a diagnosis of an Autistic Disorder under the Lanterman Act. The LAUSD Evaluation diagnosis of Autism is thus not sufficient in itself to establish a diagnosis of an Autistic Disorder under the Lanterman Act.

showed no facial reaction, but he did stop and look, and then returned the toy back to the pathologist.

18. LAUSD does not use standardized tests of intelligence to evaluate cognitive ability. The PTAI and the DP 3 were used to determine Claimant's cognitive functioning level. The PTAI presented Claimant with novel problem solving tasks, and when results could not be determined from uncompleted portions of the PTAI, the DP 3 was used, which is based on information provided by Mother. Claimant's tests results indicated that he scored in the low average range of nonverbal cognitive development, with a significant discrepancy between verbal and nonverbal ability with regard to the pragmatic use of language. Claimant showed "relative strength" in visual discrimination and visual association, but "relative weakness" in visual spatial concepts, sequential reasoning and attention.

19. Although Claimant showed some limited ability to use words to communicate his needs, the LAUSD Evaluation noted that he did not use language effectively for communication or social interaction. Claimant did not answer abstract questions or participate in conversations. He made minimal eye contact and did not attend to a person speaking to him or look at anyone when he spoke. Claimant was observed to use jargon and echolalia and was unable to engage in meaningful conversation, ask or answer questions or construct a sentence. Mother reported that Claimant had a vocabulary of at least 50 words. As for his motor skills, the LAUSD Evaluation indicated that Claimant showed a "general ability" to access class surroundings, but noted that he was observed to "toe walk" quite a bit during the evaluation.

20. The GARS-2 was administered by LAUSD using Mother as the informant. The GARS-2 measures behaviors in three areas, Stereotyped Behaviors, Communication and Social Interaction. Based on Mother's interview answers, Claimant's overall Autism Index score was "91." The GARS-2 specifies that an Autism Index score of "85" or higher indicates that it is "very likely" the subject is autistic. A score of "70-84" indicates that the subject is "possibly" autistic and a score of "69 or less" indicates that it is "unlikely" that the subject is Autistic. The subscale scores the individual areas on the GARS-2 are as follows: a subscale score of "7" or higher indicates that autism is "very likely"; a subscale score of "4 to 6" indicates a "possibility" of autism, and a subscale score of "1 to 3" indicates that autism is "unlikely." Claimant subscale scores were as follows: Stereotyped Behaviors = "6" indicating a possibility of autism; Communication = "11" indicating that Autism is very likely; Social Interaction = "9" indicating that Autism is very likely. Based upon the results of the GARS-2, LAUSD concluded that it is "very likely" that Claimant is autistic.

21. Mother's interview for the GARS-2 indicated that Claimant was energetic, impulsive and irritable, and that he was rigid with respect to his play and relationships. He likes to line or stack toys; he likes to play with cars, but insists on carrying different things around with for the day; and he opens and closes the doors of the refrigerator, DVD player, etc. and turns lights on and off. It was also reported that Claimant throws toys and objects and is typically very rough with toys. Claimant will watch a specific Elmo movie over and over. Claimant seeks out calm places in any environment because he is bothered by noise

and crowds. Mother is unable to take Claimant out into the public because he frequently throws tantrums and he is prone to run away from family members, frequently into traffic, and will tantrum severely if restrained. Mother reports that Claimant is “routine dependent” and becomes easily angered when expected events are delayed or changed. Mother also stated that Claimant is aggressive with family members and has a history of grabbing toys from peers and hitting them. If not being aggressive, Claimant will isolate himself from others, although he seemed to show some interest in an eight year-old cousin. According to Mother, Claimant will occasionally greet his father with affection, but is not an affectionate child and rarely acknowledges visitors to the family’s home. Mother states that Claimant seems to be “in his own world” and has moments when he stares off.

