

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY, Service Agency.

OAH No. 2019120467

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephonic/videoconference on August 27, 2020. Paula Noden, Fair Hearing Manager, represented the Regional Center of Orange County (RCOC or service agency). Mother represented Claimant.¹

Testimony and documents were received in evidence, the record closed, and the matter was submitted for decision at the conclusion of the hearing.

¹ To preserve confidentiality, neither Claimant nor Mother is identified by name.

ISSUE

Whether Claimant is eligible for regional center services and supports under the qualifying category of autism as provided for in the Lanterman Developmental Disabilities Services Act (Lanterman Act).²

FACTUAL FINDINGS

Jurisdictional Matters

1. By letter and Notice of Proposed Action dated October 23, 2019, RCOC informed Mother its Health Resource Group Specialists determined Claimant does not meet criteria for developmental disability and is therefore ineligible for services under the Lanterman Act.

2. On November 20, 2019, Mother, acting on Claimant's behalf, filed a Fair Hearing Request.

3. On December 18, 2019, OAH served Claimant, Mother, and RCOC with a Notice of Hearing scheduling the fair hearing for January 16, 2020, which was subsequently continued for good cause to August 27, 2020.

² Welf. & Inst. Code, § 4500, et seq. Claimant does not allege eligibility based on intellectual disability, cerebral palsy, epilepsy, or disabling conditions closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability. See Welf. & Inst. Code, § 4512.

4. All jurisdictional requirements are satisfied.

Claimant's Early Start Intervention

5. Claimant is a five-year-old male. Claimant presents with macrocephaly (an overly large head) and a right hemisphere cyst. Claimant resides with his parents and three siblings, one of whom has an Autism Spectrum Disorder (ASD) diagnosis.

6. Claimant's parents were concerned Claimant's language and communication skills and social and emotional development were delayed. At age one year and five months, on January 31, 2017, RCOC's Individualized Family Service Plan (IFSP) team, based on assessment results, deemed Claimant and his family eligible for early intervention services under the California Early Intervention Services Act³ until his third birthday.

7. In February 2017, Patterns Behavioral Services (Patterns) commenced providing Claimant with weekly applied behavioral analysis (ABA) at a frequency of 12 hours per week. Patterns regularly evaluated and chronicled Claimant's development.

8. In a January 2018 *805 Infant Toddler Development Progress Report (January 2018 Report)*, Patterns documents its January 12, 2018 administration of the Developmental Assessment of Young Children, Second Edition (DAYC-2) to measure Claimant's developmental levels in several domains. According to the *January 2018 Report*, when compared with same age peers, Claimant's cognitive skills are "average," receptive language skills are "below average" expressive skills are "average," social-emotional development is "average," gross motor is "average," fine motor is "average,"

³ Gov. Code, § 95000 et seq.

and adaptive behavior is "poor." (Exh. 23 at pp. 10-14.) According to the *January 2018 Report*, Claimant was responding "well to treatment and made great progress in the past few months of intervention." (Exh. 23 at p. 19.) Patterns recommended no change to the frequency of Claimant's 12-hours-per-week intervention services.

9. On April 14, 2018, approximately three months prior to Claimant's third birthday, RCOC notified Mother that Claimant's early start services will end on the day before his third birthday. RCOC additionally notified Mother, "We will also be closing your child's case at that time as your child is not eligible for services under the Lanterman Act." (Exh. A.)

10. On April 16, 2018, at Mother's request, Patterns issued a revised April 2018 *805 Infant Toddler Development Progress Report (April 2018 Report)* documenting its February 22, 2018 administration of the DAYC-2 to Claimant.⁴ The *April 2018 Report* documents Claimant's cognitive skills as "below average," receptive language skills as "very poor," expressive skills as "poor," social-emotional development as "very poor," gross motor as "average," fine motor as "very poor," and adaptive behavior as "poor." (Exh. 14 at pp. 3-6.) According to the *April 2018 Report*, Claimant was responding "positively to ABA services." (Exh. 14 at p. 15.) The *April 2018*

⁴ Patterns' February 22, 2018 administration of the DAYC-2 to Claimant is again documented in a July 2018 *805 Infant Toddler Development Progress Report (July 2018 Report)*. Whereas the *April 2018 Report* notes Claimant's chronological age as "2-years, 7 months," the *July 2018 Report* notes Claimant's chronological age as "2-years, 11 months." The *April 2018 Report* and the *July 2018 Report* document identical DAYC-2 Raw Scores and Standard Scores in cognition, receptive language, expressive language, social/emotional, motor, and adaptive domains.

