BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: CLAIMANT, v. INLAND REGIONAL CENTER, Service Agency.	OAH No. 2016070687

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on September 7, 2016.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was present.

The matter was submitted on September 7, 2016.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of Autism Spectrum Disorder (autism)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On July 7, 2016, following a review of records provided by claimant and an assessment conducted by IRC Staff Psychologist Ruth Stacy, Psy.D., IRC notified claimant, a 22-year old man, that he was not eligible for regional center services because the records provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

2. On July 16, 2016, claimant's authorized representative filed a Fair Hearing Request appealing IRC's determination. In the fair hearing request, claimant's representative wrote: "My son is being discriminated against due to his intelligence, although he still has a substantial mental functioning disorder." In order to resolve the matter, claimant's mother requested IRC find claimant eligible for services, and refer him to Desert Arc, a facility that will assist claimant with social interaction, job skills, and independent growth.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of Autism Spectrum Disorder. The diagnostic criteria includes persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual

must have a DSM-5 diagnosis of autism spectrum disorder to qualify for regional center services under autism.

EVIDENCE PRESENTED BY IRC

4. IRC reviewed and considered the following documents submitted by claimant's authorized representative:

- Outpatient visit record by Prem Salhotra, M.D., dated August 15, 2013
- Letter dated November 19, 2009, from T.R. Stiles, D.O.
- Psycho-educational evaluation conducted by Carolyn Beaver, School Psychologist, dated July 21, 1999
- Psycho-educational evaluation conducted by Mary Wilson, School Psychologist, dated December 15, 1999
- Initial assessment by Department of Mental Health dated January 29, 2000
- Report of psychological testing conducted by Sarah Rushbrook, Ph.D., dated September 12, 2001
- Psycho-educational evaluation conducted by Mary Wilson, School Psychologist, dated October 16, 2002
- Psycho-educational evaluation conducted by John Cottrell, Psy.D., School Psychologist, dated March 5, 2004
- Psychological assessment report completed by Edward Frey, Ph.D., on behalf of IRC, dated, January 3, 2007
- Psycho-educational evaluation report by Eric Smith, School Psychologist, dated March 1, 2010
- Letter and records from Robert Karman, Ph.D.

5. Dr. Stacy testified on behalf of IRC. Prior to conducting her assessment of claimant, Dr. Stacy reviewed claimant's records. Dr. Stacy concluded that the records did not suggest a diagnosis of autism based on the criteria set forth in the DSM-5 and did

not show claimant had a substantial disability as a result of autism. Thus, claimant was ineligible for regional center services under the Lanterman Act. Dr. Stacy noted also that she considered whether claimant's records demonstrated a history of Asperger's Syndrome[1], which is similar to autism, with the exception that a person with Asperger's Syndrome will typically not exhibit deficits in intellectual ability or language.

Dr. Stacy reviewed the November 19, 2009, letter from Dr. Stiles. Dr. Stiles stated in the letter that he had seen claimant at his clinic and claimant carried a diagnosis of Major Depressive Disorder, Attention Deficit Hyperactivity Disorder (ADHD), Mood Disorder, and Psychotic Disorder. Dr. Stiles noted that when removed from antipsychotic medications, he became anxious, irritable, agitated, and angry. Thus, Dr. Stiles felt it was important to continue the medication. Dr. Stiles also noted that claimant may suffer from Bipolar Disorder. It is unknown why or to whom Dr. Stiles wrote the letter, but language in the letter indicated he wrote the letter in order to assist claimant with obtaining some sort of benefit based on "mental health difficulties." Dr. Stacy testified that the letter from Dr. Stiles did not indicate any problem with autism, Asperger's Syndrome, or any other qualifying diagnosis under the Lanterman Act.

