

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter the Eligibility of:

Claimant,

v.

San Diego Regional Center,

Service Agency.

OAH No. 2014030539

DECISION

This matter came on regularly for hearing on July 1, 2014, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Diego, California.

Ronald House, attorney at law, represented the San Diego Regional Center (SDRC).

M.H., claimant's mother, represented claimant.

Oral and documentary evidence was received and the matter was submitted on July 1, 2014.

ISSUES

1. Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a diagnosis of autism?
2. Is claimant eligible for regional center services under the Lanterman Act based on a diagnosis of mental retardation?
3. Is claimant eligible for regional center services under the Lanterman Act as a person who has a disabling condition that is closely related to mental

retardation or that requires treatment similar to that required for mentally retarded individuals?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. Claimant is a thirteen year old boy who lives with his mother, M.H. M.H. sought regional center services for claimant because he was having problems at home and at school. In a discussion with M.H. on February 10, 2014, representatives from SDRC advised M.H. that claimant was not eligible for regional center services because he did not fit the criteria for services as required by the Lanterman Act. By letter of the same date, SDRC confirmed the determination that claimant was not eligible for services.

2. On March 6, 2014, M.H. signed and timely filed a Fair Hearing Request appealing SDRC's decision. In her hearing request she stated that she believed her son qualified for regional center services for the following reason: "My son has been diagnosed [with a] severe mood disorder and is gravely disabled and not functioning well at home or school." M.H. asked the SDRC to review claimant's "updated evaluation and school IEP." She suggested that claimant required independent living services. In her Fair Hearing Request, M.H. also requested an informal meeting to try to resolve the matter.

3. On March 31, 2014, the parties met for an informal meeting. The parties reviewed several documents including a January 2014 psychological evaluation performed by Dr. Beatriz Netter, Ph.D.; claimant's then current Individualized Education Plan (IEP); and a March 2014 Social-Emotional Assessment report completed by the school district claimant attended. At the conclusion of the informal meeting, Neil R.

Kramer, M.S., Executive Director Designee, agreed to defer his decision regarding claimant's eligibility until additional records could be obtained.

4. Additional records were obtained and reviewed by SDRC's Developmental Disability Screening Team (DDST); however, on June 23, 2014, the DDST confirmed that claimant did not meet the eligibility criteria to receive services from the SDRC. By letter dated June 24, 2014, SDRC advised M.H. of its determination.

5. M.H. disagreed with SDRC's determination, and the matter proceeded to hearing.

#### BACKGROUND

6. Claimant's mother did not experience any complications during her pregnancy or with claimant's delivery. M.H. reported that claimant developed normally for the first six years of his life, although M.H. considered him to be extremely shy. M.H. first became concerned about claimant's development when he was six years old. Her concerns centered on the fact that he was "more quiet than the other kids," and she had to "break things down more" academically for him to learn.

7. M.H. reported that, in 2011, claimant was identified by his school district as possibly having Asperger's Disorder. M.H. stated that, beginning in April 2013, claimant became extremely aggressive. In June 2013, claimant began seeing a therapist and receiving Therapeutic Behavioral Services at home for anger outbursts and non-compliant behaviors.

#### HISTORY OF CLAIMANT'S DISABLING CONDITIONS

8. Claimant's report cards from third and fourth grades indicate that claimant is academically delayed in reading, writing and mathematics. He is described as very quiet and shy. He received "outstanding" marks for both years in classroom and playground behavior.

9. School psychologist Lisa M. Aguilar evaluated claimant in April 2012 when claimant was eleven years old and in the 4th grade. She found claimant to be cooperative and polite during the assessment, and she felt that a rapport was established. In her Psycho-Educational Assessment Report dated April 20, 2012, Ms. Aguilar estimated that “[claimant’s] ability falls at least within the average range.” Ms. Aguilar concluded that claimant met the criteria for autism, speech and language impairment, and specific learning disability under the Education Code.

