BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT vs. NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2018010658

DECISION

Chantal M. Sampogna, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 16, 2018, in Chatsworth, California.

Stella Dorian, Fair Hearing Representative, represented North Los Angeles County Regional Center (NLACRC or Service Agency).

Claimant's mother represented claimant, who was not present.[1] Mother was assisted by Bernadette Buckley, a Spanish language interpreter.

Oral and documentary evidence was received and the matter was submitted for decision at the conclusion of the hearing.

[1] Titles are used to protect the family's privacy.

ISSUE

Whether claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.).[2]

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 33; Claimant's exhibit A.

Testimony: Dr. Heike Ballmaier, NLACRC Supervisor of Psychology and Intake Service Departments; Mother.

FACTUAL FINDINGS

1. Claimant is a 10-year-old boy who resides with his mother, father, thirteen-year-old sister, three-year-old sister, and three paternal aunts. Claimant enjoys playing the flute and playing video games. His family's primary language is Spanish, and claimant speaks both Spanish and English. Claimant's younger sister is a consumer of the Regional Center. Based on claimant's deficits in self-care, his behavioral challenges, and academic delays, claimant seeks a finding that he has a developmental disability as defined in the Lanterman Act under the eligibility categories of Autism Spectrum Disorder (ASD), Intellectual Disability, or a disabling condition closely related to an intellectual disability or requiring treatment similar to that required for an intellectual disability (fifth category). (§ 4512, subd. (a).)

2. The Service Agency determined that claimant is not eligible under the Lanterman Act based on the results of visual and written assessments, and the lack of

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

any qualifying conditions set forth in claimant's educational, medical, and psychological records, as described below.

3. On September 19, 2017, the Service Agency issued a Notice of Proposed Action and accompanying letter (NOPA) which informed claimant that he was not eligible for services under the Lanterman Act. On January 11, 2018, claimant filed a Fair Hearing Request.

CLAIMANT ASSESSMENTS AND RECORDS

4. The Service Agency considered following assessments to determine claimant's eligibility for services: Los Angeles Unified School District (LAUSD) Individualized Education Programs (April 25, 2013; April 8, 2014; March 17, 2015; March 16, 2016; February 16, 2017; March 7, 2018); Totally Kids Specialty Healthcare Initial Evaluation (Cheryl Determan, May 4, 2017), Progress Report (Cheryl Determan, October 17, 2017), and OT Initial Evaluation (Diana Okabe, November 15, 2017); NLACRC Social Summary (Lorena Segura, M.S., Intake Coordinator, August 2, 2017); Medical Summary (Margaret Swaine, M.D., August 7, 2017); Psychological Evaluation (Efrain A. Beliz, Jr., Ph.D., August 29, 2017); Child/Adolescent Full Assessment (Sarah Belarde, M.S.W., December 22, 2017); and Psychological Assessment (Heike Ballmaier, Psy.D., BCBA-D, March 28, 2018). These assessments consistently identified the behaviors and diagnostic results described below.

Educational Challenges

A. Throughout claimant's education, he has had deficits in speech articulation. At a young age, claimant's speech impairment in the areas of articulation made it difficult for him to be understood in spontaneous speech. From kindergarten through fourth grade, claimant was eligible for services as a student with a speech or language impairment. Through second grade, claimant required consistent teacher

support and prompts for the correct production of sound, and to be intelligible. During second and third grade, claimant made progress on his Individualized Education Plan (IEP) goals, for example he was then able to self-correct articulation, though his speech continued to be characterized by imprecision, and his speech without context remained difficult to understand. By fourth grade, claimant's voice, fluency, expressive, receptive and pragmatic social skills were age appropriate, and he had reached his IEP goals in articulation. In claimant's March 2018 fifth grade IEP, claimant's IEP team determined claimant was eligible for special education services for a specific learning disability. The team found that claimant's deficits in visual and auditory processing impacted his ability to read and solve complex math problems and to respond appropriately to questions that require abstract reasoning, therefore impacting claimant's ability to access his grade level curriculum. Mother has signed all of claimant's IEPs.