22. Based upon observations during the evaluation or Mother’s reports, the LAUSD Evaluation determined that Claimant withdraws in group situations to a significant extent, he sometimes avoids eye contact, he eats specific foods, repeats what is said either immediately or from an earlier time, speaks with a flat tone or affect, engages in repetitive or ritualistic activities, places objects in a line, looks away or ignores when his name is called and avoids looking at the person speaking to him, he does not ask for things he wants, he repeats unintelligible sounds over and over, uses gestures instead of speech to obtain objects, he resists physical contact from others, becomes upset when his routine changes, responds negatively or with temper tantrums when given commands, requests or directions, and uses toys inappropriately. In summary, LAUSD concluded that in the area of social emotional behavior, Claimant has a “labile personality,” a tendency toward tantrums when overwhelmed by sounds or inability to control his environment, he is aggressive towards other and has no awareness of the effects of his actions on others, he has little interest in developing relationships with others, and Claimant had no awareness of dangers and required constant supervision.

23. The LAUSD Evaluation also noted that Claimant had significant limitations in the area of adaptive functioning, indicating that he would require assistance for feeding, dressing, and toileting, and he required close supervision for safety reasons. It was also noted that Claimant does not like stickers or shaving cream and he is sensitive to sounds.

NLACRC Pre-School Observation

24. On April 18, 2013, Dr. Sandi Fischer Ph.D. observed Claimant in his preschool class at Valerio Elementary School and prepared a Pre-School Observation Report to provide additional information to assist NLACRC in making an eligibility determination. In addition to her classroom observation which lasted about one hour, Dr. Fischer interviewed Claimant’s teacher, Kristen Cluster (Cluster), reviewed Claimant’s Early Intervention Program assessments, Dr. Lamont’s psychological evaluation, and the LAUSD psycho-educational evaluation and assessments. Dr. Fischer agreed with Dr. Lamont’s conclusion that Claimant did not suffer from Mental Retardation or a condition similar to mental retardation and that he did not have an Autistic Disorder. She also agreed with Dr. Lamont’s diagnosis that Claimant suffered from a Mixed Receptive-Expressive Language

Disorder. Dr. Fischer applied the DSM-IV-TR diagnostic criteria in preparing the Pre-School Observation Report.

25. During the pre-school observation, Dr. Fischer observed Claimant participating in class by answering questions involving an exercise with butterflies where he accurately indicated with his fingers how many butterflies were being shown by Ms. Cluster. After holding up the correct number of fingers on one occasion Claimant looked at Ms. Cluster and smiled, although it did not appear that the smile was directed at his teacher. Dr. Fischer indicated that Claimant's verbal responses or remarks were at times unintelligible or could not be heard from her vantage point in the classroom. She observed Claimant hugging a boy sitting next to him and saw Claimant playing with the little boy. Dr. Fischer noted that Claimant turned and made eye contact with her during the reading of a story by the student teacher in the class. When the student teacher was finished reading her story, she gave "High Fives" to each of the students in the class and Claimant "anticipated" when it was his turn for a "High Five" and put his hand up and slapped it against the student teacher's hand. Dr. Fischer observed that Claimant transitioned without difficulty from one classroom exercise to another, including going from circle time to a table coloring exercise. Claimant observed that another student was crying in class and he walked over to Cluster and asked about the boy who was crying. Cluster told him that the boy was sad because he could not have a block that he wanted. Claimant then turned and walked away and continued his activity. Dr. Fisher observed Claimant playing with another child in the class. They were racing their toy cars across the floor. At one point, the other child asked Claimant for the car that Claimant was playing with and Claimant told him "No." The student teacher then instructed Claimant that she would count to ten and then he would have to give the car to the other child. When the student teacher counted to ten, Claimant gave the other child the car, without incident.