10. An IEP dated April 24, 2012, was prepared by claimant’s school district following his assessment by Ms. Aguilar. As recommended by Ms. Aguilar, the IEP classified claimant as having a primary disability of autism and a secondary disability of speech or language impairment. It noted that claimant “displays autistic-like behaviors which affect his ability to progress in the general education curriculum. He also displays an expressive language delay.” The IEP describes claimant as “a quiet, friendly boy who likes soccer.” Claimant spent a portion of the school day in general education classes and a portion in special education classes. Although claimant showed deficiencies on standardized tests in English and mathematics, it was determined by the IEP team that claimant would be placed in the 6th grade the following school year, either in a district public school or at Quest Academy, a public school for students who have difficulty adjusting to traditional middle school programs.

11. Claimant’s IEP was amended on June 14, 2013. The amendment to the IEP was needed because claimant was transferring to another school district. The IEP noted that “If [claimant] were staying in [his current school district] the district would offer a placement in a [special day classroom] with supports for students with Autism.” It was contemplated that claimant would be in the special day classroom for 85 percent of the school day.

The amended IEP stated that claimant did better in a smaller, structured environment than in larger groups. The special education teacher reported that claimant was "isolating himself socially. He does not want people to look at him and will sit under a table at breakfast and lunch time." The regular education teacher added that claimant had regressed in his willingness to do work and follow instructions. She stated that he had "become verbally and physically aggressive toward other students."

12. On June 30, 2013, claimant was involuntarily placed on a 72-hour hold in a psychiatric facility because he was aggressive with M.H. and hurt her. He was reported to have said he was not sorry and that he planned to hurt her more. Claimant was released the following day as he appeared calm and cooperative. It was noted on the discharge papers that claimant "appears to be struggling with recent changes in [his] living situation."

13. On January 14, 2014, a psychological evaluation of claimant was performed by Dr. Netter for the SDRC. Dr. Netter noted that claimant's then IEP categorized claimant as having a primary disability of autism and a secondary disability of speech or language impairment.

Dr. Netter observed that claimant did not respond to her when she greeted him, and he "engaged minimally" with her throughout her evaluation. She found it "impossible to establish a rapport or engage in reciprocal conversation." Claimant did not fully cooperate with the testing procedures but provided sufficient responses to ascertain that claimant understood what was being asked of him. Dr. Netter's impression was that claimant's "lack of engagement and participation did not have the same quality as the lack of engagement seen in autism and that it was primarily due to significant social anxiety and likely depression."

Dr. Netter's report described the tests she administered during her evaluation of claimant (Wechsler Intelligence Scale for Children IV, Vineland Adaptive Behavior Scales Second Edition<sup>1</sup> and Autism Diagnostic Observation Schedule – 2) and provided his scores. Most of claimant's scores were in the extremely low to low-average range. In the Vineland Adaptive Behavior Scale, claimant scored in the 4th percentile which indicated a moderately low level of adaptation. Dr. Netter expressed doubt that the test scores obtained accurately reflected claimant's abilities. She stated that "it is feasible that [claimant's] current functioning is impacting his performance and that therefore the scores he obtained in the intelligence test may be an underestimate of his true cognitive potential and not a good predictor of future functioning."

Dr. Netter concluded "based upon all the information gathered for this evaluation, that [claimant] does not meet criteria for the autism spectrum disorder in that he does not have the qualitative impairment in social communication characteristic of this disorder, nor the repetitive or restricted interests or activities necessary for the diagnosis." She found that the "described history of symptoms and of his development, in addition to the observations in this evaluation, appear to be more consistent with the possibility of an emotionally-based disorder rather than the neuro-developmentally-based autism spectrum disorder."

14. On February 5, 2014, school psychologist Adrienne Cornish sent an email to M.H. detailing her observations of claimant in the school setting. In addition to very detailed descriptions of claimant's conduct, Ms. Cornish noted in several areas that the conduct she observed was dissimilar to the conduct she observed in students with Autism Spectrum Disorders.

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<sup>1</sup> This diagnostic scale was completed by claimant's mother.

15. As previously noted, on February 13, 2014, claimant went through an Emergency Screening Unit. On February 19, 2014, claimant was placed on a 72 hour hold in a psychiatric facility for suicidal ideation. In an IEP dated March 17, 2014, it was noted that claimant "has been repeatedly hospitalized for observation. He currently presents assaultive behaviors towards his mother, and in school he has shut down and decompensated significantly since enrolling in [the school] November 12, 2013. [Claimant] is currently prescribed Prozac . . . for diagnosed depressive disorder."