Communication, Social Relationships, and Behaviors

B. During his assessments and while in school, claimant has consistently presented as a happy, cooperative, and verbal child, who loves to ask questions and indulge in communication, and who can make transitions easily. He initially presents as quiet and reticent, but he warms up to display friendly, socially appropriate behavior. Claimant's receptive ability to understand and follow commands is strong, and he demonstrates age-appropriate pragmatic social language skills, for example he can appropriately initiate and terminate conversations. Claimant regularly makes eye contact with others, stands a comfortable distance from others, responds to questions on topic, engages in reciprocal conversation, and has many friends at school. Teachers have not noticed any odd, repetitive, disruptive, or unsafe behaviors. At school, claimant is generally well behaved, very social and talkative, follows class and playground rules, and plays fairly. During his Child and Family Guidance Center (CFGC) assessment, claimant rocked back in forth in his chair and lined up toys, though he

otherwise played quietly. Mother reports that claimant flaps his hands and stares off into space, though claimant does not display these behaviors at school or during assessments. Claimant is aggressive with his peers and siblings, for instance he will often trip them and then laugh, and will hit his siblings. These aggressive behaviors strain these relationships.

Intellectual Functioning, Self-care, Sensory Issues, and Repetitive and Restrictive Behaviors

C. Claimant displays problem-solving skills, can strategize and suggest appropriate placement of game pieces during tabletop games, demonstrates good gross and fine motor coordination, and demonstrates dexterity and problem solving while transitioning smoothly from one activity to another. Claimant has a limited play repertoire, and requires cuing to diversify his types of play. Claimant's most significant deficits are in his inability to complete activities of daily living and self-care. Claimant requires assistance in all activities of daily living. Claimant is not able to feed himself independently using utensils, preferring to use his hands to eat; claimant requires directions from mother as to how to eat properly, and he often makes a mess on the ground with his food. Claimant is not able to brush his teeth or bathe independently, and when he does bathe, he often limits his bathing to rubbing his stomach and his under arms, and does not wash other parts of his body; during bathing, claimant also frequently flaps his hands and splashes water. Claimant does not completely clean himself after defecating, and will often return home with soiled pants, and when out in public will, at times, defecate on himself, rather than ask to use the restroom. Claimant is not able to tell time, handle money, or read a menu. Claimant does not avoid dangerous or risky activities, and does not always look both ways before crossing the street. Claimant is careful around hot and sharp objects. The assessors, service providers, and

IEP team members have not reported that claimant has demonstrated sensory issues or repetitive and restrictive behaviors.

Diagnostic Assessments and Diagnoses

D. On May 4, 2017, claimant had an initial evaluation for services by Cheryl Determan, with Totally Kids Specialty Healthcare. Based on the above identified behaviors, Ms. Determan recommended claimant receive short term diagnostic therapy to determine his language needs and to stabilize his articulation, and based on mother's reported concerns (see Factual Finding 6), that claimant receive educational psychology and occupational therapy. Ms. Determan evaluated claimant on October 17, 2017, and noted he was making progress in the areas of concern.

E. In May 2017, claimant's pediatrician, Irina Godes, M.D., referred claimant to the NLACRC for assessment due to his speech delays, hyperactivity, and anxiety. Lorena Segura, M.S., NLACRC Intake Coordinator, conducted a social summary with mother by phone on August 2, 2017.

F. As confirmed by Margaret Swaine, M.D., when claimant was one year old, he had a febrile seizure. Claimant took related medication for a couple of months, and has not since taken any related medication and has not had any subsequent seizures. Claimant has been diagnosed with strabismus and obesity, but has no indication of substantially handicapping cerebral palsy or epilepsy.

G. At the request of the NLACRC, on August 29, 2017, Efrain A. Beliz, Jr., Ph.D., conducted a psychological evaluation of claimant. Dr. Beliz administered the following assessments: Wechsler Intelligent Scale for Children-V, Wide Range Achievement Test-4, and the Vineland-3 Adaptive Behavior Scales. During the assessment, claimant was calm and alert, answered questions appropriately, had a normal rate of speech and good articulation, exhibited eye contact and a range of facial expressions, separated from his mother without difficulty, was cooperative with the

testing and followed directions, and could sit still during the testing, but was easily distracted, frequently losing focus and requiring reminders to stay on task. Based on the assessment results, Dr. Beliz concluded the following: claimant's problem-solving and abstract reasoning abilities are adequately developed; he has a low average intelligence, Full Scale Intellectual Quotient (FSIQ) 76, with deficits in fluid reasoning and working memory; claimant's academic skills are low average to average, showing most delay in arithmetic skills; and claimant scored mildly impaired across all adaptive functioning domains (communication, daily living skills, and social skills). Dr. Beliz found claimant's uneven performance was caused by his distractibility and tendency to respond without thinking, but that the assessment results do not suggest intellectual disability. Dr. Beliz further noted that claimant is at risk for falling further behind socially and academically if he does not receive treatment for attention deficit hyperactivity disorder (ADHD).