Dr. Stacy noted that the psycho-educational evaluation conducted by Carolyn Beaver, School Psychologist, on July 21, 1999, when claimant was 5 years old, also did not show claimant had autism or Asperger's Syndrome. The report described claimant as a pleasant and easy-going child, who was cooperative and who easily established rapport with Ms. Beaver during testing. Ms. Beaver concluded claimant was a friendly

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[1] Asperger's Syndrome was considered a separate diagnosis from autism prior to 2013. In 2013, the DSM-5 eliminated Asperger's Syndrome as a stand-alone diagnosis and instead incorporated many of the symptoms of Asperger's Syndrome into the new diagnostic criteria for Autism Spectrum Disorder.

child with average cognition, language, achievement and motor skills, but who showed mild deficits in adaptive behavior. Ms. Beaver concluded claimant did not qualify for special education services based on her evaluation. Dr. Stacy testified that Ms. Beaver's description of claimant showed a child with a high level of social awareness, which is atypical of a person with autism or Asperger's Syndrome.

Dr. Stacy concluded that he December 15, 1999, psycho-educational evaluation completed by Ms. Wilson when claimant was 5 years old, also did not show behaviors consistent with autism or Asperger's Syndrome. The report noted claimant was very motivated during testing, cooperative, and easily established rapport with Ms. Wilson. Claimant was talkative and readily interacted with the examiner. The report contained no indication of autism or Asperger's Syndrome.

The initial assessment by Department of Mental Health dated January 29, 2000, when claimant was 5 years old concluded claimant qualified for mental health services from the local school district, but again did not contain any diagnosis of autism or Asperger's Syndrome. To the contrary, the report documented behavioral problems such as hyperactivity and inattention. Dr. Stacy concluded that this report established more of a basis for a mental health disorder diagnosis than a developmental disability.

Dr. Stacy concluded that the report on psychological testing completed by Dr. Rushbrook on September 12, 2001, when claimant was 7 years old, did not show behavioral concerns typical of a person with autism or Asperger's Syndrome. Dr. Stacy pointed out that Dr. Rushbrook documented that claimant's profile was consistent with someone who exhibited attention and hyperactivity problems. Dr. Stacy also noted that nowhere in the report did it indicate whether Dr. Rushbrook completed any assessments or tests to diagnose autism.

Dr. Stacy testified that the psycho-educational report dated March 17, 1994, completed by Ms. Wilson when claimant was 8 years old, documented behavioral

concerns but did not make any reference to autism or Asperger's Syndrome. Instead, the report noted claimant had been diagnosed with a specific learning disorder. The report documented scores across all the cognitive and intellectual assessments that were varied and erratic. Some of the scores indicated claimant was well below average. Other scores indicated claimant was performing at an average or high average level. At the time of his assessment, claimant was taking Depakote, Risperdal, Zoloft, Effexor, and Lithium. Ms. Wilson opined in her report that the "validity of the test results are in question due to the adverse [e]ffects the medication may be having . . . ." Dr. Stacy concluded that this report was not indicative of a developmental disability.

Regarding the psycho-educational evaluation completed by Mr. Cottrell on March 5, 2004, when claimant was 9 years old, Dr. Stacy noted that claimant's diagnosis was changed from specific learning disorder to emotional disturbance. She also noted that the testing did not reveal any concerns of any kind of developmental disability.

Dr. Frey evaluated claimant on January 3, 2007, when claimant was 12 years old. The evaluation involved comprehensive intelligence, behavioral, cognitive, adaptive, and socialization assessments. Dr. Stacy noted that claimant's IQ score was 94 and his adaptive scores were in the 60's, which can be indicative of a low or mild deficit. Dr. Frey's diagnostic impressions were that claimant had ADHD and psychotic disorder, and autism was specifically ruled out. Dr. Frey wrote concluded the following:

> Overall, the clinical interview focused on the possibility of autism and suggests that [claimant] does not present as a child with an autistic disorder. There is some overlap in symptomology due to his psychosis and ADHD. Primary features of autism are not present. There was no early deficit in his communication and he does not display echolalic speech. [Claimant] is able to use pronouns correctly and uses