16. Sometime around February 24, 2014, and before March 4, 2014,<sup>2</sup> Ms. Cornish administered a Social-Emotional Assessment to claimant. Under the heading "Reason for Referral" Ms. Cornish wrote that claimant

has been increasingly depressed, anxious, and recently has decomposed significantly. He has recurrent thoughts of suicide and self-harm. He states he wants to die, shoot, or hurt himself. He has reportedly thrown himself on the ground at home and has been hitting his head. At school, he has reported that he was sore from having thrown himself to the ground "too hard."

Ms. Cornish noted that claimant had been hospitalized from February 13 to 16 for assaulting his mother by kneeling her and punching her in the face and was re-hospitalized from February 19 through 24 for suicide ideation and threatening to harm himself. In a seven-month period from June 20, 2013, to February 23, 2014, claimant had

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<sup>2</sup> The date of the assessment report is March 4, 2014, and it refers to incidents that occurred on February 24, 2014; however, IEP notes dated February 21, 2014, refer to the report.

been hospitalized for 33 days for emotional disturbances. Claimant did not engage in aggressive conduct at school but had spoken of wanting to hurt certain children and staff who, he believed, were talking about him or bullying him.

Claimant scored in the severe clinical depression range in tests administered by Ms. Cornish. Additionally, clinically significant concerns were identified in several areas, including personal adjustment, emotional symptoms and behavior symptoms. Ms. Cornish concluded that

[Claimant] is experiencing a significant disruption in his ability to engage in academics and learning. He has decompensated significantly since entering [his school]. His ability to participate and learn is severely impaired by his pervasive emotional upset and agitation, severe anxiety, and depression. He is currently gravely disabled and believed to be in a crisis state. He has experienced multiple hospitalizations for aggressive acts on mom and suicidal ideation.

17. On March 17, 2014<sup>3</sup>, an IEP meeting was held to conduct an annual review of claimant's progress. The IEP listed claimant's primary disability as Emotional Disturbance and his secondary disability as Intellectual Disability. In response to an instruction to "[d]escribe how student's disability affects involvement and progress in

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<sup>3</sup> There is a confusion of dates relating to this IEP. Some documents indicate the meeting was held on March 17, 2014; however, the IEP contains a date of February 21, 2014. The IEP noted that claimant was "currently placed in a 72 hour hold," and that may be the reason for holding an IEP meeting with claimant's mother in March.



general curriculum . . .” the IEP notes that claimant “has declined significantly in his functioning ability both academically and emotionally due to recent decompensation related to diagnosed mental health disorders.”

Other notes in the IEP state that claimant’s “ability to demonstrate his academic skills is significantly impaired at this time as he is gravely emotionally disabled (in the throws [sic] of a psychiatric crisis.). His scores reflect a decline in scores which may be related to a decompensation noted in emotional/mental functioning.” The IEP recommends that claimant’s mental health needs be met “in order to stabilize [him] and thus begin to target his communication skills.”

Claimant was described as a child who rarely speaks, keeps his head on or under his desk or pulls the hood from his sweatshirt over his head, shuts down if others focus on him, sometimes goes for an entire school day without eating or drinking, and cries deeply or laughs for no apparent reason. The IEP stated that claimant was seeing a therapist who expressed that “even if she were to give him daily therapy sessions, [the therapist] feels this would be an inadequate level of support; that he currently requires a higher level of care.”

The IEP team notes contain the following discussion:

[Claimant’s] last IEP states his primary handicapping condition to be Autism and secondary handicapping condition to be speech and language impairment. Team does not feel this is an accurate reflection of [claimant’s] current status, and current assessment throws the diagnosis of Autism into question. . . .

[¶] . . . [¶]

[Claimant may not be appropriate for [regional center] services given that his disability appears to be an emotionally based disorder rather than a developmental disability, although the ability to function is equally impaired.

