

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

WESTSIDEREGIONAL CENTER,

Service Agency.

OAH No. 2018070667

DECISION

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, heard this matter on August 20, 2018, in Culver City, California.

Claimant's mother (Mother) represented Claimant, who was not present at the hearing.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was held open for Claimant's mother to submit additional evidence to Service Agency by September 14, 2018, and for Service Agency to submit Mother's evidence and a reply by September 28, 2018. On September 27, 2018, Service Agency submitted a Closing Statement and documents received from Mother, consisting of an Amended Individualized Education Plan, dated August 30, 2018; a Functional Behavioral Assessment, dated August 2018; and a Re-evaluation Psycho-Educational Assessment, dated May 14, 2018. Claimant's new

¹ Claimant and his mother will be referred to by title to protect their privacy.

evidence was admitted without objection as Exhibits I, J, and K, respectively. The Service Agency's Closing Statement was marked and lodged as Exhibit 10.

The record was closed and the matter was submitted for a decision on September 28, 2018.

Is Claimant eligible for services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

EVIDENCE

Documentary: WRC's exhibits 1-8; Claimant's exhibits A-K.

Testimonial: KaelyShilakes, Psy.D.; Thompson Kelly, Ph.D.; and Mother.

FACTUAL FINDINGS

1. Claimant is a 7-year-old male who lives at home with his parents, although his father is often absent because of work commitments. Claimant seeks regional center services on the basis of autism.

2. On June 6, 2018, Service Agency's multidisciplinary team determined that Claimant did not meet the eligibility criteria for services set forth in the Lanterman Act. The team recommended a referral to the Department of Mental Health based on diagnoses of Oppositional Defiance Disorder (ODD) and Attention Deficit Hyperactivity Disorder (ADHD).

3. On June 7, 2018, WRC sent a letter and a Notice of Proposed Action to Claimant and his parents informing them of its determination that Claimant is not eligible for regional center services. On July 6, 2018, Mother filed a fair hearing request on her son's behalf, appealing the eligibility denial and requesting a hearing. The fair hearing request noted that Claimant "was denied services even though he has a medical diagnosis of Autism, has an IEP [Individualized Education Plan] and was offered significant services

through LAUSD, and currently [is] receiving ABA home therapy.”²(Ex. 2.)

CLAIMANT’S BACKGROUND

4. Claimant had a normal birth. He timely met all of his developmental and growth milestones. He has no history of prior hospitalizations or surgeries. He is in good general health and takes no daily prescription medications.

5. When Claimant was four years old and prior to entering kindergarten, Mother requested the Los Angeles Unified School District (LAUSD) to evaluate Claimant. Mother had concerns at the time about Claimant’s impulsivity, aggression, and other ADHD-like behaviors. In an Individualized Education Plan dated April 5, 2015 (2015 IEP), the LAUSD Special Education Infant-Preschool intake team found Claimant ineligible for special education services, speech therapy, or occupational therapy. According to the LAUSD Resource Specialist Assessment Report, dated May 2018 (ex. D), the psychologist’s report accompanying the 2015 IEP stated: “[Claimant’s] overall non-verbal cognitive ability and verbal cognition are estimated to be within the average range. Motor skills, School Readiness skills, Communication skills, Social Emotional skills, and Adaptive Behavior are within the average range.” The 2015 IEP report also noted that the behaviors then described by Claimant’s mother were not observed in the testing situation.

6. Claimant attended private Christian school from kindergarten to the middle of second grade. The school expelled him in February 2018 because of negative behaviors. Among other things, Claimant threatened to kill his peers as well as one of the school aides, hit the school aide, and pointed a pencil at her. Claimant had been expelled from a previous school for kicking a teacher.

7. Mother subsequently enrolled Claimant at an LAUSD public school (Public

² “ABA home therapy” refers to Applied Behavior Analysis therapy typically offered to children with autism and other developmental disorders at their homes.

School), which placed him in a general education second grade classroom. Soon thereafter, Mother met with the LAUSD Student Support and Progress Team during which she described Claimant as being “very active, impulsive, aggressive (biting and hitting), and will act out if stressed or scared.”