Report recommended increasing the frequency of Claimant's ABA services to 15 hours per week.

11. Based on the DAYC-2 levels documented in the *April 2018 Report*, Mother asserted Claimant was eligible for Lanterman Act services and supports. RCOC commenced a "turning three" Lanterman Act eligibility review.

Claimant's Lanterman Act Eligibility Review

NESHE PARKES, PSY.D.

12. Neshe Parkes is a member of RCOC's clinical psychologist staff and serves on its eligibility team. On May 23, 2018, Dr. Parkes deferred reaching any judgment on Claimant's Lanterman Act eligibility and required additional or clarifying information because, as she explained at the administrative hearing, the then-available reports regarding Claimant's levels of functioning were inconsistent and she had "two vendor reports with no diagnosis of Lanterman's qualifying categories.". Dr. Parkes needed a "developmental profile or DP-3" for Claimant but, around this time, Mother revoked her prior consent granting RCOC's access to Claimant's school records. Parkes explained the criteria for Lanterman Act services and supports are "more stringent than school criteria" but schools "do a good job" and a third-party assessment can provide information worth considering. On July 9, 2018, Dr. Parkes concluded the records available for her review did not support a finding Claimant presented with a substantial disability rendering him eligible of Lanterman Act services and supports.

13. On July 11, 2018, Yaejin Ashlee Park, Claimant's service coordinator at the time, discussed the ineligibility determination with Mother. By Notice of Proposed Action, dated July 12, 2018, RCOC informed Mother, effective July 15, 2018, it would

cease funding services for Claimant because Claimant “does not have an eligible diagnosis or a substantial handicap in 3 or more area of major life activity.” (Exh. A.)

14. Still, Mother expressed concerns about Claimant’s behaviors. Dr. Parkes testified, “I wanted to make sure I was not missing something.” Dr. Parkes therefore recommended conducting a behavioral observation of Claimant and administration of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), Module 1, which is a play-based instrument for pre-verbal children age 31 months or older. Dr. Parkes explained, the ADOS-2 is “the gold standard in the industry to assess behaviors of individuals with autism.”

15. On August 27, 2018, in the presence of Dr. Parkes, Mother, and Claimant’s babysitter, an RCOC licensed occupational therapist evaluated Claimant’s language and communication, reciprocal social interaction, and imagination and creativity, as well as whether Claimant presented with stereotyped behaviors and restricted interests. In the Behavioral *Observation and Assessment Report* she prepared, Dr. Parkes documents Claimant “used frequent non-echoed single words, and two-four word utterances” and she listed examples such as ““Duck, Cow, Small Ball, He’s climbing. What is this one, Put it here, I need the telephone, This one is for baby, This one is for me.”” (Exh. 7 at Page 3-Page 4.) Dr. Parkes reports Claimant “directed vocalization to the examiner to ask and answer questions, request, direct attention, share enjoyment, and identify toys/objects. There was decreased intelligibility in some vocalizations. There was no immediate echolalia. He did not use stereotyped or repetitive words during the evaluation.” (Exh. 7 at Page 4.)

