

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

E.H.,

Claimant,

and

NORTH LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH Case No. 2013060658

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Palmdale, California, on August 5, 2013.

Rhonda Campbell, Contract Officer, represented North Los Angeles Regional Center (Regional Center or Service Agency).

Claimant's foster parent and prospective adoptive parent, Paul W.,¹ represented Claimant.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision.

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 nine years old, and resides with his foster father and two other foster children, aged 15 and 16.

2. Only the broad outlines of Claimant's early years are known. Both his biological parents abused drugs, and Claimant may have been prenatally exposed to drugs. Claimant's mother abandoned him, and Claimant lived on the streets with his father. Claimant was neglected, and was physically and sexually abused. In June 2009, at 5 years, six months of age, Claimant was taken from his father and placed in a foster home. Claimant did not attend school until he was in foster care placement. He has been in his present home since March 2012.

3. a. An initial psycho-educational assessment was conducted in June 2012 by Kelly Graham Flores, M.A. (Flores), a school psychologist with Palmdale School District (District), to determine Claimant's eligibility for special education services. Claimant had started attending the District on March 29, 2012, and was enrolled in a regular third grade class. As reported to Flores, Claimant had displayed disruptive and defiant behaviors since he started attending school in the Los Angeles area. Since starting at the District, Claimant had been reprimanded or suspended 11 times for defiant and disrespectful conduct, which included violence toward other students. Flores observed Claimant and, with the assistance of other staff, including another school psychologist, Douglas Landaverde (Landaverde), administered several tests.

b. Flores reviewed teacher reports of Claimant's progress since he started attending the District, and wrote: "[Claimant] began attending Palm Tree Elementary School on 3/29/2012 when he entered the Palmdale School District. According to teacher reports, currently [Claimant] is performing significantly below grade level in reading and math. However, [Claimant] made good academic progress in the few months he was at Palm Tree ES. According to Ms. Bohannon, [Claimant's] poor academic performance seems to be substantially the result of not attending school and his poor motivation towards learning. His attitude toward school is improving, but he seriously lacks motivation. Anything remotely challenging will cause him to shut down or display other avoidant behaviors." (Exh. 3, at p.4.)

c. Claimant's cognitive function was assessed through strategies that included observations, student, parent and teacher interviews, review of performance on specialized academic tests, and administration of the standardized Cognitive Assessment System (CAS). Landaverde was unable to obtain an overall score on the CAS because Claimant refused to complete some of its subtests. Based on partial completion and stated reasons for failing to complete a subtest, such as "I give up" or "This is too hard," Landaverde noted areas of potential difficulty, such as planning and concentrating on a task for longer periods of time. In those areas that Claimant did complete, the Simultaneous Processing Index, a measure of how one perceives stimuli as a whole and how the parts are interrelated, and the Successive Processing Index, a measure on one's ability to sequence stimuli into an order, including the ability to follow verbal instructions, to follow a sequence in its correct order, to decode reading,

and to learn basic facts, Claimant's cognitive ability was assessed in the average range.

d. Claimant's visual processing skills and visual-motor integration skills, as measured through the Motor Free Visual Perception Test, Third Edition and the Beery-Buktenica Development Test of Visual-Motor Integration, fell within the average range. His auditory processing skills, tested with the Auditory Processing Skills test, fell within the low normal range.

e. Academic achievement was tested through the Woodcock Johnson III Test of Achievement (WJ III). English language skills were measured as average when compared to others at his age level. His level of academic knowledge was average. His academic skills and his ability to apply those skills were both within the low average range. Claimant's performance was in the low average in mathematics, math calculation skills, and written expression, and was low in broad reading and written languages. His fluency with academic tasks, timed exercises in both written language and mathematics, was low.

f. Results in the Behavior Assessment for Children, Second Edition, a test intended to yield information about a subject's emotional status, which was completed with Claimant's foster father as reporter, yielded significant deficits in the areas of hyperactivity, aggression, conduct problems, depression, somatization, atypicality, activities of daily living, functional communication, and adaptive skills. His foster father also provided the information for the Scale for Assessing Emotional Disturbance, where the results were indicative of emotional disturbance in three of the five domains tested, Relationship Problems, Physical Symptoms or Fears, and Inappropriate Behaviors. Flores concluded that these results were consistent with a well-documented and long history of emotional adjustment difficulties.

g. Flores concluded that Claimant met the criteria for eligibility for special education services as a student with emotional disturbance (ED). In her opinion, Claimant appeared to struggle building and maintaining relationships, and used aggression toward others, which affects his ability to maintain friendships. He demonstrated significant and severe reactions to situations that would not warrant such behaviors. He had a general pervasive mood of unhappiness or depression. He expressed physical complaints or fears associated with personal or school problems.

