

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

OAH Case No. 2015120856

and

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Irina Tentser, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on March 16, 2016.

Judith A. Enright, Attorney at Law, represented South Central Los Angeles Regional Center (Regional Center or Service Agency).

Claimant's mother (Mother) represented Claimant.¹

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 Party titles have been used to protect the privacy of Claimant and his family.

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

FINDINGS OF FACT

1. a. Claimant is three years and four months old and resides with his mother, father, and older brother.

2. a. In 2015, when Claimant was 30 months old, he was referred for Regional Center assessment due to demonstrating significant developmental delays. He was then assessed by Regional Center. (Exh. 5.) As part of the assessment, Claimant's mother completed the Regional Center's Modified checklist for autism in toddlers (16 to 30 months). (Exh. 3.) According to the testimony of Owen Fudim (Dr. Fudim), Ph.D., ABPP, Regional Center's Psychologist Manager, a review of the results of the checklist did not indicate autism indicators for Claimant.

b. Specifically, Dr. Fudim pointed to Claimant's ability to engage in symbolic play, making eye contact, social smiling, learning from a model by imitation, and social and joint referencing, as indicators inconsistent with an autism diagnosis.

3. a. On March 31, 2015, Gerald D. Alpern, Ph.D. administered a Developmental Profile 3 (DP-3)³ test to Claimant. (Exh. 4.) DP-3 results were based on the responses by Claimant's mother to the DP-3 interview. Claimant's DP-3 test results indicated that Claimant's physical, adaptive and social development was in the average range. (Exh. 4 at p. SCLARC000005.) However, in the areas of cognitive, communication, and general development, Claimant's scores fell below the average range. (*Id.*)

b. At hearing, Dr. Fudim indicated that Claimant's average adaptive behavior and social-emotional scale results on the DP-3, as described in factual finding 3a, were not consistent with an autism diagnosis for Claimant.

4. On April 15, 2015, Claimant was found eligible for Regional Center's Early Start program due to demonstrating significant developmental delays. According to Claimant's Individual Family Services Plan (IFSP), he was found eligible for Regional Center services as a result of his cognitive and communication developmental delays. (Exh. 5 at p. SCLARC000015.) As previously noted, no significant developmental delays were noted in Claimant's IFSP in the areas of adaptive/self-help, physical, and/or social/emotional development. (*Id.*)

5. a. After finding Claimant eligible for Early Start program services based on his developmental delays, Regional Center referred Claimant for further assessment to assist in providing Claimant with a program tailored to his needs. On July 18, 2015, Claimant was assessed by Regional Center vendor, CurtisCARE Infant Development Program. (CurtisCARE). The assessment focused on the following domains: Gross and Fine Motor,

³ The DP-3 is designed to aid in the screening, diagnosis, treatment planning, and communication with parents.

Speech and Language, Cognitive, Social, and Self-Help using the Hawaiian Early Learning Profile. (HELP.)⁴ (Exh. 6.)

b. According to CurtisCARE's Initial Report (Initial Report), Claimant exhibited significant delays in one or more developmental areas. (Exh. 6 at p. SCLARC000025.) Claimant was 33 months old at the time of CurtisCARE's assessment. Based on the Initial Report's HELP profile, Claimant's developmental levels fell between 14.5 months and 24 months. Accordingly, his developmental averages were below his chronological age. Specifically, Claimant's cognitive, gross motor, fine motor, social-emotional, and self-help developmental levels ranged from 20.5 months to 24 months. The area with the most developmental delay was identified as Claimant's expressive language development, which was measured at a 14.5 month level. (*Id.*)

6. Claimant received center-based infant development program services three days a week, three hours per day via CurtisCARE, funded by Regional Center. Claimant's participation in Service Center's Early Start program ended when Claimant reached the age of three.