16. In the *Behavioral Observation and Assessment Report*, Dr. Parkes documents Claimant “used appropriate gaze with subtle changes meshed with other communication throughout the ADOS-2. He smiled immediately in response to the

first smile of the examiner. He directed some appropriate facial expressions to the examiner in order to communicate affect including excited, happy, and concerned." (Exh. 7 at Page 4.) Dr. Parkes also notes Claimant's effective eye contact to communicate while responding to his name and as part of his efforts to direct another person's attention to an object. Regarding Claimant's social skill and efforts, Dr. Parkes reports, "He effectively used nonverbal and verbal means to make clear social overtures to the examiner. He made frequent attempts to get and maintain the examiner's attention and to direct the examiner to objects and actions. He showed relatively little concern as to whether his parent or the babysitter was paying attention to him during the session." (*Ibid.*)

17. Regarding whether Claimant exhibited stereotyped or repetitive behavior, Dr. Parkes reported Claimant "did not present with unusual sensory interests or sensory seeking behaviors during this administration of the ADOS-2. No unusual and/or repetitive hand and finger mannerisms were observed. He did not present with any self-injurious behaviors. There were no repetitive or stereotyped behaviors during the ADOS-2 evaluation." (Exh. 7 at Page 5.)

18. Under the heading ADOS-2 CLASSIFICATION Dr. Parkes notes: "**Level of autism spectrum-related symptoms: Minimal To-No-Evidence**" (Exh. 7 at Page 5; bold text in original.)

19. In the *Behavioral Observation and Assessment Report* she prepared and at the administrative hearing, Dr. Parkes opined Claimant does not meet the DSM-5

diagnostic criteria for Autistic Spectrum Disorder.⁵ Consequently, on September 4, 2018, during the RCOC eligibility determination review, based on available data, including the August 27, 2018 behavioral observation and ADOS-2 evaluation results, Dr. Parkes determined Claimant did not present with autism and Claimant was not eligible for Lanterman Act services and supports.

LISA LAWTON, BA

20. Lisa Lawton holds an undergraduate degree in social work. For 17 years she has served RCOC as an intake coordinator in its assessment unit. On June 4, 2019, Ms. Lawton was assigned to Claimant's case with responsibility for reassessing Claimant considering a March 28, 2019 report from The Center for Autism and Neurodevelopmental Disorders (Center for Autism), University of California, Irvine finding Claimant meets the DSM-5 criteria for ASD.

21. Robin Steinberg-Epstein, M. D., a Clinical Professor of Pediatrics and Chief of Developmental Behavioral Pediatrics at the Center for Autism, examined Claimant during a March 28, 2019 office visit, and she memorialized her observations of Claimant's behaviors in a March 28, 2019 report she prepared as follows:

Responds to name 80%, poor eye contact, can sit with back toward partner, can develop play, initiates, offers, asks for

⁵ Dr. Parkes explained RCOC uses the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) to determine eligibility for services and supports under the Lanterman Act's qualifying category of "autism."

more, intermittently share affect, but decreased in frequency, well developed expressive lang, 4-5 word sentences and nice, but not professional lang. On 2-3 occ repeated last word of someone else, but not clearly echolalic. Will allow others to play, but not lead play. Does not like it if others change play, and will ignore their attempts regularly (numerous-50% of the time). Can use figurines and comes up with some great solutions. Rapport can be good but not maintained. Great smile that he directs, again with less frequency. Will come over and join adult but then wanders away if not what he wants to do. Can answer name, age (3rd try), shows me 3, knows the difference between boy/girl, names 7 colors, knows eyes, nose, tongue, shoulder, knee, and finger but no elbow, ears. . . . Mood-happy. . . . Rapport-good, but not maintained. Smiles and jokes on his terms. . . . Good attn. "Mommy" but doesn't look. Diminished eye, not maintained, shares emotion on his term, directs play and is not flexible in storyline, to the point of insistence (trying to pull something out of my hand), but not to the point of anger or crying. Offers, asks for more, look, this is a batman. Gestures-shows me 3 fingers for age, nods, shakes, shows me small.

(Exh. 8 at Page 5 of 9.)

22. Dr. Steinberg-Epstein used a "DSM-5 Criteria for Autism Spectrum Disorder Checklist" to diagnose Claimant with ASD. "[Claimant] meets DSM-5 criteria

for Autism Spectrum Disorder, with Level 2: Requiring Substantial Support. He presents with deficit in his social communication and social interactions as well as having restricted, repetitive, and stereotypical patterns of behaviors and interests.” (Exh. 8 at Page 6 of 9.) Dr. Steinberg-Epstein provided a plan, which included “ADOS-module 2 vs 3.” (Exh. 8 at Page 8 of 9.)