[Claimant] is experiencing a significant disruption in his ability to engage in academics and learning. He has decompensated significantly since entering [a new school]. His ability to participate and learn is severely impaired by his pervasive emotional upset and agitation, severe anxiety, and depression. He is currently gravely disabled and believed to be in a crisis state. He has experienced multiple hospitalizations for aggressive acts on mom and suicidal ideation, with his most recent hospitalization being the day before yesterday, February 19, 2014. He was hospitalized February 13, 2014 for assaulting his mother; causing her significant harm and landing her in the emergency room with a bloodied nose and black eye.

The IEP noted that claimant's mother agreed with the IEP, including the change of the primary handicapping condition from autism to emotional disturbance.

18. Based on Dr. Netter's report and her conclusion that claimant did not meet the criteria for autism spectrum disorder or mental retardation, the regional center concluded that claimant was not eligible for regional center services.

#### DR. EISNER'S TESTIMONY

19. Harry Eisner, Ph.D. has a master's degree and obtained a doctorate in clinical psychology in 1978. He is licensed in California as a clinical psychologist. He has

served as clinical psychologist for SDRC since 1988 and currently coordinates psychological services at the service agency. Dr. Eisner has extensive experience diagnosing various disorders, including autism, and has conducted thousands of evaluations. He supervises psychologists, reviews reports, and is regularly involved in evaluating what he characterized as "difficult cases." He has substantial input into eligibility determinations made on behalf of SDRC.

20. Dr. Eisner reviewed the materials provided by claimant, including the school district's evaluations and observations, claimant's IEPs, and Dr. Netter's report. Dr. Eisner considered whether claimant qualified for services under the categories of autism, mental retardation, or as a person who has a condition similar to mental retardation and who requires treatment similar to a person with mental retardation – the Fifth Category. He concluded that claimant was not eligible for regional center services under any of those categories.

#### Consideration of Autism

21. Dr. Eisner concluded that claimant was not eligible for regional center services because he did not meet the diagnosis for autistic disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV or V<sup>4</sup>; he opined that claimant was properly diagnosed as having substantial mental health disorders. Under each version of the DSM, a diagnosis of autism must be supported by evidence that a child showed substantial signs of autism by age five.

Dr. Eisner found no documentation of autistic behaviors in claimant's early years. No serious concerns were raised about him until he was six years old, and those

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<sup>4</sup> In June, 2013, the American Psychiatric Association issued a revised Diagnostic and Statistical Manual of Mental Disorders, referred to as the "DSM-V."

concerns were related to educational concerns not social issues. Dr. Eisner noted that the historical records relating to claimant do not contain the kinds of observations one would expect to see in records relating to an autistic child.

Dr. Eisner explained that the fact that a school district categorized claimant as autistic is not persuasive evidence that claimant has a diagnosis of autism. School districts often have different standards for determining school placements and their use of a "diagnosis" of autism for an educational placement does not constitute a formal diagnosis. There was no evidence presented that the school district based its determination that claimant was autistic on recognized and accepted testing instruments.

Dr. Eisner questioned the interpretation of test results obtained by earlier evaluations of claimant. For example, in one subtest of the Autism Diagnostic Observation Schedule (ADOS), claimant obtained a significantly high score indicating autism. However, claimant was clearly not "so autistic" as to warrant that score. Instead, Dr. Eisner opined that claimant's mental health issues substantially interfered with claimant's social interactions and were responsible for the high score. Dr. Eisner further observed that claimant's ADOS scores were "wildly out of whack" which indicated that "something else was going on."

Dr. Eisner further noted that professionals who performed more recent evaluations and observations of claimant disagreed with his earlier diagnosis of autism and recognized that claimant was more properly diagnosed with severe emotional disturbances. Dr. Eisner agreed that claimant was misdiagnosed as autistic when he was 11 years old. He stated that "something was going on, but it was emotional." Dr. Eisner observed that claimant was "clearly a kid in trouble."

#### CONSIDERATION OF INTELLECTUAL DISABILITY

22. Dr. Eisner concluded that claimant was not eligible for regional center services because he did not meet the criteria for an individual with an intellectual disability. As happens when testing for autism, mental health issues can skew test results. In the case of tests for intellectual abilities, mental health issues can deflate scores obtained.