7. Subsequently, on October 27, 2015, Claimant was referred by Service Agency for evaluation by Regional Center psychologist Dr. Victor Sanchez (Dr. Sanchez), Ph.D. (Exh. 7.) The purpose of the referral was to clarify Claimant's diagnosis and to aid in program planning based on the termination of Regional Center's Early Start program for Claimant when he turned three. More explicitly, the purpose of Dr. Sanchez's evaluation was to determine whether or not Developmental Disability related to Intellectual Disability or Autism Spectrum Disorder was present in Claimant. (*Id.* at p. SCLARC000030.)

8. a. Dr. Sanchez described Claimant's emotional behavior, based on Mother's report, as being overly sensitive to loud or high pitched sounds, often covering his ears. (Exh. 7 at p. SCLARC000031.) However, Dr. Sanchez further noted that Claimant's mother did not report self-stimulatory, ritualistic, or perseverative interests. (*Id.*)

b. Dr. Sanchez described Claimant's social history, based on Mother's report, as being very friendly and affectionate towards persons he knew well. Mother further reported that Claimant had "never exhibited any significant problem with willingness to establish or maintain eye contact." (Exh. 7 at p. SCLARC000031.)

c. At hearing, Dr. Fudim opined that Dr. Sanchez's description of Claimant's emotional behavior and social history was significant, because it highlighted characteristics, such as Claimant being an affectionate boy and easily engaging in eye contact,

⁴ HELP is a curriculum-based assessment. It provides a general range of developmental functioning each domain rather than a definite single age level or score. The major purpose of HELP as a curriculum-based assessment is to identify curriculum outcomes, strategies and activities. (Exh. 6 at p. SCLARC000020.)

that were inconsistent with an autism diagnosis under the Lanterman Act.

9. a. Dr. Sanchez's psychological evaluation of Claimant was based on information provided by Claimant's mother and on application of various testing. (Exh. 7.) Tests conducted by Dr. Sanchez in evaluating Claimant included the WPPSI IV⁵, the Peabody TVIP⁶, the DP-3⁷, the Beery Visual Motor Integration Test⁸, the Childhood Autism Rating Scale-2-ST⁹, and the Autism Diagnostic Interview-Revised (ADI-R).¹⁰

b. Claimant's WPPSI-IV results data indicated that his overall cognitive skills fell in at least the average range. (Exh. 7 at pp. SCLARC000032 and 000034.) Claimant's Receptive Language Skills (relating to the language skills of listening and reading), as measured by the Peabody Picture Vocabulary Test, appeared to be age-appropriate. (*Id.*) Similarly, Claimant's Visual Motor Integration Skills measured by the Beery appeared to be well-developed as Claimant's performance approximated that of the average child of two years and ten month. (*Id.*) In evaluating Claimant's performance on the foregoing assessments, Dr. Sanchez noted that the obtained scores may have been mild underestimations of Claimant's actual abilities based on Claimant's distractibility and impulsivity, which Dr. Sanchez opined

⁵ Wechsler Preschool and Primary Scale of Intelligence - Fourth Edition. (WPPSI-IV) is an assessment that is designed to measure cognitive development for preschoolers and young children.

⁶ TVIP is an assessment of an individual's phonological awareness in Spanish.

⁷ See Footnote 3 herein for a description of the DP-3.

⁸ This assessment provides information on the development of an individual's visual and motor abilities. The test is broken down into three sections. The first examines how efficiently the visual and motor systems are communicating with one another (the ability referred to as visual motor integration), while the second and third isolate the visual perceptual and the motor control pieces of the puzzle.

⁹ The Childhood Autism Rating Scale—Second Edition (CARS2) is a 15-item rating scale used to help identify children with autism and distinguishing them from those with developmental disabilities. It provides ratings based on direct behavioral observation. CARS second edition is more responsive to individuals on the "high functioning" end of autism spectrum disorders. The clinician rates the individual on each item, using a 4-point rating scale. Ratings are based on frequency of the behavior in question, its intensity, peculiarity, and duration.