8. A. Because of Claimant’s behaviors, the school held an IEP meeting on May 18, 2018. The IEP team found Claimant eligible for special education services based on an “Other Health Impairment (OHI)” disability.³(Ex. C.) The report of the May 18, 2018 IEP meeting (May 2018 IEP Report) noted Claimant performed in the superior range in academics and Claimant’s health did not affect his ability to assess the educational curriculum. In assessing Claimant’s social behavior, the May 2018 IEP Report states as follows:

[Claimant] is highly distractible, loses focus and attention to tasks and directives easily, needs constant re-direction combined with positive reinforcement, performs better when given non-preferred tasks first with the promise of a preferred task upon completion, talks constantly, often off-topic, gets out of his seat without permission, bangs and kicks his feet, moves his body and needs movement breaks. . . . He requires one to one attention and constant prompting but even with attention and incentives, [Claimant] does not

³ California Code of Regulations, title 5, section 3030, subdivision (b)(9), defines OHI as an impairment characterized by limited vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment due to chronic health problems such as ADHD, and which adversely affects a child’s educational performance.

complete class work primarily due to inattention and lack of motivation.

[¶. . . ¶]

[Claimant's] negative behaviors significantly impact his ability to focus on new learning, complete class work and relate in a positive way to peers and adults. He may benefit from learning positive replacement behaviors/choices, consistent redirection, prompting and a positive behavior support plan to address negative behaviors. Negative behaviors also significantly disrupt [Claimant's] classroom routines and lessons and at this time he lacks awareness of how his behaviors impact himself and others.

(Ex. C, pp. 4, 5.)

B. The May 2018 IEP Report provided that Claimant would be placed in a general education classroom with instructional accommodations, including a behavioral support plan, positive reinforcement, and shortened tasks. In addition, Claimant was to receive 30 minutes of individual counseling per week and individual resource support for an hour, one to five times per week. The behavior support plan did not moderate Claimant's behaviors, and counseling for Claimant was limited because of the short time remaining in the school year.

9. In August 2018, Claimant started the third grade at Public School, where he participates in a general education classroom and is part of the Gifted and Talented Education program because of his high academic functioning. Claimant takes karate classes outside of school. He also receives 15 hours per week of ABA services, paid for by private

insurance and prescribed by his medical doctor, as detailed in Factual Finding 15E below.

10. On August 15, 2018, soon after the start of school, Claimant's teacher sent him to the principal's office because he had thrown pencils at her and threatened to throw chairs at his classmates. In the principal's office, Claimant kicked the principal's chair; grabbed, crumpled, and threw documents off her desk; and punched, kicked and spat at the principal and her Coordinator. Public School staff contacted the LAUSD School Police and Mother. Mother was able to calm Claimant by spending time alone with him and having him jump up and down to re-focus.

11. Because of the August 15, 2018 incident, Public School held a new IEP meeting on August 30, 2018, with Mother and school representatives. In the report of the meeting (August 2018 IEP Report), LAUSD agreed to provide Claimant with the following: a individual behavioral aide for the full school day; 30 minutes of individual counseling each week; resource support; a behavioral support plan; and assessments to determine Claimant's eligibility for adaptive physical education and recreational therapy. In addition, LAUSD agreed to conduct an occupational therapy assessment in January 2019. The IEP confirmed that Claimant continued to be eligible for special education services based on OHI.

12. A. The August 2018 IEP Report was based in part on the Functional Behavioral Assessment (FBA), dated August 2018 and conducted by Nancy Griffin, M.A., R.S.P. The FBA included interviews of Claimant's teachers and direct observations of Claimant in various school settings between March and June 2018. Ms. Griffin summarized her observations as follows:

[Claimant] was observed engaging in both on-task, but primarily off-task behavior with prompting and point incentives given throughout all classroom observations. Although [Claimant] was engaged in preferred academic

tasks and activities, he was also consistently making off-topic comments, asking off-topic questions, unrelated random vocalizations, sitting unsafely on his chair, touching things, putting objects in his mouth, getting out of his seat without permission, walking around the room with a pencil in his mouth, climbing on furniture, making loud protests, threatening peers and adults, unwilling to follow directions even when given prompting and/or incentives to earn points, being argumentative, refusing to comply with directives, negative interaction with peers, complaining of being tired or in pain, lack of focus and attention, tantruming and constant off-topic talking and questions asking to seek attention. When [Claimant] engaged in these behaviors, he was reminded to focus on the activity/task, seated next to an on-task peer, given visual reminders of expectations, given a "cooling-off" corner, given points for compliance, positive reinforcement, behavior was ignored and/or he was removed from the classroom. Throughout this observation, [Claimant] became consistently defiant when presented with a non-preferred activity, task, object or directive. During such times he began loudly verbally protesting, talking off-topic, verbally manipulating and arguing, complaining of physical discomfort, making sounds, yelling, tantruming, climbing on furniture, getting out of his seat without permission and verbally threatening. He also became angry and defiant when being held accountable to positive behaviors, saying, "I'm

not going to do that! Or I'm calling 911!" On other occasions during the observations, he would become intensely focused when presented with preferred activities such as watching a video or working on a puzzle.

(Ex. J, pp. 49-50.)

B. Ms. Griffin opined that [Claimant] engaged in these maladaptive behaviors to seek attention, gain access to what he wants, or to gain control.

13. A. The August 2018 IEP was also based on a May 14, 2018 Re-Evaluation Psycho-Educational Assessment (PE Assessment) conducted by Christy Chon, School Psychologist. The PE Assessment evaluated Claimant's eligibility for special education eligibilities based on Specific Learning Disability, OHI, and Autism. Ms. Chon's assessment included a review of Claimant's academic records; observations of Claimant in the school setting; teacher and parent interviews; cognitive, visual perceptual skills, and visual motor integration testing; behavior assessments by Mother and claimant's teacher; and autism rating scales provided by Mother and Claimant's teacher.

B. Ms. Chon's findings are summarized as follows: Claimant's estimated cognitive ability is within the High Average range, although the test scores may underrepresent Claimant's true ability because he exhibited "significant hyperactive, off-task, and non-compliant behaviors during the administrations of most of the subtests." (Ex. K.) Although Claimant's academic skills were at or above grade level, his academic performance was below grade level expectations because his behaviors interfered with his learning. Claimant did not exhibit any difficulties with his fine motor or gross motor skills. Both Mother and Claimant's teacher expressed "very elevated concerns for his inattention, hyperactivity/impulsivity, defiance/aggression, and peer relations." In addition, Mother and Claimant's teacher noted Claimant's "unusual behaviors, self-regulation, and overall

Autistic like behaviors."Mother and Claimant's teacher found that Claimant had many behavioral characteristics similar to youth diagnosed with autism, including attention deficits, difficulty tolerating changes in routine, overreaction to certain sensory experiences and difficulty initiating, engaging in, and maintaining social contact.

C. Based on these findings, Ms. Chon concluded that Claimant did not meet the special education eligibility criteria as a student with a Specific Learning Disability or with autism. Specifically, Ms. Chon acknowledged that Claimant had some autistic-like behaviors insofar as he was resistant to change and had unusual responses to sensory experiences. However, Ms. Chon opined that Claimant did not suffer from autism because he was articulate and able to communicate his wants, needs, and questions. Ms. Chon also did not observe claimant engaging in any stereotypical or repetitive activities, the presence of which is indicative of autism. Ms. Chon believed that Claimant was eligible for special education based on an OHI classification because Claimant exhibited a heightened alertness to environmental stimuli that may be due to ADHD and that adversely affected his education performance.

PAST EVALUATIONS

14. On January 23, 2018, Dr. Alice A. Kuo, a pediatrician with UCLA Health, examined Claimant. DR. Kuo's report of the visit notes that Claimant suffers from ODD, although the basis of her diagnosis is unclear. (Ex. H.)Dr. Kuo did not prescribe any medical treatment for Claimant's condition. However, according to Mother, Dr. Kuo recommended that Claimant's family and school establish strict boundaries for Claimant and punish Claimant if he violated those boundaries.