23. Ms. Lawton testified her reassessment of Claimant’s current functioning included consideration of Dr. Steinberg-Epstein’s March 28, 2019 report and diagnosis, Claimant’s Early Start service records and evaluations, and Dr. Parkes’ *Behavioral Observation and Assessment Report*. At the time Ms. Lawton was not afforded access to Claimant’s educational records.

24. In a *Social Assessment* report Ms. Lawton prepared, she documents, in the motor domain, Claimant is ambulatory. He can run, jump, and skip. He can go up and down stairs holding onto a person’s hand for support. He uses the slides, swings, and jungle gym at the playground. He scribbles spontaneously and stacks a few blocks. He can turn single pages in a cardboard book. He can unfasten Velcro straps but cannot fasten them. He cannot unfasten zippers, buttons, or snaps. He cannot snip with scissors and cannot imitate horizontal, vertical or circular strokes.

25. Ms. Lawton documents, in the self-care domain, Claimant cannot independently care for his hygiene. He cannot help himself to snacks from the pantry or refrigerator. He does not initiate food preparation when he is hungry. He requires assistance feeding himself. He is noncompliant with commands to clean up or put away his toys. He is unaware of common dangers and he will run into the street without caution. He does not seek help when he is hurt. He does not understand the function of a phone or currency.

26. Ms. Lawton documents, in the social/behavioral/emotion domain, Claimant has no friends. He does not initiate play with other children; he plays alone lining up toys, holding them or mouthing them. He engages in aggressive behaviors when around his peers and family members. He engages in self-injurious behaviors. He has tantrums. He can get out of his car seat thus requiring nearby adult supervision. He requires prompting and reminders to complete tasks. He repetitively watches selected scenes from Mickey Mouse Playhouse.

27. Ms. Lawton documents, in the cognitive domain, Claimant does not know his personal information or names of his family members. He can identify his body parts. He can scribble.

28. Ms. Lawton documents, in the communication domain, Claimant has an expressive vocabulary of six-words. His speech is unclear. He mumbles. He does not point to indicate his needs. He does not reciprocate a goodbye wave. He will repeat words or phrases he hears on television. He neither initiates nor maintains conversation with others. He is unable to interpret the facial expressions or body language of others. He does not consistently respond to his name. He has difficulty following simple commands.

29. In the *Social Assessment* report, Ms. Lawton recommends Claimant's parents request special education services for Claimant "due to his diagnosis of ASD." (Exh. 16 at Page 7 of 7.) Ms. Lawton additionally recommends RCOC specialists review Claimant's available records to determine whether he "meets the criteria to receive services." (Exh. 16 at Page 7 of 7.)

30. At the administrative hearing, Ms. Lawson conveyed her observations that Claimant demonstrated more skills than that reported by Mother. In Ms. Lawson's

presence, Claimant used three- and four-word phrases to answer questions and to indicate his needs. He spoke clearly. He understood and responded appropriately to questions such as "How are you?" "What is your name?" and "What is your favorite toys?" Claimant did not babble or use jargon. His speech was not scripted, perseverative, or echolalic.

SARA BOLLENS, PH.D.

31. Sara Bollens is a licensed clinical psychologist with a specialization in pediatric psychology. At RCOG, Dr. Bollens assesses developmentally complex individuals to resolve their eligibility status for Lanterman Act services and supports. Dr. Bollens explained at the administrative hearing, Claimant's case was "routed to me around September 2019," at which time she performed a record review consisting of the *Social Assessment* report Ms. Lawson prepared, the *January 2018 Report* and the *April 2018 Report* Claimant's Early Start service provider, Patterns, prepared chronicling his ABA intervention, and Dr. Steinberg-Epstein's March 28, 2019 diagnosis. At the time of her record review Dr. Bollens was not afforded access to Claimant's educational records.