¹⁰ ADI-R is a structured interview conducted with the parents of individuals who have been referred for the evaluation of possible autism or autism spectrum disorders. The interview, used by researchers and clinicians, is used for diagnostic purposes for anyone with a mental age of at least 18 months and measures behavior in the areas of reciprocal social interaction, communication and language, and patterns of behavior.

may have affected Claimant's performance. (*Id.*)

c. Claimant's adaptive skills fell in the upper end of the average range with the exception of a relative weakness in the area of communication skills. (Exh. 7 at p. SCLARC000032.) For example, based on mother's report and clinical observation, Claimant received credit for the following: walking and running with good coordination; scribbling with a pencil; initiating his own play activities; counting to three; correctly identifying some primary colors; ascending stairs without help; washing and drying his own hands reasonably well; pedaling a tricycle; using a straw well; being toilet trained; blowing his nose when assisted; identifying facial features on himself accurately; recognizing himself in a photograph; saying the names of family members; saying a number of single words; and, helping at small household tasks. (*Id.*) Dr. Sanchez noted, however, that Claimant did not speak yet in phrases of sentences; did not recite any letters of the alphabet; did not always descend stairs one step per tread; did not relate experiences consistently; and, did not draw recognizable objects. (*Id.*)

d. Based on Mother's report and clinical observation of problems with attention, overactivity, distractibility, and impulsivity, Claimant's emotional/behavioral level was described by Dr. Sanchez as pointing to the possible presence of Attention Deficit Hyperactivity Disorder (ADHD.) (Exh. 7 at p. SCLARC000033.) However, Dr. Sanchez noted that the limited nature of his evaluation of Claimant did not allow for unequivocal diagnosis of such problems. As a result, Dr. Sanchez recommended extended evaluation by a mental health specialist to clarify whether an ADHD diagnosis would be appropriate for Claimant. (*Id.*)

e. With respect to Regional Center eligibility, Dr. Sanchez concluded that there did not appear to be significant symptoms in the area of possible Autism Spectrum Disorder. (Exh. 7 at pp. SCLARC000033 and SCLARC000034.) To support his conclusion, Dr. Sanchez pointed to Claimant's score on the Childhood Autism Rating Scale, which fell at a level well below that which would generally be seen if Autism Spectrum Disorder were present (i.e., below the first percentile.) (*Id.*) Similarly, Dr. Sanchez pointed to Claimant's scores generated by the Autism Diagnostic Interview – Revised, which fell below the cutoffs seen in cases in which Autism Spectrum Disorder is unequivocally diagnosed. (*Id.*)

f. At hearing, Dr. Fudim opined that Dr. Sanchez evaluation supported Service Center's conclusion that Claimant did not support an Autism and/or Autism Spectrum diagnosis as defined by the Diagnostic and Statistical Manual of Mental Disorder, 5th Edition (DSM 5.)

g. Ultimately, after conducting his evaluation, Dr. Sanchez diagnosed Claimant with Language Disorder – 315.32 (F80.2), as defined by the DSM 5 and recommended further evaluation to rule out of ADHD.

10. Around the time of Dr. Sanchez's evaluation and diagnosis of Claimant and Claimant's termination of enrollment in Service Center's Early Start program in October, 2015, based on his turning three years-old, Claimant's Regional Center Service Coordinator referred Claimant to Los Angeles Unified School District (LAUSD) for assessment. The purpose of

LAUSD's assessment of Claimant was to determine if he was eligible for special education services by the District at age three. (Exh. 8 at p. SCLARC000036.) At the time of the referral, Mother reported that LAUSD had already completed an Individual Education Plan (IEP) for Claimant and that he was in the enrollment phase in special education services at LAUSD. (*Id.*)

