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. 2018040661

DECISION

This matter was heard by Nana Chin, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), in Lancaster, California, on July 17, 2018. Claimant was represented by his mother.[1] Doris Panamino acted as a Spanish language interpreter for Claimant's mother. North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by its Contract Officer, Dana Lawrence.

Evidence was received, and the matter was submitted for decision on July 17, 2018.

ISSUE

Is Claimant eligible to receive regional center services within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

[1] The names of Claimant and his mother are omitted to protect their privacy.

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EVIDENCE RELIED UPON

Documentary: Exhibits 1-27; and A-B

Testimonial: Sandi Fischer, Ph.D., and Claimant's mother

FACTUAL FINDINGS

JURISDICTION

1. Claimant is a 9-year-old boy who lives with his family within the Service Agency's catchment area. In October 2017, Claimant's mother requested regional center services for Claimant.

2. On January 18, 2018, the Service Agency issued a Notice of Proposed Action (NOPA) notifying Claimant's mother of its determination that Claimant is not eligible for services because he does not meet the criteria set forth in Welfare and Institutions Code section[2] 4512 and California Code of Regulations, title 17, sections 54000 and 54001.

3. Claimant's mother filed a fair hearing request dated April 5, 2018, resulting in this hearing.

CLAIMANT'S BACKGROUND

4. At the time of Claimant's request for services, Claimant was in the third grade and attending elementary school.

5. Sometime in the 2017/2018 school year, Claimant's mother requested an evaluation of her son to determine his eligibility for special education services.

6a. Pursuant to the request, the school psychologist Alejandra Roman and Specialized Academic Instruction (SAI) Teacher Therese Wilkinson conducted apsycho-

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[2] Further undesignated statutory references are to the Welfare and Institutions Code.

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educational assessment, which included interviews of Claimant and his mother, observations of Claimant in interview and classroom settings, educational review, teacher report, and the administration of a number of various standardized tests, including the Cognitive Assessment System, Second Edition (CAS-2); Wechsler Nonverbal Scale of Ability (WNV); Test of Auditory Processing Skills-Third Edition (TAPS-3), Motor-Free Visual Perception Test-Fourth Edition (MVPT-4), the Beery-Buktenica Development Test of Visual Motor Integration, Sixth Edition (Beery VMI-6); the Beery-Buktenica Development Test of Visual Perception, Sixth Edition; the Beery-Buktenica Development Test of Visual Motor Coordination, Sixth Edition; Woodcock Johnson IV Normative Update Tests of Achievement (WJIV ACH) and the Behavior Assessment System for Children, Third Edition (BASC-3).

6b. On November 2, 2017, Ms. Roman and Ms. Wilkinson issued a Psycho-Educational Assessment Report, detailing and interpreting the findings of the tests given to Claimant during the assessment, finding a discrepancy between Claimant's intellectual ability and achievement.

7. Claimant's test results were as follows:

- On the CAS-2, an assessment battery designed to evaluate cognitive processing in children, Claimant's Full Scale score was 89, which was within the "low average" classification. In the four scales (PASS) that make up the CAS-2, Claimant obtained a standard score of 85 on the Planning Scale, which is within the below average classification; a standard score of 110 on the Simultaneous Scale, which is within the average classification; a standard score of 91 on the Attention Scale, which is also within the average classification; and a standard score of 79 on the Successive Processing Scale, which is within the low classification.

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- On the WNV, a nonverbal culture-free measure of fluid cognition, Claimant scored a standard score of 129, which is in the Superior range of ability.
- On the MVPT-4, an assessment tool designed to evaluate an individual's visual perceptual abilities, Claimant's standard score was 117, which is within the High average range when compared to his peers. On the Beery VMI-6, an assessment tool designed to measure the extent to which individuals can integrate their visual and motor abilities, Claimant's standard score was 87, which is in the low average range.
- On the TAPS-3, Claimant scored in the average range in the areas of phonological skills and cohesion, and low average in range in memory skills. Overall, Claimant scored in the low average range in auditory processing skills.
- On the WJIV ACH, assessments which evaluate a child's strengths and weaknesses in cognitive ability, achievement and oral language, Claimant scored generally in the average to low average ranges.
- On the BASC-3, which is set of rating scales and forms, including the Teacher Rating Scales, Parent Rating Scales, Self-Report of Personality, Student Observation System, and Structured Developmental History, designed to facilitate the classification of a variety of emotional disorders, Claimant's teacher, Deborah Gava, rated him Clinically Significant in the area of learning problems and at-risk in the areas of study skills and functional communication. Claimant's mother rated him Clinically Significant in a number of areas and At-Risk in the areas of social skills and leadership.