> "I" to refer to himself. There is no repetition of stereotyped phrases.
>
> [Claimant] does not engage in finger flicking or hand flapping. He is not obsessed with licking or smelling objects.
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> [Claimant] does have some difficulty in social relationships because of his immaturity. At this point, however, he is affectionate with his mom. There is no ritualistic type behaviors reported. [Claimant] is able to deal with change appropriately.
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> [¶] . . . [¶]
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> Overall analysis and synthesis of the testing data does not suggest that [Claimant] presents as a child with [an intellectual disability]. He does not present with a diagnosis of autism. [Claimant] does have behavior problems and some oddities of behavior secondary to psychosis and [ADHD].

Dr. Stacy agreed with Dr. Frey's conclusions.

Regarding the psycho-educational evaluation completed by Mr. Smith when claimant was 15 years old, Dr. Stacy noted that the report documented claimant's test taking behavior as highly motivated, talkative, and cooperative. Claimant was also observed to have positive self-esteem. Dr. Stacy said these behaviors are not consistent with a person who has autism.

The outpatient visit record by Dr. Salhotra, M.D., dated August 15, 2013, when claimant was 19 years old, listed Asperger's Syndrome, ADHD, and Bipolar Disorder as three of claimant's "current problems." Dr. Stacy pointed out, however, that the record

did not indicate what testing was completed in order to reach these diagnoses and nothing in claimant's history warranted such a diagnosis.

Dr. Stacy reviewed the March 4, 2016, letter provided by Dr. Karman. In the letter, Dr. Karman stated that the school psycho-educational reports never evaluated claimant for Asperger's Syndrome or autism. Dr. Karman administered the Ritvo Autism-Asperger's Diagnostic Scale (RADS). The RADS is a subjective test, scored based on claimant's self-reported answers to a series of questions. According to Dr. Karman's letter, a score of 65 on the RADS is indicative of autism. Claimant scored a 192. As a result, Dr. Karman concluded claimant had autism. Dr. Stacy pointed out that Dr. Karman's letter stated claimant related well to animals, is very logical in his thinking, had an above-average IQ, and warned up to people as he gets to know them. Dr. Stacy said these observations are not consistent with a person who has autism. Finally, Dr. Stacy noted that Dr. Karman indicated claimant was in the ADHD combined diagnostic category and his scores were significant for Bipolar disorder.

6. Dr. Stacy conducted her own assessment of claimant on July 5, 2016.

Dr. Stacy administered three measures, conducted a diagnostic interview, observed claimant, and reviewed his file. According to Dr. Stacy, the Autism Diagnostic Observation Schedule (ADOS) is considered the gold standard assessment tool for diagnosing autism. It measures claimant's performance in structured activities. In order to be diagnosed as autistic, a person must obtain certain scores in communication, reciprocal social interaction, and an overall score within a certain range. Claimant's scores indicated he did not have autism.

The Street Survival Skills Questionnaire (SSSQ) measures a person's adaptive skills in the following 11 areas: Basic concepts, functional signs, tools, domestics, health and safety, public services, time, money, and measurements. The test is meant to measure how well a person would be able to take care of themselves. Claimant's SSSQ score was

99, placing him in the overall average range. His individual scores placed him in the average range, with one area, time management, in the above average range.

The Wechsler Adult Scale of Intelligence –Fourth Edition (WASI -IV) placed claimant, overall, in the average range of intellectual functioning.

Dr. Stacy observed that claimant used sentences in a correct fashion. He varied his intonation and volume while speaking and did not use repetitive speech. No echolalia was observed. Claimant offered spontaneous thoughts about his feelings and emotions. He responded appropriately to Dr. Stacy. Claimant used a lot of emphatic gestures and talked with his hands. Claimant initiated and participated in reciprocal social interactions and maintained consistent eye contact.