15. A. On February 15, 2018, Susan Schmidt-Lackner, M.D., a member of the Early Childhood Partial Hospitalization Program at UCLA Stewart and Lynda Resnick Neuropsychiatric Hospital Claimant, examined Claimant for diagnostic evaluation and treatment recommendations. The report prepared by Dr. Schmidt-Lackner does not

contain any test results; the report also does not reflect whether Dr. Schmidt-Lackner conducted any formal testing of Claimant or Mother. Dr. Schmidt-Lackner appears to rely exclusively on her discussions with Mother and her observation of Claimant to make her findings. Although her report does not indicate the length of her examination, Mother testified Dr. Schmidt-Lackner's examination took approximately four hours. It appears that the examination took place in Dr. Schmidt-Lackner's office.

B. During her examination, Dr. Schmidt-Lackner observed that Claimant's eye contact was "extremely poor" and that Claimant "did not look at her." (Ex. 8, p. 2.) She noted that Claimant "was spinning a toy lizard in a self stimulatory manner" and his ability to relate socially was poor. Dr. Schmidt-Lackner also indicated that Claimant engaged in off-topic talking.

C. Dr. Schmidt-Lackner's interview with Mother revealed that Claimant has poor motor planning and runs into doors and walls. He also mouths many items, including shoelaces, pencils, erasers, and rulers. Mother reported that Claimant lines up his toys, is routine bound, and does not do well with change. Mother also noted that Claimant hand flaps when he is excited and upset, does not like loud noises, stares into space, and is extremely anxious.

D. Based on Claimant's developmental history and his clinical presentation, Dr. Schmidt-Lackner diagnosed claimant with Autism Spectrum Disorder (ASD).⁴ According to Dr. Schmidt-Lackner:

[Claimant] has persistent deficits in social communication
and social interaction across multiple contexts as manifested

⁴ In 2013, the psychiatric community began referring to a diagnosis of autism or autistic disorder as a diagnosis of ASD. The terms are used interchangeably in this Decision.

by deficits in social emotional reciprocity, (abnormal social approach and failure of normal back and forth conversation, failure to initiate or respond to social interactions). He also has deficits in nonverbal communicative behaviors used for social interaction (extremely poor eye contact). He also has deficits in developing, maintaining and understanding relationships, (difficulty adjusting behavior to suit various social context, difficulty in making friends, limited interest in peers). [Claimant] also has restricted repetitive patterns of behavior, interests or activities as manifested by stereotyped or repetitive motor movements use of interests or activities as manifested by stereotyped or repetitive motor movements use of objects or speech (hand flapping, echolalia, twirling). He also has insistence on sameness, and inflexible adherence to routines or ritualized patterns of verbal or nonverbal behavior (difficulty with transition, evening rituals[]). He has highly restricted fixated interests that are abnormal in intensity or focus (stuffed animals). He also has hyper reactivity to sensory input or unusual interest in sensory aspects of the environment (sensitivity to sound, mouthing objects and licking mother). All of these symptoms are impairing his functioning.

(Ex. 8, p. 3.)

E. In addition to a trained behavioral aide at school, Dr. Schmidt-Lackner recommended that Claimant receive 15 hours per week of in-home ABA services. If

Claimant's dysregulation continued despite the intensive ABA services,

Dr. Schmidt-Lackner suggested exploring medication. She also recommended that Claimant become a client of Service Agency and attend the UCLA Early Childhood partial hospitalization program for full interdisciplinary evaluation and formulation of a treatment program. As noted above, Claimant began ABA therapy in June 2018. Claimant was unable to attend the UCLA Early Childhood program because he was too old.

WRC EVALUATIONS

16. A. Mother sought Service Agency's services based on Dr. Schmidt-Lackner's ASD diagnosis. Yolanda Cora, S.W., conducted a psychosocial assessment of Claimant on March 15, 2018, based on conversations with Mother. (Ex. 6.) Melissa Bailey, Psy.D., a licensed clinical psychologist, conducted a psychological evaluation of Claimant on behalf of WRC on March 15 and 16, 2018, and she observed Claimant in his classroom at Public School on April 17, 2018.