32. At the administrative hearing, Dr. Bollens explained a "high bar" exists for "labeling a child with a permanent life-long substantial disability" such as autism. According to Dr. Bollens, "If the child is not so, that label could hurt the child. Do no harm is a professional responsibility." With these considerations in mind and based on her record review, Dr. Bollens concluded there was insufficient information to diagnose Claimant with ASD and did not find him eligible for Lanterman Act services and supports under the qualifying category autism.

33. Dr. Bollens explained the records available to her reflected inconsistent reporting and diagnoses. Regarding Patterns, Claimant's Early Start service provider, Dr. Bollens questioned the quality of its reporting focusing on the identical raw score and standard score reported in the April 2018 Report and the July 2018 Report Patterns prepared.⁶ According to Dr. Bollens, Claimant's DAYC-2 raw score and standard score "should have changed with age" and because they did not, Dr. Bollens testified, " I question the quality of the reports."

34. Dr. Bollens noted Mother's reporting about Claimant's behaviors did not square with the behaviors Claimant demonstrated during Ms. Lawton's social assessment session with him. Claimant demonstrated behaviors revealing he possessed more skills than Mother reported. (See Factual Finding 28.) Dr. Bollens suggested Mother may be a "poor historian" citing Dr. Steinberg-Epstein's March 28, 2019 report attributing the following statement to Mother: "I do not know any milestones. Life is too busy and I have too many kids." (Exh. 8 at Page 3 of 9.)

35. Dr. Bollens explained Dr. Steinberg-Epstein's diagnosis Claimant meets DSM-5 criteria for autism is "accompanied with many caveats," notably "his autism is mild, but he meets criteria . . . albeit weakly." Dr. Bollens additionally explained Dr. Steinberg-Epstein diagnosed Claimant without the benefit of the ADOS-2 and Dr. Steinberg-Epstein's recommendation for "ADOS-module 2 vs 3" suggests a need for an additional follow up.

36. At the conclusion of her records review, Dr. Bollens recommended a Transdisciplinary Assessment (TDA) of Claimant. Ms. Lawton, after discussions with

⁶ See Footnote 4.

Mother, scheduled a TDA for October 14, 2019, which was then rescheduled multiple times at Mother's request for various reasons. The TDA Dr. Bollens recommended has yet to occur.

PETER HIMBER, M.D.

37. Peter Himber, M. D., serves as the Medical Director at RCOC. Dr. Himber has a 23-year practice diagnosing and treating individuals with developmental disabilities. Dr. Himber served on the RCOC team determining Claimant's eligibility for Lanterman Act services and supports. On October 22, 2019, Dr. Himber could not confirm Claimant presented with a substantially disabling, life-long developmental disability.

38. At the administrative hearing, Dr. Himber reiterated, even assuming the validity of Dr. Steinberg-Epstein's diagnosis that Claimant meets the DSM-5 Criteria for Autism, Claimant does not present with a substantially disabling life-long condition. He testified Claimant reported symptoms are "only in the home environment" and "I don't understand the reason for that, but regardless of reason, they are not present in multiple environments." Dr. Himber referenced Claimant's school records, which became available to the RCOC eligibility team in March 2020. Dr. Himber opined the school records, which are discussed in Factual Findings 39-41, confirm Claimant's ineligibility for Lanterman Act services and supports because "the bar for special education is lower than the bar for regional center services and since [Claimant] is not eligible for special education services he is not eligible for regional center services." Dr. Himber concluded, "At this point no additional information is needed. [Claimant] failed autism on every proxy."

Claimant's School Records

39. On June 12 and 21, 2018, the Preschool Assessment Team for the school district in which Claimant resides evaluated Claimant for autism and speech and language impairment. The evaluation included observations of Claimant in his home on June 26 and 29, 2018. On July 5, 2018, an initial Individualized Education Plan (IEP) meeting occurred and was continued on August 21, 2018. The district found Claimant did not meet the eligibility requirements for Characteristics Often Associated with Autism, Speech and Language Impairment, Other Health Impairment (physical disability) or Other Health Impairment (ADHD) and therefore did not qualify for Special Education services. (Exh. 23 at pp. 125-137.)