Regarding a review of claimant's past records, Dr. Stacy testified that the records show a mental health issue and not a developmental disability. She testified that claimant's adaptive scores varied widely over time. If a person truly has a developmental disability, one would expect to see consistent deficits in adaptive scores over time. Moreover, claimant did try to make friends growing up; but because of his other psychiatric conditions, he experienced difficulty in that area. Claimant likes to play video games; he told Dr. Stacy about how he saved up to purchase a particular game he enjoys playing with a friend. Dr. Stacy said this shows social interest and the fact that he can relate to another person. She does not see claimant's enjoyment of video games as a restricted or unusual interest typical of a person with autism.

Dr. Stacy concluded that claimant did not meet the criteria for regional center services under the Lanterman Act. She concluded he did not meet the diagnostic criteria for autism under the DSM-5, and even if he did, he does not have significant functional limitations in three or more of the following areas of major life activity. Dr. Stacy's testimony was credible.

EVIDENCE PRESENTED BY CLAIMANT

7. During the entirety of the hearing, claimant sat next to his mother, quietly. He did not move or fidget. He did not show any expression. He did not show any repetitive movements or behaviors. When Dr. Karman arrived, claimant acknowledged his presence and appropriately responded to Dr. Karman's greeting. Claimant was asked if he wished to testify; he politely declined.

Testimony of Dr. Karman

8. Dr. Karman is claimant's psychologist and testified at the hearing. Dr. Karman has been treating claimant for two years. Dr. Karman believes claimant has autism. Dr. Karman administered the RADS assessment because he finds that test useful when it comes to assessing people with autism. As he explained in his above-referenced letter, claimant scored a 161 on the RADS assessment, placing him well within the range for autism. Dr. Karman explained that when he reviewed the same reports reviewed by Dr. Stacy, he saw symptoms and behaviors consistent with autism. He said many of the behaviors could be consistent with autism or another disorder, and he is not surprised that the school psychologists did not document anything relating to autism. In his opinion, claimant did not have ADHD, Bipolar disorder, or psychosis. Instead, the behaviors labeled as such were actually a result of his autism. In reviewing the criteria for regional center services under the Lanterman Act, Dr. Karman felt claimant met the criteria because, although his condition has improved over time, claimant has difficulty relating to other people, his self-care skills are low, he does not have the capacity for independent living, and does not have the ability to be economically self-sufficient. Dr. Karman's testimony was credible.

Testimony of Claimant's Mother

9. Claimant's mother is concerned that claimant is going to have difficulty as he goes forward trying to get a job and live an independent life. She does not feel he will be able to do so without regional center services.

Claimant's mother testified that claimant displayed a lot of autistic-like behaviors growing up so she is not sure why he was never diagnosed with autism. She said claimant only showed anger until he was 6 years old; she had to buy a book and teach him emotions. Claimant was "somewhat" potty trained but had bed wetting problems until the age of 14 and bowel accidents on a daily basis. Claimant smeared feces on the wall until age 14 and would tell her he did not know why he did it. Claimant has "sensory issues" and is very much affected by smells. Claimant has his own bowl and spoon that she can only wash with water because he will know if it was washed with soap and it bothers him. Claimant "banged" his head on the wall from the time he was four years old until he was about 12 years old. Claimant paces a lot, which claimant's mother feels is a repetitive action. Claimant did not want to be touched when he was younger; if she would try to hug him he would stiffen up. With her assistance, claimant has warmed up and now he has gotten to the point where he can hug family members.

Claimant's mother testified that claimant does not socially interact on a normal basis with anyone. Since he has been a child, he has been teased consistently by children because he was different and "easily flustered." Claimant's ability to communicate has improved over time, but it depends on with whom he is communicating. For example, recently there was a girl at their church that took an interest in claimant. She has come to visit claimant and tries to talk to him but claimant gets nervous, anxious, and confused. According to claimant's mother, claimant does not know how to react to someone who has a different opinion than he does because to him, a different opinion is not logical.