11. a. On November 30, 2015, LAUSD Bilingual Speech-Language Pathologist, Carmen Gillman, M.S., CCC-SLP, performed a Preschool Assessment Report of Claimant. At that time, Claimant was enrolled in the Head Start program at Hope Street Elementary, a private parochial program, in Pre-Kindergarden. (Exh. 9 at p. SCLARC000037.) The assessment was conducted in order to determine Claimant's eligibility for speech/language services by LAUSD. (*Id.*)

b. Claimant's Preschool Assessment Report indicated that Claimant tested at the low average range in Receptive Language and below average range in Expressive Language (Exh. 9 at p.SCLARC000039.) In regard to Pragmatic Language, it was noted that "[Claimant] displayed adequate eye contact and some social reciprocity. He displayed communicative intent and briefly interacted with assessors." (*Id.*)

c. The Preschool Assessment Report concluded that Claimant may need Language and Speech (LAS) support and referred Claimant to a final determination of the need of LAS support by the IEP team, which establish special education eligibility, placement and instructional setting. (Exh. 9 at p. SCLARC000042.)

d. In reviewing LAUSD's Preschool Assessment Report of Claimant, Dr. Fudim testified that the results were consistent with that Claimant had expressive language problems, but that Claimant's social development was age appropriate.

12. a. On November 30, 2015, Claimant was assessed by LAUSD's Division of Special Education. Claimant's Initial Preschool Team Assessment was conducted by Martha Guillem, a Bilingual School Psychologist, and Carmen Gillman, a Speech Therapist. (Exh. 10 at p. SCLARC000043.) Mother's report and Claimant's teacher report were included as a basis for the evaluation in addition to various assessment tools. The suspected eligibilities at the time of assessment were delayed speech and Autism.

b. Based on the assessment results, as described in factual findings 12c through 12g below, evaluators concluded that Claimant was eligible for special education services due to meeting two or more of the eligibility criteria under Title 5 of the California Code of Regulations, section 3030, subdivision (1), and determined "[Claimant] *appears to meet* the eligibility criteria for autism." (Exh. 10 at p. SCLARC000054.)

c. Claimant's cognitive ability was measured in the average to below low average range through the DP-3. (Exh. 10 at pp. SCLARC000047 – SCLARC000048.) Results from the Mullen Scales of Early Learning¹¹ (MSEL) were in the average range for

¹¹ A normative assessment measure for children birth to 68 months which

Visual Reception;¹² the below average range on the Fine Motor scale¹³; the below average range on the Receptive Language scale¹⁴; and the very low average on the Expressive Language scale¹⁵. (Id. at pp. SCLARC000045 – SCLARC000047.) Based on the generated results, the report concluded that “[P]otential factors impacting the validity of the findings include: attention deficits and delays in expressive and receptive language.” (Id. at p. SCLARC000048.)

d. With respect to communication functioning, Claimant’s was within the below average range, based upon ratings on the DP-3. (Exh. 10 at p. SCLARC000050.) Claimant’s motor abilities were within the average range, based upon ratings on the DP-3. (*Id.*) Claimant’s social-emotional functioning¹⁶ was within the average range, based on ratings on the DP-3. (Id. at p. SCLARC000051.)

e. To evaluate Claimant’s social, emotional and behavioral issues, evaluators administered the tests described in factual findings 12e, 12f, and 12g, described below. Based on the results of the Behavior Assessment System for Children, Second Edition (BASC-2), as reported by Claimant’s teacher, Claimant demonstrated high levels of Hyperactivity and Attention Problems in the home and community settings. (Exh. 10 at p. SCLARC000052.)

f. According to the results of the Autism Spectrum Rating Scales (ASRS) (2-5 Years) Parent form, Claimant “uses language appropriately, does not engage in stereotypical behaviors, and tolerates changes in routine well; however, he has difficulty using appropriate verbal and non-verbal communication for social contact, engages in unusual behaviors, has difficulty relating to children, has difficulty relating to adults, has difficulty providing appropriate emotional responses to people in social situations, overreacts to sensory

provides a measure of a child’s cognitive functioning in visual, linguistic, and motor domains.

¹² Visual Reception scale measures a child’s ability to discriminate, recall, organize, and sequence visual stimuli.

¹³ Fine Motor scale examines visual motor planning, unilateral, and bilateral manipulation and writing readiness.

¹⁴ Receptive Language scale involves intra-sensory and inter-sensory tasks.