8. Based on the results of the assessment, Claimant was found eligible for special education services under the eligibility criteria of specific learning disability (SLD).

9a. Claimant's initial individualized education program (IEP) was on November 2, 2017. The IEP team consisted of Ms. Gava, Ms. Wilkinson, Ms. Roman, an

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administrator, Claimant's mother and a translator.

9b. During the IEP, Ms. Roman and Ms. Wilkinson reported on Claimant's test results from the full psycho-educational evaluation which was described in Factual Finding 6a.

9c. Due to the IEP team finding a severe discrepancy between Claimant's intellectual ability and achievement on valid standardized tests, Claimant was found to have a SLD which requires special education.

Service Agency Assessment

10. Claimant's mother also sought an evaluation from the Service Agency for regional center services due to her concerns related to Claimant's lack of academic progress, difficulty focusing in class, speech delay and behavioral concerns.

11. On October 11, 2017, Social Intake Vendor Silvia Mejia, Licensed Clinical Social Worker (LCSW), met with Claimant and his mother to conduct a social assessment of Claimant.[3] Following the assessment, Mr. Mejia recommended medical and psychological evaluations, as well as review of pertinent medical and school records.

12. On November 27, 2917, Margaret Swaine, M.D., Service Agency Supervisor of Medical Services, noted that there were no medical records available to complete a summary, but she concluded that, based on the information obtained during the intake interview, there was no indication Claimant suffered from substantially handicapping conditions of cerebral palsy or epilepsy.

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[3] At the time of the intake, Claimant's mother appears to have reported that Claimant had been diagnosed with Autism by Penny Lane. There were no records which would indicate such a diagnosis had been rendered. Exhibit 8, which was a Full Assessment conducted by Penny Lane dated September 22, 2017, indicates Claimant's diagnosis was of "Attention-deficit hyperactivity disorder, unspecified type."

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13. The Service Agency referred Claimant to Larry Gaines, Ph.D. for a psychological evaluation to determine Claimant's current levels of cognitive, adaptive, and social functioning. The assessment was specifically limited to the assessment of developmental disabilities including ID and Autism.

14. Dr. Gaines conducted the assessment on December 29, 2017. The assessment included a clinical interview with Claimant and his mother, review of unspecified records, behavioral observations of Claimant during the assessment and the administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Autistic Diagnostic Interview-Revised, Autistic Diagnostic Observation Scale-2 Module 2 and Aspects of Module 3, and the Vineland Adaptive Behavior Scales Second Edition (VABS-II).

15a. During his behavioral observation, Dr. Gaines noted that Claimant "was able to make eye contact and a greeting" but that he "immediately went jumping and spinning around, showing his hyperactive levels." Claimant had difficulties sitting still and frequently fell out of his chair. (Exhibit 14.)

15b. To assess Claimant's cognitive functioning, Dr. Gaines administered the

WISC-V, an intelligence test for children. On the WISC-V Claimant scored as follows: Verbal Comprehension (SS=100) and Fluid Reasoning (SS=115). The results of the WISC-V indicate Claimant's overall cognitive ability as measured by the Full Scale IQ (SS=95) to be in the average range.

15c. Claimant's adaptive behavior skills were measured through the VABS-II, yielding an overall adaptive functioning score of 69, which falls within the mild deficit range. Dr. Gaines, however, found that these deficits appear to be related to compliance rather than the lack of developmental capability.

15d. Dr. Gaines concluded that Claimant did not have a diagnosis of Intellectual Disability (ID), which requires deficits in both intellectual and adaptive functioning.

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Claimant's cognitive skills, however, fell within the average to above-average range of performance. As to his adaptive functioning, Claimant's adaptive behavior skills fell within the borderline-to-mild range of deficiency but noted that those deficits may be secondary to aspects of Attention Deficit/Hyperactivity Disorder (ADHD).