B. During her examination, Dr. Bailey observed that Claimant was extremely hyperactive, exhibited poor boundaries, and engaged in contrary and defiant behavior. (Ex. 5.) However, at no time did Dr. Bailey observe Claimant engaging in stereotypical or repetitive behaviors; instead, she noted that Claimant's behavior was "very directed and purposeful" and that Claimant maintained eye contact. When observing Claimant in his classroom, Dr. Bailey noted that he made eye contact with her, had a difficult time sitting still, and needed constant redirection. Claimant repeatedly mocked his teacher, did not listen to directions, and was frequently argumentative and disruptive. His teacher reported to Dr. Bailey that Claimant has difficulty making friends because of his defiance and his rigidity. His teacher noted Claimant had meltdowns when he was disappointed and Claimant was constantly seeking attention from adults.

C. Dr. Bailey administered the Autism Diagnostic Observation Schedule, Second Edition, Module 2 (ADOS), and the Wechsler Intelligence Scale for Children, Fifth Edition

(WISC), to Claimant. Based on her observations, Claimant did not suffer from autism based on ADOS. Her written report did not include Claimant's ADOS scores. Claimant's cognitive skills under WISC were within the average to high range for verbal comprehension, visual spatial skills, and fluid reasoning. Claimant had a more difficult time with time tests for visual puzzles, digit span and coding, reflecting a relative weakness in terms of his working memory and processing speed.

D. Dr. Bailey assessed Claimant's adaptive function using the Vineland Adaptive Behavior Scales, Third Edition (Vineland), with Mother serving as the informant. Based on the response by Mother, Dr. Bailey found Claimant to be functioning overall in the average range. Claimant's communication skills scored in the high average range: he speaks in full sentences, and he reads and writes simple sentences from memory. Claimant scored average in the daily living skills: he is able to take care of all of his own hygiene and dressing issues. Claimant's motor skills scored in the average range as well: he can hold a pencil, cut out complex objects, and ride a bicycle with training wheels. Dr. Bailey found Claimant's socialization skills to be in the borderline range: he has a difficult time interacting with his peers and sharing, poor coping skills, and difficulty managing his emotions.

E. Dr. Bailey found that Claimant did not meet the criteria for ASD. Although Claimant had "an abnormal social approach," Dr. Bailey believed it was mostly attributable to his defiant behavior and nature. She found that Claimant showed rigidity of thinking and was quite literal, but that these traits were not determinative in her diagnosis. Dr. Bailey observed that Claimant was able to have a back-and-forth conversation when he wanted to and when he was not being defiant. She also noted that Claimant was able to maintain regular eye contact. While he had difficulty maintaining relationships, Dr. Bailey believed the difficulty was attributable more to defiance than because of an absence of wanting to play with his peers. Dr. Bailey did not note any stereotypical or repetitive motor

movements, highly fixated interests, or hyper- or hypo-reactivity to sensory input, all characteristics of autism.

F. Based on her observations, her discussions with Mother and the test results, Dr. Bailey diagnosed Claimant with ADHD, Combined Presentation, and ODD. Her report states in relevant part:

It is the opinion of the examiner that [Claimant's] symptoms more appropriately fit attention deficit hyperactivity disorder, combined presentation and oppositional defiant disorder. During the examiner's interactions with [Claimant], he was extremely defiant and many of his behaviors were extremely purposeful. Several times during the observation, he looked over at the examiner. At one point, he even made a dagger motion towards her. Oftentimes, he was interruptive and disruptive which are some of the core symptoms relative to the hyperactivity component of attention deficit hyperactivity disorder. Furthermore, the examiner saw him being extremely defiant with both her and his mother. One such example was him attempting to lock himself in a room and turn off the lights and tell the examiner that that was "her punishment."

(Ex. 5, p. 10.)