¹⁵ Expressive Language scale is an intra-sensory task that requires the student to employ auditory discrimination, auditory comprehension, and auditory memory in order to verbally demonstrate concept formation.

¹⁶ The DP-3 provides a comparative measure of social/emotional development tapping into interpersonal relationship abilities, social and emotional understanding and functional performance in the school setting.

stimulation, and has problems with inattention and/or motor and impulse control.” (Exh. 10 at p. SCLARC000052.)

g. The Gilliam Autism Rating Scale-2¹⁷ (GARS-2) was completed through an interview with Mother during Claimant’s testing session. The responses of Claimant’s mother resulted in an overall Autism Index score that suggested the presence of autism was a “possibly.” (Exh. 10 at p. SCLARC000052.) In sum, Claimant’s mother reported that Claimant frequently ate specific foods and refused to eat what most people usually ate; licked, tasted, or attempted to eat inedible foods; made rapid lunging movements when moving to place to place; pranced; hit himself; used gestures instead of speech to obtain objects; resisted physical contact from others; behaved in an unreasonably fearful, frightened manner; was unaffectionate; used toys or objects inappropriately; and did certain things repetitively, ritualistically. (*Id.*)

13. Following the District’s November 2015 evaluation results, Claimant’s mother requested Service Agency to complete an evaluation and eligibility re-determination of Claimant due to the suspected presence of Autism Spectrum Disorder.

14. a. Service Agency’s interdisciplinary core staffing team reviewed Claimant’s case on October 30, 2015 for redetermination of eligibility for consumers age three or older. In reviewing Claimant’s case, Service Agency’s team considered the Claimant’s case records, including the psychological evaluation conducted by Dr. Sanchez on October 27, 2015. (Exh. 1 at p. SCLARC000001.)

b. Service Agency’s interdisciplinary team found that Claimant did not meet the definition of developmental disability in section 4512 and 4644 of the Welfare and Institutions Code and section 54000, 54001, and 54010 of Title 17 of the California Administrative codes. (Exh. 1 at p. SCLARC000001.) The bases for the team’s finding of ineligibility were that Claimant was diagnosed with Language Disorder on October 27, 2015, and it was determined that Claimant did not have a qualifying condition such as substantially disabling autism, substantially disabling cerebral palsy, substantially disabling epilepsy, or intellectual disability. (*Id.*) In addition, Claimant was determined not to have a substantial disability found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. (*Id.*)

15. Based on its re-evaluation, on December 7, 2015, Service Agency issued a Notice of Proposed Action, informing Claimant that he was not eligible for services under the Lanterman Act. (Exh. 1.) Claimant’s mother filed a Fair Hearing Request on December 23, 2015. (Exh. 2.)

16. a. Subsequent to the filing of the Fair Hearing Request, an informal meeting was held by the parties where Claimant’s mother provided additional documents to Service

¹⁷ The GARS-2 rating scale contains behaviors and characteristics exhibited by individuals with a diagnosis of autism. These items are divided into three main categories: communication, stereotypical behaviors, and social interaction.

Agency for possible re-evaluation of Claimant's eligibility for Regional Center services. No resolution was reached by the parties and the instant hearing was conducted.

b. In anticipation of the hearing, Dr. Fudim reviewed the entire case file, including the District's evaluations of Claimant, as described in factual 10 through 12. (Testimony of Dr. Fudim.) Further, during the hearing, Dr. Fudim reviewed the additional documents submitted by Claimant's mother, including Claimant's St. Matthias Elementary School Preschool 2015-2015 Progress Report (Exh. A) and Claimant's December 7, 2015, Ages & Stages Questionnaires, Third Edition (ASQ-3) Information Summary (Exh. B.)

c. In regard to the District's evaluation of Claimant as "possibly" Autistic, as described in factual finding 12, Dr. Fudim first opined that the evaluation's validity was potentially improper because it provided inconsistent results for Claimant. Specifically, Dr. Fudim pointed to the fact that Claimant's social-emotional status was described as in the average range by the DP-3 results (Exh. 10 at p.SCLARC000051), thereby contradicting the GARS-2 results outlined which pointed to the possibility of Autism (Id. at p. SCLARC000052.)

