

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

In the Matter of:

OAH No. 2011100918

MINA H.

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

**DECISION**

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings on May 31, 2012, in Bakersfield, California.

Mina H., claimant, was represented her grandmother, who is also claimant's legal guardian.

Kern Regional Center (Service Agency) was represented by Jeffrey Popkin, Associate Director.

Evidence was received and the matter was submitted for decision.

**ISSUE**

Is claimant eligible for regional center services based any of the four qualifying conditions<sup>1</sup> or on "the fifth category" (a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation) pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?

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<sup>1</sup> The four qualifying conditions for regional center services are autism, cerebral palsy, epilepsy, and mental retardation.

## FACTUAL FINDINGS

1. Claimant is a five-year-old girl who is requesting eligibility for regional center services based on Autism Disorder, epilepsy or seizure disorder, or on her contention that she suffers from a disabling condition found to be closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation, also known as the “fifth category.”

2. The Service Agency determined that claimant is not eligible for regional center services because he does not suffer from autism, mental retardation, cerebral palsy, epilepsy, or from a disabling condition under the “fifth category” as set forth in Welfare and Institutions Code section 4512, subdivision (a), or California Code of Regulations, title 17, section 54000. Based on the above determination, the Service Agency denied services to claimant under the Lanterman Act. Claimant filed a request for a hearing and this matter ensued.

3. Claimant’s grandmother testified that claimant exhibits numerous behavior problems such as temper tantrums and physical aggression. However, claimant’s grandmother stated that she has learned to defuse the tantrums and reduce claimant’s aggressive behavior. Her grandmother also testified that claimant’s behavior has improved dramatically both at home and at school since claimant has been taking medication. In fact, according to her grandmother, claimant now has a friend at school. While claimant’s behavior has improved, her grandmother stated that her receptive communication skills are still very poor.

4. Claimant was evaluated by Joshua Lefler, Psy.D., on March 9 and 20, 2012. Dr. Lefler utilized a number of testing instruments including the Mental Status Examination, Behavioral Observation, the Stanford Binet Intelligence Scale: Fourth Edition (SB-IV), the Autism Diagnostic Observation Scale (ADOS), the Gilliam Autism Rating Scale – Second Edition (GARS-2), and the Vineland Adaptive Behavior Scales – Second Edition (Vineland-2). The results of the evaluation were as follows:

(a) In the mental status examination, claimant maintained eye contact and was able to speak clearly to the point of being talkative. She was able to identify her age and appeared to have an adequate fund of general knowledge. While claimants’ memory appeared to be somewhat below average, there were no apparent problems with her processing ability.

(b) Claimant performed in the low average range of intellectual ability in the Stanford Binet Intelligence Scale, with a Test Composite IQ score of 84. She displayed a significant strength in quantitative reasoning. Her other scores fell within the low average range with the exception of short term memory, which fell within the borderline range.

(c) On the Vineland-II, claimant was given an Adaptive Composite Score of 84, which Dr. Lefler considered in the moderately low range, meaning that she scores higher than 14 percent of similarly aged individuals. Claimant scored as follows: 83 (low moderate level) in communication; 87 (adequate level) in daily living skills; 74 (moderately low level) in socialization; and 104 (adequate level) in motor skills.

(d) In the ADOS Module 2 testing, Dr. Lefler determined that claimant did not present with symptoms of autism. In the Communication and Reciprocal Social Interaction section of the test, claimant scored a “1” which is well below the autism cutoff score of 8. Dr. Lefler stated in his report that “[claimant] revealed slightly unusual social overtures but they were often restricted to her personal demands and interests. Otherwise she revealed no deficits in this area. Her social responsiveness was normal and she revealed extensive use of verbal and non-verbal behaviors in order to communicate. Overall, there was a comfortable interaction with the examiner that was appropriate to context. . . . [Claimant revealed no unusual sensory interests or any complex hand or finger mannerisms. She did not reveal self injurious behaviors. There were no repetitive or stereotypic behaviors on display during the ADOS evaluation or at any other point during the psychological evaluation.” Dr. Lefler determined that claimant does not have Autism Spectrum Disorder.