26. Ms. Cluster informed Dr. Fisher that Claimant's behavior during the classroom observation was typical for him. She reported that in general, Claimant was "doing great" in the classroom. Claimant was reported to have "tantrums on occasion" because he does not like to share or take turns, but that they ignore him and the tantrums resolve quickly. Claimant typically prefers to play alone and does not have a particular friend, but he tends to play with a group of children when they are outside of the classroom. Ms. Cluster reported that Claimant's social skills were delayed and he had "regulation issues." She also expressed that her major concern was Claimant's lack of safety awareness, reporting that he had been running away from school, but that this behavior has been eliminated. Ms. Cluster indicated that Claimant otherwise follows directions and is "making the expected progress" academically in the program. She reported that Claimant uses full sentences sometimes, but still has a language delay and needs support services, but that she did not believe he needed speech therapy. Ms. Cluster reported that she has not heard Claimant use repetitive or idiosyncratic language and that he does not line up objects, engage in repetitive behaviors, or flap his hands. Ms. Cluster believed that Claimant was uncomfortable during his psycho-education evaluation because of his unfamiliarity with the examiners. She stated that he did not exhibit autistic-like behaviors in her classroom.

27. Dr. Fischer identified several diagnostic considerations based upon her preschool observation of Claimant. In considering whether Claimant had a qualitative impairment in social interaction, Dr. Fischer noted that Claimant made eye contact with his teacher, his peers, and the observer (Dr. Fisher) and used some facial expressions (social smiling sometimes directed at another person and sometimes not) and many gestures. Based upon these observations, Dr. Fischer concluded that Claimant did not have a qualitative impairment of his use of nonverbal behaviors to regulate social interactions. In the area of “social skills,” Dr. Fischer described Claimant as being below the expectation level for a child of his developmental age, noting that he “briefly interacted” with his peers and “occasionally” played with a peer, but this was “less frequent and less complex than the types of peer relationships that would be expected.” Consequently, Dr. Fischer concluded that Claimant failed to develop peer relationships appropriate to his developmental level. With regards to Claimant’s ability to share enjoyment and interest, Dr. Fischer noted Claimant’s interaction with his teachers in class and his seeking of approval from his teachers for the work he had completed in class. Regarding Claimant’s ability to show social and emotional reciprocity, Dr. Fischer concluded Claimant’s “emotional reciprocity was intact,” but that his “social reciprocity was limited.” Claimant occasionally interacted with his peers, but was observed to be socially isolated at other times. Claimant displayed emotional reciprocity when he inquired of his teacher why another child was crying in class. In sum, Dr. Fischer concluded that Claimant was qualitatively impaired in only one of the DSM-IV-TR criteria for social interaction, failure to develop appropriate peer relationships, and thus, found there was not a qualitative impairment in social interaction.

28. Given Claimant’s history of language delays, Dr. Fischer concluded that Claimant was qualitatively impaired in the area of communication. She noted that he could not maintain a conversation, although several attempts were made. Consequently, Claimant met two of the criteria for qualitative impairment in communication, delay in spoken language and the inability to sustain a conversation. Dr. Fischer stated that although Claimant did not engage in make-believe play, there were no opportunities for such play, and he had been observed engaging in make-believe play during the LAUSD Evaluation. She stated Claimant was not observed to engage in repetitive or stereotypic language, although he “occasionally repeated something once or twice until someone responded.” Dr. Fischer did not believe this was echolalia. Claimant did not use idiosyncratic language during the observation, and Cluster did not report that she heard or observed Claimant using such language in her class.

29. Finally, as to restricted repetitive and stereotyped patterns of behaviors, interests, and activities, Dr. Fischer did not observe Claimant to engage in an encompassing preoccupation; she did not observe him to engage in specific nonfunctional routines or rituals, although Mother and the LAUSD Evaluation reported that he opens and closes doors and turns lights on and off, and lines up chairs. Cluster reported that Claimant did not engage in these types of behaviors in her class. Finally, Dr. Fischer did not observe, and nor had Cluster, Claimant to engage in stereotyped and repetitive motor movements (e.g. flapping hands) in the classroom environment.