4. The District accepted Flores's recommendation and Claimant was found eligible for special education services by reason of ED. His first individualized education program plan (IEP) was prepared following a meeting on July 18, 2012. He was placed at Yellen, a public non-integrated facility for students with emotional and behavioral difficulties, where he receives specialized academic instruction and psychological services. The IEP also contained a Behavior Support Plan.

5. a. Claimant receives mental health services, including therapy and medication. He is presently taking Abilify 10 mg, an antipsychotic medication with antidepressant properties.

b. On February 8, 2013, Joseph Ezra, M.D. (Ezra), conducted a psychiatric consultation. Dr. Ezra reviewed Claimant's psychiatric history and performed a mental status examination. His report, which was received in evidence, does not indicate that he reviewed any specific records or that he conducted any tests. Dr. Ezra reported the following diagnoses, using the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV-TR): Oppositional Defiant Disorder, Dysthymia, History of Abuse, and Sexual Abuse in the Past on Axis I; and Mental Retardation, Mild on Axis II. Dr. Ezra did not cite any test results for his Axis II diagnosis and did not articulate the basis for his diagnosis.

c. Dr. Ezra wrote: "Please refer the patient to Regional Center to continue his treatment, [*sic*] special needs school, and due to severe intellectual delay and academic delay, the patient will be requiring [instruction] in a small environment rather than his Palmdale School District that cannot provide [for] his needs due to bullying and abuse by children around him. Abilify 10 mg will be continued daily on a temporary basis. The purpose is to assist with reducing violent behavior. [He] is a sweet little boy who needs and deserves better than is provided by his school district at this time. He is specially need [*sic*] child with special school needs at this time. I highly recommend referral to the Regional center for appropriate testing and continuation in an appropriate Regional center program." (Exh. 7, at p. 3.)

d. Inasmuch as Dr. Ezra did not present any testing data to support his diagnosis or articulate the basis for his conclusion, his opinion that Claimant has mental retardation is not persuasive and has not been relied upon.

6. Following Dr. Ezra's recommendation, Claimant's father sought eligibility for Regional Center services. On April 15, 2013, Service Agency obtained information from Claimant and his foster father, including medical records from Dr. Ezra. Hillary Zebberman, M.S.W., Intake Vendor, prepared a Social Assessment based on the information obtained on that date. Of note, Claimant had significant issues with personal care. He did not like taking showers, and at times acted out when required to do so; he spends up to two hours in the shower, and is not always clean afterwards. He requires reminders to brush his teeth and comb his hair. Claimant is able to dress himself, but does not always match his clothes and shoes and uses wrinkled clothes. He engages in aggressive and self-injurious behavior at home. He has stated that he wants to kill himself, but has not articulated a specific plan or taken steps to take his life.

7. Also on April 15, 2013, Margaret Swaine, M.D. (Swaine), reviewed Dr. Ezra's records. She found no psychological testing records to support a diagnosis of intellectual disability. Dr. Swaine concluded that the records did not support the presence of a substantially handicapping cerebral palsy or epilepsy. She recommended a psychological evaluation to assist in the determination of eligibility under the Lanterman Act.

8. a. Sandi J. Fischer, Ph.D. (Fischer), conducted a psychological evaluation on May 7, 2013. Dr. Fischer reviewed records, including those noted above, spoke to Claimant's foster father, observed Claimant, and administered the following tests: Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), Adaptive Behavior Assessment

System, Second Edition (ABAS-II), and the Gilliam Autism Rating Scale, Second Edition (Gilliam). Claimant worked hard to complete the tests, despite stating that some were hard.

b. Claimant obtained a full scale Intelligence Quotient (IQ) score of 72, in the borderline range. However, Dr. Fischer did not think this was a reliable number due to the significant variability in its components. Claimant's scores on WISC-IV scales ranged from the mildly mentally retarded (processing speed) to the low average (verbal comprehension and perceptual reasoning). Variability in the subtests was even greater, as Claimant scored in the mildly mentally retarded range in one subtest (coding) and in the average range in three others (similarities, picture concepts, and comprehension).