(e) The results of the Gilliam Autism Rating Scale, which was based on information obtained from claimant’s grandmother, suggested some signs and/or symptoms associated with Autistic Spectrum Disorder, but not to a significant degree.

5. Based on the above testing, Dr. Lefler diagnosed claimant with Mixed Receptive/Expressive Language Disorder, ADHD (provisional), and Disruptive Behavior Disorder, Not Otherwise Specified (provisional) in Axis I, and Seizure Disorder by History in Axis II. In his report, Dr. Lefler opined that claimant did not evidence enough deficits in the areas of communication, social skills and stereotypic behaviors to warrant a diagnosis of Autism Spectrum Disorder. He further opined that claimant did not have mental retardation.

6. On March 3, 2010, Donna Luciano, M.S., a school psychologist evaluated claimant for the Kern County School District. Ms. Luciano utilized the Differential Ability Scales – Second Edition (DAS II), the Vineland II, and the Autism Behavior Checklist.

(a) In the DAS II, Claimant scored a 75 in General Conceptual Ability (GCA), which is in the low range of cognitive functioning. Ms. Luciano stated in her report that “there was a statistically significant difference between Mina’s Verbal Composite Standard Score of 60 and her Non-Verbal Reasoning Composite Score of 94. This difference suggests that the GCA alone presents an incomplete description of Mina’s cognitive abilities. A valid interpretation of the present results suggests that Mina is demonstrating a relative weakness in the area of verbal intellectual ability when compared with her non-verbal intellectual ability.” Ms. Luciano also noted that the DAS II results were “estimates of [claimant’s] cognitive functioning

because testing of young children is highly variable due to the nature of young children's experiences, development and behavior.”

- (b) The Vineland II revealed an Adaptive Behavior Composite Score of 79, which fell in the low adaptive level. Specifically, the Communication domain revealed a score within the very low range, while her scores in the socialization and motor skills were at the average range.
- (c) Regarding the Autism Behavior Checklist, Ms. Luciano notes that the probability that claimant has autism is unlikely. She states in her report that while claimant has some characteristics and behaviors associated with autism, these behaviors do not by themselves indicate the presence of autism.

7. On May 17, 2011, Mary Ann Krating, M.S., a school psychologist evaluated claimant for the Kern County School District “for the purpose of ruling out the handicapping conditions of autistic-like and emotional disturbance.” Ms. Krating utilized the following test instruments: the Brigand Diagnostic Inventory of Early Development II (Brigand II); Adaptive Behavior Assessment System II (ABAS II); Behavior Assessment System for Children II (BASC II); and the Social Responsiveness Scale (SRS).

- (a) Regarding the ABAS II testing, Ms. Krating wrote in her report that “Mina’s overall adaptive behaviors were rated in the extremely low range by her grandmother and her Special Day Class pre-school teacher, with significant problems noted in all areas with the exception of Functional Pre-Academics where Mina was rated as average by both raters.”
- (b) Regarding the administration of BASC II, Ms. Krating stated in her report that claimant’s grandmother and pre-school teacher indicated scores in the clinically significant range for aggression, atypicality and hyperactivity. The report also stated that “Mina tends to behave aggressively, acts in a strange manner and is overly active. However, she was not noted as being withdrawn to a significant degree, nor was she rated as having significant problems in the school setting, with adapting to new settings and/or people, or with her social skills as she was in the home setting.
- (c) Regarding the administration of the SRS, Ms. Krating noted that in general all of the subscales were rated in the severe range by grandmother and in the mild to moderate range by claimant’s teacher. Ms. Krating noted some symptoms of autistic like behaviors but also noted that at other times claimant presented with “behaviors that were inconsistent with autistic children such as her ability to engage in pretend play, imitate, show a normal range of facial expressions, and show interest in others.”