30. Both Dr. Lamont and Dr. Fischer applied the DSM-IV-TR diagnostic criteria for an Autistic Disorder and Mental Retardation. The American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5-TR) was published and became available in May 2013. The DSM-5-TR diagnostic criteria were not available for Dr. Lamont's psychological evaluation or the LAUSD Evaluation. Dr. Fischer testified that although Dr. Lamont's evaluation did not apply the DSM-5 diagnostic criteria, the NLACRC Interdisciplinary Eligibility Committee reconsidered its initial denial of eligibility applied DSM-5-TR diagnostic criteria and determined that Claimant did not meet the eligibility criteria for either an "Autistic Spectrum Disorder" or an "Intellectual Disability" (Intellectual Developmental Disorder) as those developmental disorders are defined in the DSM-5-TR.

LEGAL CONCLUSIONS

1. Claimant established that he suffers from a developmental disability entitling him to regional center services. (Factual Findings 1 through 29.)

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 or her eligibility for services, the burden is on the appealing Claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has 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, subdivision (a),⁷ defines "developmental disability" 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. [T]his term shall include mental retardation, cerebral palsy, epilepsy, and 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. To prove the existence of a developmental disability within the meaning of section 4512, an individual must have a "substantial disability." Section 4512, subdivision (l), defines "substantial disability" as the existence of significant functional limitations in

⁷ All further references are to the Welfare and Institutions Code unless otherwise indicated.

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. California Code of Regulations, title 17, section 54001, subdivision (a), provides that:

(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. Claimant must show that his “substantial disability” fits into one of the five categories of eligibility in section 4512. These categories are mental retardation, epilepsy, autism and cerebral palsy, and a fifth category of eligibility described as having “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (§ 4512, subd. (a); Cal. Code. Regs., tit. 17, § 54000.) Under the Lanterman Act, “developmental disability” excludes conditions that are *solely* physical in nature. (§ 4512; Cal. Code. Regs., tit. 17, § 54000.) Section 54000, subdivision (c), excludes conditions that are *solely* psychiatric disorders, learning disabilities, or physical in nature.

Autistic Disorder

6. The DSM-IV-TR states that “the essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests.” The DSM-IV-TR describes the diagnostic criteria for autism to include the following:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
- (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 interaction;
 - (b) failure to develop peer relationships appropriate to developmental level;
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);
 - (d) lack of social or emotional reciprocity;
 - (2) qualitative impairments in communication as manifested by at least one of the following:
 - (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
 - (c) stereotyped and repetitive use of language or idiosyncratic language;
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;
 - (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals;
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
 - (d) persistent preoccupation with parts of objects;
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

(DSM-IV-TR at pp. 70-71, and 75.)

7. A preponderance of the evidence established that Claimant met the DSM-VI-TR diagnostic criteria for an Autistic Disorder. Dr. Lamont's psychology evaluation is found to be not credible because a Spanish language interpreter was not used during the evaluation and Mother credibly testified that she and Claimant did not understand Dr. Lamont's Spanish. Mother also reported to the LAUSD evaluators that she and Claimant did not understand Dr. Lamont's Spanish during the Service Agency's psychological evaluation and that this communication impacted Claimant's test results. Although the LAUSD Evaluation's diagnosis of autism is insufficient to support a diagnosis of an Autistic Disorder under the Lanterman Act, when considering the underlying examiners' observations, Mother's reports about Claimant's behaviors, and the GARS-2 Autism test scores that supported the LAUSD Evaluation, it is determined that Claimant has satisfied at least six of the 12 necessary criteria in the DSM-IV-TR to support a diagnosis of an Autistic Disorder. The LAUSD Evaluation and Claimant's corroborating Early Start evaluations established sufficient behavioral impairment to find that Claimant has an Autistic Disorder. The GARS-2 administered by LAUSD showed that it was "highly likely" that Claimant was Autistic. The only other Autism tests that can be considered are Dr. Lamont's ADOS-1 and ADI-R, which were not given weight because of the language defect. Consequently, the preponderance of the evidence showed that Claimant is eligible for regional center services based upon an Autistic Disorder.