Claimant does seem to have difficulty with timed tasks, which helps explain the mildly mentally retarded and borderline scores in the coding and symbol search subtests, respectively. In Dr. Fischer's opinion, the score in the coding subtest was low in part because Claimant did not fully hear or understand her test instructions. Claimant had displayed similar difficulties in the test administered by the District, where he obtained the lowest score in Writing Fluency, a timed activity. Low scores in these subtests lowered overall results in the working memory and processing speed scales. On the other hand, Claimant showed relative strength in tasks requiring more abstract thinking, such as the similarities, picture concepts, and comprehension subtests, which required differentiation between items and, in the case of the comprehension subtest, to provide explanations for the differences.

In Dr. Fischer's opinion, Claimant's cognitive ability lies somewhere in the low-average to average range.

c. Dr. Fischer reviewed the results of the WJ III obtained by the District in June 2012 and noted that most scores were in the average or low average ranges, with some scores in the borderline range. She also noted that District evaluators concluded Claimant was making academic progress and that they believed that emotional difficulties were interfering with Claimant's academic progress.

d. Scores in the Gilliam, based on Claimant's foster parent's report, were above the autism cutoff. However, this is only a screening test and Dr. Fischer saw no other clinical evidence, either in her observation of Claimant or in the records reviewed, that would correlate with these results and point to autism as a possible diagnosis.

e. Adaptive skills, as measured through the ABAS-II, are in the extremely low range in the areas of communication, functional academics, home living, health and safety, leisure, and self-care, and in the borderline range in the area of community use. These deficits were not viewed by Dr. Fischer as resulting from cognitive deficits, but, rather, from emotional difficulties.

f. Dr. Fischer concluded that Claimant most likely suffers from a mood disorder, but that a definitive diagnosis must be deferred to this mental health treatment team. She also suggested evaluation to rule out Posttraumatic Stress Disorder and Oppositional Defiant Disorder.

9. Dr. Fischer opined that Claimant did not have a qualifying diagnosis under the Lanterman Act. He does not have mental retardation or a condition similar to mental retardation or requiring treatment similar to that required by individuals with mental retardation because he has cognitive strengths in areas of abstract thinking that are not present in individuals with these conditions. His low scores in some areas of cognitive testing are the result of a difficulty with processing speed, which can be accommodated. He has been making academic progress, which is not typical of those with mental retardation. His other academic, behavior, and adaptive difficulties are better explained by the lingering effects of a very difficult and traumatic childhood, for which he is receiving services from another agencies.

10. On June 3, 2013, Service Agency informed Claimant's foster father of its conclusion that Claimant was not eligible for Regional Center Services under the Lanterman Act, and on June 12, 2013, Claimant's foster father filed a Fair Hearing Request challenging such determination.

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. While results in the Gilliam were above the cutoff that suggests Autism, Dr. Fischer credibly testified that there was no clinical evidence to support a diagnosis of Autism. Her opinion was not contradicted and is credited.

3. On the issue of whether Claimant has mental retardation, a condition related to mental retardation, or a condition requiring treatment similar to that required by a person with mental retardation, Dr. Fischer again provided uncontradicted persuasive opinion that he does not. While Claimant has attained some scores on tests of his cognitive ability that are in the borderline range, he has achieved other scores in the same tests that are consistent with higher cognitive functioning. He has demonstrated abilities in abstract thinking that are above the level expected of someone with mental retardation or related conditions. Dr. Fischer opines that Claimant's cognitive ability is in the low average to average range, and

her opinion is consistent with the testing and actions of District evaluators. Claimant's adaptive skills deficits, which are significant, were not shown to be reflective of lack of cognitive ability, but, rather, were more consistent with his existing mental health challenges.

4. By reason of the foregoing factual findings and legal conclusions, it was not established that Claimant has a developmental disability that makes him eligible for services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

DATED: August 16, 2013

_____/s/_____
SAMUEL D. REYES
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.