8. On August 15, 2011, Bryna Siegal, Ph.D., a clinical psychologist, evaluated claimant via video tele-conference. Dr. Siegal assessed claimant using the DSM IV diagnostic criteria for Autistic Disorder. In her report, Dr. Siegal noted some deficits in the area of reciprocal social interactions in the form of mild failure to develop peer relationships. Regarding claimant's social development, Dr. Siegal stated that during the assessment, she spoke with claimant and noted that "Mina chatted nicely, though her speech was sometimes a bit [un]clear, but made revisions and clarifications to her speech when asked. She seemed to have a good narrative capacity for a four-year-old. . . . She was well organized and calm, including when she was asked to leave the room with Christine so I could talk with Grandma alone." Dr. Siegal also noted that claimant "does not seem to have specific sensory differences, but that she can be quite agitated and often seemingly unable to self-soothe or self-direct when something specific bothers her." Dr. Siegal diagnosed claimant with Articulation Disorder, and offered Rule Out diagnoses of Oppositional Defiant Disorder, Receptive/Expressive Language Disorder, and Psychosis Not Otherwise Specified (per maternal family history).

9. On December 7, 2011, claimant was examined by Gregorio Pineda, M.D., a neurologist. In his medical report Dr. Pineda noted that "step-mother is worried about seizure pleasant staring episodes noticed by her teacher. . . . Neurological examination: Developmentally normal. She is able to count to 10 backwards. She can count up to 20, she knows all of her colors, very interactive, very pleasant. Cranial nerves are normal. Speech [is] appropriate for age. Reflexes are normal. Motor examination: Normal tone, no focal weakness. Sensory examination: grossly normal. Coordination: no tremor. Gait: normal for age." In the comment section, Dr Pineda notes that claimant is "clearly not autistic, she is very interactive. She is seemingly quite bright."

10. Dr. Pineda saw claimant again for a follow-up visit on January 20, 2012. He was told, presumably by claimant's grandmother, that claimant would have staring episodes with eyes rolled up, and that she would be unresponsive after the episode. Dr. Pineda noted in his report that claimant's MRI (brain scan) was normal and that claimant did not exhibit a "focal or lateralizing motor sensory speech or condition problem." Dr. Pineda assessed claimant with "Generalized Non-convulsive Epilepsy with Intractable Epilepsy – Stable. He noted that it was not the petit mal variety. Dr. Pineda prescribed Tegretol.

10. Fidel Huerta, M.D., testified at the hearing on behalf of the regional center. Dr. Huerta testified that based on the Dr. Pineda's medical report, claimant has a seizure disorder which has been stabilized. Dr. Huerta further opined that claimant's seizure disorder does not present a substantial handicapping condition or impairment as defined in Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001.

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## LEGAL CONCLUSIONS

1. California Code of Regulations, title 17, section 54000 defines “developmental disability” as a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or other conditions closely related to mental retardation, or that require treatment similar to that required for individuals with mentally retardation. The disability must originate before age 18, be likely to continue indefinitely, and constitute a substantial disability. Welfare and Institutions Code section 4512, subdivision (1), defines substantial disability as follows:

(1) “Substantial disability” means 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 determined by the regional center, and as appropriate to the age of the person:

- (1) Receptive and expressive language;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self sufficiency.

2. California Code of Regulations, title 17, section 54001 defines substantial disability as follows:

(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.

3. For Claimant to be eligible for regional center services, it must be determined that she suffers from a developmental disability. That disability must fit into one of the eligibility categories mentioned in Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000, and must not be solely from an excluded condition. Excluded conditions are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical.

4. Claimant does not have autism disorder, cerebral palsy or mental retardation. Therefore, claimant is not eligible for regional center services based on any of the above conditions pursuant to Welfare and Institutions Code section 4512, subdivision (a),

5. Claimant is not eligible for regional center services based on the fifth category because the evidence did not establish that she suffers from a disabling condition that is closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000.

6. In this case, claimant did not prove that she has a major impairment of cognitive and/or social functioning which has resulted in functional limitations in three or more of the above referenced areas. Claimant was assessed and/or evaluated numerous times over the past two years. None of the evaluators diagnosed respondent with Autistic Disorder. Further, the evidence did not establish that claimant suffers from a disabling condition similar to mental retardation. Finally, the evidence did not establish that claimant's seizure disorder has caused a major impairment of cognitive and/or social functioning.

## ORDER

The Kern Regional Center's determination that claimant is not eligible for regional center services is affirmed. Claimant's appeal of that determination is denied.

DATED: June 12, 2012

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HUMBERTO FLORES  
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.**