17. After reviewing Dr. Bailey's evaluation, Service Agency deemed Claimant ineligible for services and recommended a referral to the Department of Mental Health. (Ex. 7) However, in response to Mother's request for further evaluation, WRC scheduled a multidisciplinary community observation to observe Claimant at a playground on July 24,

2018.WRC Director of Clinical Services Thompson Kelly, Ph.D., WRC Chief Psychologist Kaely Shilakes, and WRC fair hearing specialist Mary Rollins participated in the playground observation.

18. A. Dr. Shilake testified at the hearing. She has been a licensed clinical psychologist for four years; before then, Dr. Shilakes worked for two years as a behavioral therapist working with children suffering from autism. Dr. Shilakes prepared a report of the July 24, 2018 community observation (ex. 4), and she was a member of the eligibility committee that deemed Claimant ineligible for regional center services. In her observation of Claimant on the playground, Dr. Shilakes found Claimant initiated and maintained frequent interactions with Dr. Kelly. Claimant sought Dr. Kelly out, conversed with him, and wanted Dr. Kelley to play with him. Claimant also gestured to his mother to look and see what he was doing. Dr. Shilakes testified that such conduct was not typical of autism.

B. Dr. Shilakes was also familiar with Dr. Bailey's report. She agreed that Dr. Bailey's observations of Claimant did not support an autism diagnosis. Dr. Shilakes opined that Claimant was aware of his defiance and intentionally sought attention, and such awareness was not typical in children suffering from autism. According to Dr. Shilakes, Claimant's defiance was dissimilar to the repetitive and fixated refusals to participate exhibited by autistic children. Dr. Shilakes acknowledged that autistic children expressed rage but she believed Claimant's rage was of a different nature. According to Dr. Shilakes, based on Claimant's mother's descriptions of Claimant's behavior and Dr. Bailey's report, Claimant's rage stems from his refusal to do what is asked of him, not from being denied a preferred activity, which is usual source of rage for an autistic child.

C. Based on Dr. Bailey's report and her own observation, Dr. Shilakes found that Claimant was substantially disabled in the area of self-direction because of his poor emotional, social, and coping skills. She did not find Claimant to be substantially disabled in his other adaptive skills.

19. Dr. Kelly, a licensed psychologist for over 20 years, also testified about his interactions on the playground with Claimant. Dr. Kelly found Claimant to be pleasant and engaging. Dr. Kelly was able to establish a rapport with Claimant, and he noticed Claimant had good eye contact and could track conversation. According to Dr. Kelly, Claimant was able to shift topics, respond to changing topics, and understood humor and innuendo. Dr. Kelly did not observe Claimant to act in a robotic or disassociated manner. He observed that Claimant suffered from anxiety, particularly when his mother left. He noted that Claimant had a level of awareness and of oppositionality that was different from an autistic child because Claimant's behaviors were an attempt to bring attention to himself and to control the situation. Dr. Kelly too acknowledged that Claimant exhibited some characteristics of autism, such as social deficits and sensory challenges. However, Dr. Kelly believed Claimant's anger and animosity were not consistent with autism, and his other behaviors suggested mental health issues, not a developmental disability. Dr. Kelly explained that autistic individuals were aloof, did not understand jokes, and their behaviors were chronic and pervasive. Dr. Kelly did not observe Claimant exhibiting any of these behaviors.

20. Dr. Shilakes and Dr. Kelly both took issue with Dr. Schmidt-Lackner's examination of Claimant. Neither believed Dr. Schmidt-Lackner followed best practices. They pointed to several deficiencies in her examination, including her limited observation of Claimant in a single setting and her failure to conduct any formal testing, assessments, or autism diagnostic interviews.

21. According to WRC's Closing Statement, Dr. Shilakes and Dr. Kelly both had the opportunity to review the August 2018 IEP, the FBA, and the PE Assessment submitted by Mother after the hearing. The information contained in these reports did not alter their conclusions that Claimant does not suffer from autism.