H. On November 15, 2017, Totally Kids Specialty Healthcare conducted an occupational therapy initial evaluation of claimant and determined he would benefit from occupational therapy two times per week to facilitate therapeutic activities and exercise, cognitive and psychosocial skills, and to promote age-appropriate play and self-care abilities.

I. On December 22, 2017, Sarah Belarde, M.S.W., with CFGC conducted a Child/Adolescent Full Assessment of claimant. Based on her assessment of claimant and interview with mother, Ms. Belarde diagnosed claimant with disruptive disorder. Based on mother's reports of claimant's behavior, such as hand flapping, Ms. Belarde suggested claimant receive further assessment to rule out ASD, and due to his encopresis, that he be further assessed to rule out generalized anxiety disorder. Ms. Belarde found claimant's symptoms and behaviors impact his ability to build friendships, and they create conflict at home.

J. On March 28, 2018, Heike Ballmaier, Psy.D., BCBA-D, NLACRC's Supervisor of Psychology and Intake Service Departments, conducted a psychological assessment of claimant to determine if claimant has ASD. Dr. Ballmaier reviewed the assessments and educational records to date and administered the following assessments: Adaptive Behavior Assessment System, Second Edition (ABAS-II) Parent Form – rater mother; Autism Diagnostic Observation Schedule Generic (ADOS-2)-Module 3; Autism Spectrum Rating Scales (ASRS) – rater mother; Clinical Interview; Records Reviewed. The assessments resulted in Dr. Ballmaier concluding claimant does not have ASD. Claimant scored in the extremely low range in the General Adaptive Composite of ABAS-3. However, Dr. Ballmaier found this to be a function of his poor attention, his lack of motivation at home, and his oppositional tendencies, rather than an accurate assessment of claimant's capacities and behaviors. Based on mother's ratings, claimant's scores across the ASRS domains were very elevated on most domains, except in social communication (elevated) and social-emotional reciprocity (slightly elevated). However, the ASRS also provides a validity index which assesses the validity of the rater's responses; mother's ASRS responses resulted in a caution rating, demonstrating mother may have depicted claimant in an inordinately negative fashion. Finally, on the ADOS-2, claimant's scored 1on social affect and 0 on restricted and repetitive behavior, for a combined score of 1(cut-off 9). Dr. Ballmaier made the following diagnoses: specific learning disorder with impairments in mathematics, reading, and written expression; parent-child relational problem; ADHD; language disorder; and speech sound disorder. Dr. Ballmaier recommended claimant's case be referred back to intake team for decision, and that claimant be evaluated by a psychiatrist to confirm the presence of ADHD and consider treatment, continue with special education services, and be reevaluated in approximately five years.

NLACRC Re-Determination

K. Dr. Ballmaier provided testimony supporting NLACRC's re-determination that claimant is not eligible for services under the Lanterman Act. Dr. Ballmaier agreed with Dr. Beliz's determination that claimant does not have an intellectual disability. Claimant's FSIQ score was 76, outside of the margin of error. However, this is not determinative. In reviewing Dr. Beliz's assessment, Dr. Balmaier explained that in addition to a FSIQ of 76, claimant's subtest scores were scattered, further demonstrating claimant does not have an intellectual disability; for example, claimant's verbal comprehension and spatial scores were low average, his verbal abstract scores were average, and his fluid reasoning scores were low; similarly, claimant had a wide range of academic achievement, with his reading and spelling scores in the average range, and his math scores were lower. Dr. Beliz found these variances to be due to claimant's distractibility, and not due to an intellectual disability. Dr. Ballmaier found claimant's higher level verbal skills scores show claimant's verbal skills are intact, further indication he does not have an intellectual disability.