16a. In order to assess Claimant for Autism Spectrum Disorder, Claimant's mother was administered the Autism Diagnostic Interview -Revised (ADI-R), and Claimant was administered the Autism Diagnostic Observation Scale 2 and Module 2 and Aspects of Module 3. Claimant's scores were well below the Autism and Autism spectrum disorder cutoffs.

16b. According to Dr. Gaines, Claimant did not show any deficits in social communication, social interaction or restrictive, repetitive types of behavior. Dr. Gaines noted that Claimant was reported to bite on his clothes, which could suggest hypersensitivity to sensory input but could also be fidgety behavior.

17. Based on his evaluation, Dr. Gaines provided the following diagnoses: ADHD, Combined Type (Provisional).

18. The Service Agency's Interdisciplinary Eligibility Committee met on January 17, 2018, considered all the information gathered regarding Claimant, and determined that Claimant was not eligible for regional center services. In a letter dated January 18, 2018, Claimant's mother was advised of the Service Agency's determination.

19. Claimant's mother appealed the decision.

20. Following the appeal, Service Agency elected to obtain more information on Claimant's behavior. Dr. Fischer is employed by Service Agency as a Supervisor of Psychological and Intake Services and is a member of the Interdisciplinary Team. On May 22, 2018, Dr. Fischer conducted a school observation of Claimant and followed up with an extensive record review. Dr. Fischer issued a report regarding her findings.

21. During the school observation, Dr. Fischer observed Claimant following his

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teacher's instructions on how to line up, actively interacting with his peers during recess and transitioning from recess to class without difficulty.

22. Based on her observation and her review of records, Dr. Fischer diagnosed Claimant with ADHD, Combine Presentation (by history) and possible learning disabilities.

23. On June 6, 2018, the Service Agency's interdisciplinary eligibility committee reconvened and, using the criteria from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), determined that Claimant is not eligible for regional center services. A handwritten comment on the Eligibility Re-Determination document, stated, "school observation does not suggest the presence of a developmental disability." (Exhibit 22.)

24a. Dr. Fischer credibly testified at the hearing and her testimony was given great weight.

24b. Based on her review of records and her school observation, Dr. Fischer opined that Claimant does not meet the diagnostic criteria for a diagnosis of ID or Autism and does not have any diagnosis which would qualify him to receive regional center services.

Testimony of Claimant's Mother

25. Claimant's mother conceded that she did not know if Claimant's behaviors were caused by ADHD or some other condition. Claimant has been receiving the services of a therapist through Penny Lane, but was told recently that those services would be terminated in the next few months.

26. Claimant's mother is concerned about the termination of these services as Claimant's atypical behaviors have not abated and is therefore seeking services through NLACRC.

27. At hearing, Claimant's mother did not present any evidence that Claimant has received a diagnosis with either autism or ID.

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28a. Claimant's mother, however, did describe many of Claimant's atypical behaviors. Claimant exhibits many repetitive behaviors, will bite himself until he gets blisters in his month, and will put Legos in his mouth and forget. On other occasions, Claimant will become manic, twisting his arms and hands, screaming or turning his head in a circular motion.

28b. Claimant's mother also reported Claimant has deficits in the areas of adaptive function, forgetting on occasion to put on his underwear and fails to clean himself properly.

28c. Claimant's mother is also concerned that Claimant seems to be unaware of dangers and behave inappropriately by going up to strangers and hugging them.

LEGAL CONCLUSIONS

Jurisdiction

1. The Lanterman Act governs this case. (§ 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of a regional center's decision.

Standard of Proof

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is a preponderance of the evidence. (See Evid. Code,§§ 115, 500.) Therefore, the burden is on Claimant to demonstrate that the Service Agency's decision is incorrect. Claimant did not meet his burden.

Applicable Statutes and Regulations

3. In order to establish eligibility for regional center services, a claimant must

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have a qualifying developmental disability. 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. . . . [T]his term shall include ID, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to ID or to require treatment similar to that required for individuals with an ID, but shall not include other handicapping conditions that are solely physical in nature."