Dr. Eisner reviewed the test results obtained by Ms. Aguilar in 2012. He interpreted the results as indicating claimant had trouble learning, but not strongly suggestive of an intellectual disability. Dr. Eisner noted that claimant was already showing signs of emotional disturbances such that the accuracy of the test scores was questionable under the circumstances. Claimant's scores in Ms. Aguilar's assessment did not fit the pattern of consistently low scores obtained by individuals with intellectual disability. Claimant's scores were inconsistent – some high, some low and some average. No other evaluators who assessed claimant reached the opinion that claimant had an intellectual disability. Dr. Eisner stated that a diagnosis of intellectual disability may qualify an individual for special education services under California Code of Regulations, Title 5 (the regulations related to special education), but it does not constitute an eligible developmental disability for regional center services under the Lanterman Act or the applicable Lanterman Act regulations in California Code of Regulations, Title 17. Based upon claimant's history and records, he concluded that the evidence did not support a finding that claimant was eligible for regional center services based upon an intellectual disability.

#### CONSIDERATION OF FIFTH CATEGORY

23. The so-called "Fifth Category" of conditions that can qualify an individual for regional center services is defined as a "disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded

individuals.” (Welf. & Inst. Code, § 4512, subd. (a).) Dr. Eisner stated that there is no test to help determine whether an individual qualifies for regional center services under the Fifth Category. Although Dr. Eisner admitted that it was difficult to know what claimant’s functionality was because it was obscured by his mental health problems, his condition was not similar to mental retardation (or intellectual disability). Despite the fact that claimant may benefit from “services” offered by the regional center to persons with intellectual disability, he does not require “treatment” similar to that required for intellectually disabled individuals. Dr. Eisner testified that claimant’s core deficiencies are not similar to those of a person with an intellectual disability and, therefore, claimant’s treatment program would not be the same. Based upon claimant’s history and records, he concluded that the evidence did not support a finding that claimant was eligible for regional center services based upon the Fifth Category.

#### EVIDENCE PRESENTED ON BEHALF OF CLAIMANT

24. M.H. believed that the lack of early school records documenting claimant’s early signs of autism were the result of a lack of attention paid to claimant by his school district. Because claimant was shy and quiet, no one paid attention to him. M.H. felt that it was only her proactive involvement that finally forced the school district to take notice. M.H. stated that she did not know the signs of autism, and so she did not draw attention to his conduct earlier.

25. M.H. agreed that claimant was not mentally retarded; she was always told that he was “high functioning.” M.H. also stated that she was not trying to prove that claimant was autistic or intellectually disabled; however, she felt the regional center provided services from which claimant could benefit.

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## LEGAL CONCLUSIONS

### THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

### THE LANTERMAN ACT

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, §

4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

- (a) Developmental Disability means a disability that is attributable to mental retardation, 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 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.”

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

#### EVALUATION

8. Claimant’s mother believed claimant was eligible for regional center services because he has been found to qualify for special education services from his school district and because she believed he could benefit from services offered by the regional center. However, eligibility for special education services does not determine eligibility for regional center services. The Lanterman Act and the applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. The regional center is statutorily required to use different criteria for eligibility than a school district.

9. Although some educational professionals have suggested that claimant may be autistic and/or intellectually disabled, their opinions were not based upon accepted testing instruments, and all medical and educational professionals who have recently evaluated claimant have discounted a diagnosis of autism or intellectual

disability. Claimant's history supports a diagnosis of psychiatric disorders, which does not qualify him for regional center services.

10. No competent evidence was presented at hearing to contradict Dr. Eisner and Dr. Netter's assessment that claimant did not qualify for regional center services under the autistic, intellectual disabled or "Fifth" category of disabling conditions.

11. Claimant's mother was sincere, her testimony heartfelt, and her frustration palpable. She is clearly motivated by her desire to help her child and to obtain the services that she believes are necessary to allow him to function in the world; she undoubtedly has her child's best interest at heart. However, the weight of the evidence demonstrated that claimant was not eligible for services under the Lanterman Act based upon a diagnosis of autism, a diagnosis of mental retardation, or under the fifth category. The weight of the evidence established that claimant did not have a condition that made him eligible for regional center services.

## ORDER

Claimant's appeal from SDRC's determination that he is not eligible for regional center services and supports is denied.

DATED: July 16, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
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SUSAN J. BOYLE

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.**