40. Mother requested an Independent Educational Evaluation (IEE), which the school district granted on August 29, 2018. During week of April 22, 2019, the California Department of Education Diagnostic Center of Southern California completed Claimant's IEE. Claimant was age three years, 9 months, and 7 days old at the time. A transdisciplinary team comprised of an educational specialist, school psychologist, speech-language pathologist, and pediatrician/clinical geneticist administered formal and informal assessments, conducted school and parent interviews, and observed Claimant's social interactions within a variety of environments. The team addressed the following questions:

a. *What are Claimant's levels of cognition, adaptive behavior, communication and academics?* Claimant demonstrated typical cognitive abilities attained by four years of age with a couple of skills expected by seven years of age. Claimant's overall adaptive skill composite, which incorporates communication, daily living and socialization domains, fell within the below average range. However, many skills Mother reported Claimant was unable to do, the transdisciplinary team observed

Claimant doing in the course of the evaluation. Developmentally, Claimant's receptive communication falls at the three to four-year-old level; on standardized assessments, within the average range. Developmentally, Claimant's expressive communication falls at the three to four-year old level; on standardized assessments, within the low-average range. He used language for a variety of pragmatic functions, including to request, protest, initiate, respond, comment, and provide information. During play-based assessment, Claimant used realistic props in pretend play using multiple toys and demonstrating multiple actions. He responded well to the introduction of novel play schemas but did not necessarily build on the schema. He incorporated symbolic play initiated by adults, but he did not use symbolic play independently. Overall Claimant's play was consistent with a three-year-old and emergence of his play skills were consistent with a three- or three and a half-year-old. (Exh. 23 at pp. 156-161.)

b. *What diagnosis, if any, best describes Claimant?* Claimant presented with developmentally appropriate eye contact, joint attention, social interaction, shared enjoyment of activities, and generally age-appropriate communication skills. Claimant did not exhibit any unusual or repetitive behaviors, unusual sensory responses to touch, sound, or smell. Claimant presented to the transdisciplinary team as a happy, engaging typical three-year-old boy. (Exh. 23 at p 162.) The transdisciplinary team administered Module 2 of the ADOS-2 to Claimant and determined, overall, Claimant's scores did not meet the cutoff scores for an ADOS-2 Classification of Autism/Autism Spectrum. "[Claimant's] Comparison score indicated that [Claimant] exhibited **minimal to no-evidence** of autism spectrum-related symptoms as compared with children who have ASD and are of the same chronological age and language level." (Exh. 23 at p.163; bold text in original.)

c. Does Claimant meet the eligibility criteria to receive special education services? If so, what special education eligibility is recommended? The transdisciplinary team assessed Claimant in all areas of suspected disability and determined "current assessment does not support eligibility for special education. Regarding autism, "[Claimant] does not demonstrate autism that 'significantly affects verbal and nonverbal communication and social interaction across settings' as stated in Education Code Title 5, § 3030. Therefore, [Claimant] does not meet the criteria for eligibility under Autism (AUT)." (Exh. 23 at p. 164.) Regarding speech and language impairment, "[Claimant] has a history of language delay and language continues to be an area of relative weakness; however, he has progressed significantly and his skills at this point fall in the average range for his chronological age; therefore, he does not meet the eligibility criteria for a speech-language impairment at this time." (Exh. 23 at p. 164-165; italic text in original.) Regarding health impairment, "[Claimant] does not demonstrate any health impairments that 'adversely affects a performance area' as stated in Education Code Title 5, §3030. Therefore, [Claimant] does not meet the criteria for eligibility under Other Health Impaired (OHI)." (Exh. 23 at p. 165.)

41. As part of the IEE, the transdisciplinary team reviewed Claimant's medical records, obtained a detailed history from Mother, and conducted a physical examination of Claimant. The transdisciplinary team noted Dr. Steinberg-Epstein's previous examination of Claimant and her diagnosis of mild ASD for Claimant. The transdisciplinary team reports in the IEE, "[W]e did not see any of the features of ASD during our assessment here and the ADOS-2 also did not support this diagnosis." (Exh. 23 at p. 173.)