4. Pursuant to Section 4512, subdivision (l), a "substantial disability" is one which constitutes "significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

5. California Code of Regulations, title 17, section 54001, subdivision (a), also defines "substantial disability" as:

(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

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(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.

6a. In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Section 4512. The first four categories are specified as: ID, cerebral palsy, epilepsy and autism. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to ID or to require treatment similar to that required for individuals with an ID." (§ 4512.)

6b. Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catch-all, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, a regional center does not have a duty to serve all of them.

6c. The Lanterman Act requires that the qualifying condition be "closely related" (§ 4512) to ID or to "require treatment similar to that required for individuals with an ID."(§ 4512.) The definitive characteristics of ID include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to ID, there must be a

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manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with ID. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to ID (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with an ID. Furthermore, determining whether a claimant's condition is a disabling condition "found to be closely related to ID or to require treatment similar to that required for individuals with an ID" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational or living skills training, speech therapy, occupational therapy). The criterion is not whether someone would benefit. Rather, it is whether someone's condition *requires* such treatment.

7. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (§ 4512, and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does *not* have a developmental disability would not be eligible.

8. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "ID." Consequently, when determining eligibility

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for services and supports on the basis of ID, that qualifying disability has previously been defined as congruent to the diagnostic definition set forth in the DSM-5.

9a. The DSM-5 describes ID as follows:

> ID . . . is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains. The following three criteria must be met:

A. 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.
B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits 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.
C. Onset of intellectual and adaptive deficits during the developmental period.(DSM-5, at 33.)

9b. The DSM-5 notes that the “essential features of intellectual disability . . . are deficits in general mental abilities . . . and impairment in everyday adaptive functioning in comparison to an individual’s age-, gender-, and socioculturally matched peers. . . . Onset is during the developmental period. . . . The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions. . .” (DSM-5, at 37.)

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9c. The DSM-5 further explains that ". . . Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75(70+/-5). . ." (DSM-5, at 37.)

10. Claimant did not present any evidence that Claimant had ever received testing which would indicate that Claimant cognitive below average. When Claimant was tested by his school he received a Full Scale score of 89 on the CAS-2, which was within the "low average" classification. When Dr. Gaines tested Claimant, he found Claimant's overall cognitive ability was within the average range with a Full Scale IQ (SS=95) and that Claimant only had mild deficits in his adaptive behavior.

11. Additionally, it was not established that Claimant demonstrates deficits in cognitive and adaptive functioning such that he presents as a person suffering from a condition similar to ID. Claimant's testing demonstrates average IQ and only minor deficits in adaptive functioning. Moreover, the evidence did not establish that Claimant requires treatment similar to that required for individuals with ID. Based on the foregoing, Claimant does not fall under the fifth category of eligibility.

12. As with ID, the Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "autism." Consequently, when determining eligibility for services and supports on the basis of autism, that qualifying disability has been defined as congruent to the DSM-5 definition of "Autism Spectrum Disorder."

13. The DSM-5, section 299.00 discusses the diagnostic criteria which must be met to provide a specific diagnosis of Autism Spectrum Disorder, as follows:

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A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

[¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes,

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difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement)

[¶] . . . [¶]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by ID (intellectual development disorder) or global developmental delay. ID and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and ID, social communication should be below that expected for general developmental level. (DSM-5 at pp. 50-51.)

14. The evidence did not establish that Claimant suffers from Autism Spectrum Disorder, and therefore, Claimant is not eligible for regional center services based on a diagnosis of autism. Claimant did not present any evidence that he had ever received a clinical diagnosis of autistic disorder (under the DSM-IV, the prior edition of the DSM) or Autism Spectrum Disorder (under the DSM-5) by a qualified psychologist. All the evidence presented showed that Claimant did not have any deficits in social communication or

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interaction.

15. The evidence did not establish that Claimant suffers from cerebral palsy or epilepsy. Therefore, Claimant is not eligible for regional center services based on these conditions pursuant to Section 4512, subdivision (a).

16. The preponderance of the evidence did not establish that Claimant is eligible to receive regional center services.

ORDER

Claimant's appeal is denied. The Service Agency's determination that Claimant is not eligible for regional center services is upheld.

DATED:

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NANA CHIN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

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