L. As with intellectual disability, when determining if an individual is eligible under fifth category, the FSIQ is considered, but not determinative. While Dr. Ballmaier and others found claimant has significant functional limitations in his self-care, based on the entirety of claimant's assessments and behaviors, she finds these deficits attributable to his untreated ADHD and lack of motivation at home. Claimant does not present these self-care deficits across all settings, but rather shows more self-care adaptive skills when at school and during his assessments. The evidence did not establish that claimant's significant functional limitations were attributable to a disabling condition closely related to intellectual disability or requiring treatment similar to that required for an individual with an intellectual disability.

M. Dr. Ballmaier further testified that claimant does not have ASD. Of significance in claimant's assessment results, Dr. Ballmaeir explained that if claimant had ASD, his social abnormalities would display in all settings and environments, not just at home. Claimant has consistently throughout his assessments and education made good eye contact with others, has had a peer group, has been conversational, and has not displayed restricted or repetitive movements across environments (only mother has witnessed his hand flapping). In addition, claimant's IEP goals are related solely to academics and claimant's severe academic discrepancies in his cognitive skills, reading, auditory processing, and conceptualization are directly related to his learning disability.

N. On March 28, 2018, NLACRC reconsidered claimant's eligibility and determined he is not eligible for services under the Lanterman Act. NLACRC has concerns about claimant's cognitive abilities, noting that he currently performs in the low average to borderline functioning and has deficits in fluid reasoning and working memory, and therefor suggests claimant be reevaluated for eligibility in five years.

CLAIMANT'S EVIDENCE

5. In mother's testimony and in her reports to service providers and the assessors, mother described claimant's behaviors which she believes make him eligible for services under the Lanterman Act. In regards to claimant's intellectual functioning, mother has observed the following: claimant retains information like a third grader, though he is in fifth grade, and needs help with his homework; he has fears other children his age do not have (such as fear of heights and of darkness); he dislikes certain sounds, for example the sounds of trains and blenders; he lines up toys, and enjoys playing with toys meant for younger children; and he falls consistently in soccer and forgets the rules. Mother is concerned about claimant's frequent fidgeting and poor attention, and his unusual behavior, flapping his hands and counting on his fingers, which he displays at unusual times such as while in the shower. Mother struggles most

with claimant's inability to attend to his own self-care, as described in Factual Finding 5C. Mother finds that when claimant comes home from school, his pants are soiled because he does not thoroughly clean himself after defecating; he does not thoroughly brush his teeth or bathe himself. Due to his limited hygiene skills, claimant's therapist has provided claimant signs containing a series of pictures which direct him how to clean his teeth and how clean himself after defecating. Similarly, at home claimant is not able to button his own clothing. Mother is also concerned about claimant's disruptive and aggressive behaviors, as described in Factual Finding 5C, his lack of remorse when he hits or trips others, and his refusal to cooperate with homework or chores. Mother has found that claimant's speech and occupational therapy have not made a difference. Mother has not sought treatment for claimant's ADHD.

DIAGNOSTIC STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) DEFINITIONS OF AUTISM SPECTRUM DISORDER AND INTELLECTUAL DISABILITY

6. Regional Centers determine eligibility for services under the Lanterman Act by applying the DSM-5's definitions of ASD and intellectual disability. Relevant portions of the DSM-5 defining these conditions were admitted into evidence.

Autism Spectrum Disorder

7. The DSM-5 defines ASD as having the following four essential features. First, an individual must have persistent impairment in reciprocal social communication and social interaction (Criterion A), as manifested either currently or historically by all of the following: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. Second, the individual must have restricted, repetitive patterns of behavior, interests or activities (Criterion B), as manifested by at least two of the following: (1) stereotyped or repetitive motor

movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and (4) hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment. These symptoms must be present in early childhood and limit or impair everyday functioning. (Criteria C and D).

Intellectual Disability

8. The DSM-5 provides that the following three diagnostic criteria must be met to be diagnosed with ID:

9. An individual must have deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing (Criterion A). Individuals with ID have FSIQ scores between of 65 to 75, including a five point margin for measurement error. The DSM-5 cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. The DSM-5 explains that a person with an Intellectual Quotient (IQ) score above 70 may "have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." (Ex. 30, at p. 8.)