d. Second, Dr. Fudim explained that the criteria for eligibility to evaluate the presence of Autism used by the District (i.e., section 3030, subdivision (1) of Title 5 of the California Code of Regulations) differed significantly from the DMS 5 Autism criteria used by the Regional Center to diagnose Autism.

e. Notwithstanding the fact that the District's criteria differed from the Regional Center's for Autism/Autism Spectrum Disorder, Dr. Fudim opined that his review of the results described in the District's evaluation of Claimant did not establish the presence of Autism Spectrum Disorder or Autism when he applied the DSM 5 criteria.

f. Moreover, Dr. Fudim pointed to the fact that Claimant's preschool progress report and ASQ-3 (Exhs. A and B.) descriptions of Claimant's behavior as engaging in cooperative play were not consistent with a diagnosis of Autism under the DMS 5. He further noted that the results actually supported Dr. Sanchez's evaluation results for Claimant as an individual with Language Disorder and possible ADHD.

17. Mother testified that she had observed progress in Claimant since the evaluations had been conducted in fall 2015 in the areas of language development and social interaction. Claimant's mother indicated that she was mainly concerned with the discrepancy between the District's diagnoses of Autism with that of the Regional Center, which ruled out Autism/Autism Spectrum Disorder for Claimant. However, as Dr. Fudim testified, District categories for special education services are defined by Special Education Laws and do not constitute clinical DMS 5 diagnoses. Regional Center eligibility, on the other hand, is determined by the Regional Center, as per the Lanterman Act.¹⁸ In light of Dr. Sanchez's evaluation and Dr. Fudim's

¹⁸ To qualify for Regional Center services based on psychological findings, an individual must have Autism Spectrum Disorder, Intellectual Disability, or a disabling condition closely related or requiring treatment similar to that required for individuals with

testimony, and the absence of any scientific evidence to the contrary, Claimant's concerns and the District's evaluation of Claimant as Autistic using Special Education Laws, are insufficient to call into question the validity of Dr. Sanchez's evaluation and Dr. Fudim's opinion.

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 intellectual disability, 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. The evidence of cognitive functioning indicates that Claimant does not have intellectual disability, or a condition closely related to intellectual disability or requiring treatment similar to that required by individuals with mental retardation. While Claimant has some adaptive skills deficits in daily living skills and in socialization, these are insufficient to establish the presence of a developmental disability.

3. Claimant has been diagnosed with Autism by the District. However, California Education Code section 56846.2, subdivision (b), specifically makes the distinction that the definition of a "pupil with autism" by a school "shall not apply for purposes of the determination of eligibility for services pursuant to the Lanterman Act." Accordingly, the public school's diagnosis of Claimant as a "pupil with autism" does not make him eligible for Lanterman Act services.

4. Mother reported some behaviors consistent with Autism Disorder, but these were not deemed sufficient by Dr. Fudim to lead to a diagnosis of Autism as established by the DMS 5. As previously noted, the District provided a diagnosis of Autism using the criteria established by Special Education Laws, not by the criteria established by the DMS 5. The District's diagnosis of Autism is insufficient to establish that Claimant has Autism or to warrant rejection of Dr. Sanchez's and Dr. Fudim's contrary opinions.

5. By reason of the foregoing factual findings numbers 1 through 17 and legal conclusions numbers 1 through 4, Claimant did not establish that he has a developmental disability that makes him eligible for services under the Lanterman Act.

Intellectual Disability.

6. Notwithstanding the current finding of Claimant's ineligibility for Service Agency services, Mother may submit any future evaluations and/or assessments of Claimant to Service Agency and request re-evaluation of Claimant by the Service Agency.

ORDER

Claimant's appeal is denied.

DATED: March 25, 2016

DocuSigned by:
Irina Tentser
ADD1484FB193489...

IRINA TENTSER
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.