MOTHER'S EVIDENCE

22. Mother credibly testified to Claimant's behavioral issues both in and out of school. She testified that Claimant's behavior has always been problematic. She explained how he could no longer participate in Sunday school because of his misconduct. Mother reported that Claimant's language abilities have regressed since his expulsion from school. She also reported that claimant constantly picks at his nose and chews on his collar, his nails, and her clothes. Mother has been able to calm Claimant by isolating him, speaking gently to him, and encouraging him to jump or move. She contended that Claimant is able to track eye movement because she has taught him to look at people's eyes when they are talking to him. Mother testified that Claimant suffers from anxiety when separated from her. She also testified that Claimant is obsessed with his stuffed animals and only wants to watch soccer on television. He does not have friends and screams often. According to Mother, Claimant runs into walls and does not learn from his mistakes. However, once Claimant calms down, he has the ability and awareness to apologize for his conduct and "act normally."

23. Mother is an active and vocal advocate for her son. She has tried to pursue many avenues of support for Claimant, and she has been given conflicting diagnoses. She believed that her son suffered from autism after noting that he shared many similar behaviors with her friend's children who have been diagnosed as autistic.

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LEGAL CONCLUSIONS

JURISDICTION

1. The Lanterman Act governs this case. (Welf.& Inst. Code, §§ 4500 et seq.)⁵ A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-8.)

2. The burden of proof is on the individual who seeks government benefits or services. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid.Code, § 115.) In this case, Claimant has the burden of proving by a preponderance of the evidence that he suffers from a developmental disability to be eligible for regional center services.

LEGAL CONCLUSION PERTAINING TO ELIGIBILITY GENERALLY

3. Section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means 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 intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions

⁵ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. A. The definition of "developmental disability" contained in California Code of Regulations (CCR)⁶, title 17, section 54000, subdivision (a), mirrors the definition found in section 4512, subdivision (a).

B. CCR section 54000, subdivision (c), excludes certain conditions from the definition of a developmental disability under section 4512. The excluded conditions are:

- (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
- (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.
- (3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which

⁶ All references to the CCR are to title 17.

are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

5. To prove the existence of a qualifying developmental disability within the meaning of section 4512, Claimant must show that he has a "substantial disability."

Pursuant to section 4512, subdivision (j)(1):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

6. Additionally, CCR section 54001 states, in pertinent part:

(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.

LEGAL CONCLUSIONS SPECIFIC TO THIS CASE

7. To establish eligibility, Claimant must prove by a preponderance of the evidence that he suffers from an eligible condition, i.e., autism, intellectual disability, cerebral palsy, epilepsy, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. He must further establish that he is substantially disabled by his condition.

8. Claimant did not establish by a preponderance of evidence he was substantially disabled in at least three of the areas defined in section 4512, subdivision(1)(1) or CCR section 54001, subdivision (a). Claimant established that he was substantially disabled in the area of self-direction. (Factual Finding 18C.) However, Claimant did not establish that he was substantially disabled in any other area. Claimant uses receptive language, excels academically, has average motor skills, and can take of himself in an age-appropriate manner. (Factual Findings 8A, 13B, 16D, 18C.)

9. Claimant did not establish by a preponderance of evidence he suffers from the developmental disabilities defined in sections 4512, subdivision (a), or CCR section 54000, subdivision (a). Claimant does not suffer from epilepsy, cerebral palsy, intellectual disability, or a condition similar to intellectual disability.

10. Claimant did not establish by a preponderance of evidence he suffers from autism. Three licensed psychologists and a school psychologist evaluated Claimant and

each concluded that he did not suffer from autism. Although the three psychologists and school psychologist each acknowledged that Claimant exhibited autistic-like behaviors, they noted that the behaviors were not persistent and were the result of emotional and mental health issues, rather than a developmental disability. (Factual Findings 13, 16, 18, 19.) Dr. Schmidt-Lackner's report is not persuasive evidence that Claimant suffers from autism given the limited nature of her observations and her failure to administer any testing.

11. In light of Claimant's inability to demonstrate he is substantially disabled or suffers from autism, he has not established his eligibility for services under the Lanterman Act.

ORDER

Claimant's appeal of Service Agency's determination that he is not eligible for services from Service Agency is denied.

Dated:

CINDY F. FORMAN

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.