10. Individuals with ID have deficits in adaptive functioning that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility, which, without ongoing support, limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community (Criterion B). This criterion is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired such that "ongoing

support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." (*Id.* at p. 9.) The levels of severity of ID are defined on the basis of adaptive functioning, and not IQ scores, because the adaptive functioning determines the level of supports required.

11. Individuals with ID must experience the onset of these symptoms during the developmental period (Criterion C).

Fifth Category

12. The Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals," under the fifth category of eligibility, but does "not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code § 4512, subd. (a); see *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129 (*Mason*).) The fifth category is not defined in the DSM-V.

13. On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the Guidelines for Determining 5th Category Eligibility for the California Regional Centers (Guidelines). These Guidelines list the following factors to be considered when determining eligibility under the fifth category: whether the individual functions in a manner that is similar to that of a person with mental retardation; whether the individual requires treatment similar to that required by an individual who has mental retardation; whether the individual is substantially handicapped; and whether the disability originated before the individual was 18-years-old and is it likely to continue indefinitely. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval to the ARCA Guidelines and recommended their application to those

individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)" for fifth category eligibility. (*Id.* at p. 1477.)

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that claimant is eligible for Lanterman Act services. (Evid. Code, § 115.)

3. A developmental disability is a disability that originates before an individual turns 18 years old. This disability must be expected to continue indefinitely and must constitute a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, autism, an intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for an individual with an intellectual disability. Developmental disabilities do not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a), Cal. Code Regs., tit. 17, § 54000.)

4. A substantial disability is the existence of significant functional limitations in three or more of the following areas of major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (*l*); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

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5. As defined under the Lanterman Act, developmental disability does not include the following: 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; solely learning disabilities which manifest 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; and disabilities that are solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

6. A. Claimant does not have cerebral palsy or epilepsy. (Factual Finding 4.)

B. Claimant is not eligible for Lanterman Act services under the category of ASD. (Factual Findings 5-13.) The evidence did not demonstrate that claimant has a persistent impairment in reciprocal social communication and social interaction, and the evidence did not demonstrate that claimant has restricted repetitive patterns of behavior, interest, or activities.

C. Claimant is not eligible for Lanterman Act services under the category of intellectual disability. (Factual Findings 5-13.) Claimant has borderline intellectual functioning. His standardized intelligence testing results show claimant's FSIQ is 76, above that which would identify someone as having an intellectual disability (70), even when accounting for the five–point margin for measurement error. Claimant did not demonstrate such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning which might show his actual functioning is comparable to that of an individual with a lower FSIQ score. In addition, the validity of claimant's test results is questionable because claimant's untreated ADHD interfered with his assessments and likely lowered his scores.

D. Claimant is not eligible for Lanterman Act services under the fifth category. Though claimant's adaptive functioning results show he is unable to perform activities of daily life and has failed to meet developmental and socio-culture standards for personal independence and social responsibility while at home, claimant does not

consistently demonstrate this limited functioning across environments. Claimant is progressing in his academics, has strong verbal skills and a peer group, and has always been social and adept at age appropriate conversation and communication skills. Claimant's educational deficits are being addressed through his IEP services. Based on the entirety of claimant's assessments and behaviors, claimant's deficits in self-care are attributable to his untreated ADHD and lack of motivation at home. The evidence did not establish that claimant's significant functional limitations were attributable to a disabling condition closely related to intellectual disability or requiring treatment similar to that required for an individual with an intellectual disability. (Factual Findings 5-13.)

E. Claimant did not establish that he has a substantial disability. Claimant's most pronounced and limiting symptoms are related to attention deficits and specific learning disabilities. Claimant is not yet receiving treatment for his ADHD. Claimant receives special education services for his learning disability. Claimant's ADHD and specific learning disability do not make him eligible for services under the Lanterman Act. Though claimant demonstrates at times significant behavioral challenges and deficits in self-care, these behaviors do not pose significant functional limitations on three or more of the major life activities identified in section 4512, subdivision (*l*). (Factual Finding 4-13.)

ORDER

Claimant is not eligible for regional center services under the Lanterman Act. Claimant's appeal is denied.

DATED:

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CHANTAL M. SAMPOGNA

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of the receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)