Claimant "rehearses" things in his head, and is very methodical when he approaches different tasks. Claimant's mother has had to break down tasks his whole life in order to make things less complex.

Claimant's mother believes claimant has deficits in the areas of self-care, receptive and expressive language, self-direction, capacity for independent living, and economic self-sufficiency. Claimant's mother wants claimant to become eligible for regional center services so she can place him at the Desert Arc Program.

Claimant's mother's testimony was credible.

Letter From Ronald Cooley

10. Claimant's mother provided a letter from Ronald Cooley, the pastor at the church where claimant and his family attend services. According to Rev. Cooley, claimant has "tremendous challenges" in his social interactions and exhibits anxiety around people. Claimant will help collect offerings at church, but claimant requires specific direction and supervision. Rev. Cooley wrote that claimant is very smart and caring but seems to have a "cognitive disconnect" so he will not be "employable." Rev. Cooley's letter supplemented the testimony of claimant's mother.

Decision by Social Security Administration

11. Claimant's mother presented a decision made by Social Security Administration stemming from an administrative hearing held on February 19, 2015, finding claimant eligible for social security benefits under federal law. Although there is some discussion in the decision regarding claimant's behaviors, symptoms, past medical history, the decision and evaluation of evidence presented at the hearing related to federal statutes and regulations concerning social security eligibility, and not eligibility under the Lanterman Act. Therefore, the decision was not relevant and was not considered in reaching a decision in the instant case.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.
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> [¶] . . . [¶]
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> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to

prevent the dislocation of persons with developmental disabilities from their home communities.

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that "originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual." A developmental disability includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

4. California Code of Regulations, title 17, section 54000, provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation,[2] cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or

[2] Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

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

5. California Code of Regulations, title 17, section 54001, provides:

(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.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

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EVALUATION

6. Claimant had the burden to establish eligibility for regional center services. None of the documents introduced in this hearing established that claimant has autism. Indeed the documents showed quite the contrary; they appeared to establish that claimant suffers from psychiatric disorders and ADHD, which do not qualify him for services under the Lanterman Act.

The one document that actually mentioned Asperger's Syndrome was the outpatient visit record dated August 5, 2013, but that document did not contain any testing or evaluations to explain how that diagnosis was reached. Further, given claimant's other diagnoses over the years of ADHD, Bipolar Disorder, Mood Disorder,

Psychotic Disorder, and evidence of behaviors wholly inconsistent with a diagnosis of autism, a preponderance of the evidence did not establish claimant had Asperger's Syndrome or autism.

The testimony of both Dr. Stacy and Dr. Karman was credible. Dr. Karman administered one test to claimant, based on claimant's self-reporting, to determine claimant had autism. Dr. Stacy conducted an evaluation that included multiple assessments designed specifically to assess a person for autism in an objective manner. Based on claimant's test results and her clinical observations, claimant's behaviors and intelligence level are inconsistent with a person who has autism. Thus, Dr. Stacy's assessment was given more weight than that of Dr. Karman. Overall, claimant's behaviors may be affected by the medications he takes as well as the psychiatric disorders that have long been a part of claimant's medical history. In other words, while the behaviors claimant has exhibited over time may be attributable to autism, they are also attributable to ADHD, Bipolar Disorder, Mood Disorder, and Psychotic Disorder. What is notably missing from any of the psycho-educational evaluations and other assessments conducted in the past 22 years of claimant's life, as Dr. Stacy explained, are the central features of autism under the DSM-5: persistent deficits in social communication and social interaction across multiple contexts and restricted repetitive and stereotyped patterns of behavior, interests, or activities.

On this record, it cannot be concluded that claimant has autism. Accordingly, claimant does not qualify for regional center services under the Lanterman Act.

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ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services is denied.

DATED: September 19, 2016

_____/s/_____

KIMBERLY J. BELVEDERE

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 ninety days.