8. Dr. Fischer conceded, and the evidence showed, that Claimant's eligibility based upon a diagnosis of an Autistic Disorder (DSM-IV-TR) was a close call. Dr. Fischer concluded Claimant met three of the six necessary DSM-IV-TR criteria, one for a qualitative impairment in social interaction (failure to develop peer relationships), two for a qualitative impairment in communication (speech delay and inability to initiate or sustain conversation), but that he met no criteria for a qualitative impairment in restricted repetitive and stereotyped behaviors. However, assessments and evaluations conducted prior to Dr. Fischer's observation and before and after Dr. Lamont's psychological evaluation, consistently established that Claimant met several additional criteria that would establish impairment in both social interaction and restricted repetitive and stereotyped behaviors. For example, with regards to Claimant's inability to make eye-to-eye gaze, an additional criteria that would have established qualitative impairment in social interaction for Claimant, it was consistently documented that Claimant made poor eye contact in all of his assessments and evaluations except Dr. Lamont's evaluation and Dr. Fischer's pre-school observation. Claimant was also observed or reported to engage in restricted repetitive and stereotyped behaviors such as opening and closing refrigerator doors, turning lights on and off, and stacking and lining up toys and objects in the LAUSD Evaluation and the Early Start evaluations and assessments. Although Dr. Fischer testified that she did not observe Claimant engaged in any of the restricted and repetitive behaviors during her observation, she observed Claimant for only one hour for the single pre-school observation. Mother's reports and observations in this

area, which were to a large extent corroborated by the Early Start assessments and the LAUSD Evaluation, are given more weight.

9. Of particular significance, the LAUSD Evaluation concluded that it was highly likely that Claimant was Autistic based upon his test results on the GARS-2 and observations made by their examiners. LAUSD utilized a Spanish language interpreter for both Claimant and Mother to assist in their examination, making it more likely that the LAUSD Evaluation was more accurate than the test results obtained by Dr. Lamont. The LAUSD Evaluation established that Claimant is qualitatively impaired in the area of social interaction in that Claimant made poor eye contact, that he failed to develop appropriate peer relationships, and that he isolated himself from others and showed little interest developing relationships with others, indicating that he lacked social or emotional reciprocity. The LAUSD Evaluation, consistent with the Early Start Evaluations and assessments, showed a qualitative impairment in communication as it noted that Claimant did not use language effectively for communication or social interaction, he could not engage in meaningful conversations, and he engaged in jargon and echolalia. Finally, as to restricted repetitive and stereotyped behaviors, Claimant was observed during the LAUSD Evaluation to place chairs into lines and Mother reported that he lined or stacked his toys frequently, and that he frequently opens and closes the door of the refrigerator at home and turns lights on and off. This was consistent with the Buonora discharge report which indicated that Claimant needed specific items (cars) and routines to regulate him and reduce his high level of activity. Claimant was also observed to “toe walk” quite a bit during the LAUSD Evaluation.

10. Claimant exhibited other behaviors consistent with a child who has Autism in all of the evaluations and assessments produced at hearing. He showed an enhanced sensitivity to loud noises and was oversensitive to messy things such as painting and shaving cream. Claimant’s assessments and evaluations also noted that he exhibited hyperactivity, aggressiveness, a short attention span, and frequent temper tantrums.

11. Base on the totality of the evidence considered, Claimant has met his burden by a preponderance of the evidence to establish that he is eligible for regional center services based upon an Autistic Disorder.

12. Because it is found that Claimant met the DSM-IV-TR diagnostic criteria for an Autistic Disorder, and all of the evaluations conducted applied the DSM-IV-TR, it is not necessary to consider whether Claimant met the DSM-5-TR diagnostic criteria.

13. Finally, Because Dr. Lamont’s evaluation is discounted, and the LAUSD Evaluation did not utilize standardized testing to measure cognitive functioning, there is insufficient evidence to make a determination of whether Claimant suffers from mental retardation or from a condition similar to mental retardation or that requires treatment similar to that required for a person with mental retardation or Fifth Category eligibility.

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ORDER

The Service Agency's determination that Claimant Mateo C. is ineligible for regional center services is reversed. Claimant is eligible for regional center services based upon Autism. Claimant's appeal is granted.

DATED: October 15, 2013



MICHAEL A. SCARLETT
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.