Claimant's Evidence in Support of Eligibility for Lanterman Act Services and Supports

MOTHER'S TESTIMONY

42. Mother disagrees RCOC's determination Claimant does not present with the DSM-5 diagnostic characteristics for ASD. Mother maintains Claimant exhibits multiple deficiencies. She asserts in the self-help domain Claimant is unable to hygiene independently; he needs prompts and directions. He still wears diapers. He is upset when routines change. He watched the same show over and over. She opined at the administrative hearing, "He requires training and tasks broken down into simple steps—life training skill and not just school skills; long-term training, continuous remedial training, teaching through repetition."

43. Mother asserts in the language domain Claimant has difficulty following directions and requires simple directions. Claimant cannot carry on a conversation, does not know facial expressions or gestures, uses jargon, fixates on certain pictures and items, and is a little echolalic.

44. Mother asserts in the learning and cognitive domains Claimant is not able to apply knowledge and skills to new situations, has poor retention and long-term memory, and does not understand cause and effect. Claimant does not know his age and gender and has limited knowledge of colors and shapes. He has no danger awareness, including not understanding the difference between hot and cold water or objects.

45. Mother asserts in the self-direction domain Claimant cannot make decisions; he exhibits fears, anxiety, and frustration. He bangs his head on the floor. He

wanders off. He is good with adults but not with peers. He was “kicked out” of a preschool.

46. Overall, Mother’s testimony was consistent with prior reporting of her observations about Claimant’s behaviors.

47. Mother addressed Claimant’s school records stating the district “failed to identify him for special education because it got inconsistent information from the pre-school that kicked him out.” Mother asserted Claimant is “not improving as expected.” Mother opined the “school are not clinicians; they can’t diagnose autism.”

CLAIMANT’S JANUARY 2020 FUNCTIONAL BEHAVIORAL ANALYSIS

48. Based on Dr. Steinberg-Epstein’s March 28, 2019 diagnosis Claimant meets the DSM-5 criteria for ASD, on January 16 and 23, 2020, Advance Behavioral Health, Inc. interviewed Mother, engaged Claimant in unstructured interactions to evaluate his language and play skills, and employed the Adaptive Behavior Assessment System, 3rd Edition (ABS-3) to assess Claimant’s skills in daily living. At the time, Claimant was age four years, six months.

49. The resulting Functional Behavioral Analysis (FBA) report states Claimant’s communication, social, adaptive, play, and self-help skills are “extremely low.” The FBA report recommends target therapeutic intervention to decrease “excessive maladaptive behaviors” identified as tantrums and climbing. The FBA report sets forth a behavioral health treatment program itemizing several skill-acquisition goals and achievement dates for “intervention areas” labeled communication, language, visual performance, social/leisure, and self-help/daily living. (Exh. H.)

Relative Weight Accorded the Evidence Offered at Hearing

50. As Dr. Parkes testified, the ADOS-2 is the recognized “gold standard” for assessing communication, reciprocal social interactions, interests, and behaviors characteristic of individuals who may present with ASD. On August 27, 2018, Claimant was administered Module 1 of the ADOS-2. On April 22, 2019, Claimant was administered Module 2 of the ADOS-2. Both administration of the ADOS-2 to Claimant yielded minimal to no evidence to support a diagnosis Claimant presents with ASD. Assessments and diagnoses of Claimant incorporating or premised on results obtain from administration of the ADOS-2 to Claimant are accorded significant weight.

51. Dr. Steinberg-Epstein did not administer the ADOS-2 to Claimant. Other than her examination of Claimant during an office visit, Dr. Steinberg-Epstein administered no assessment to support her March 28, 2019 diagnosis Claimant meets DSM-5 criteria for ASD. Rather, Dr. Steinberg-Epstein documents she used a “DSM-5 Criteria for Autism Spectrum Disorder Checklist” to diagnose Claimant. Dr. Steinberg-Epstein’s plan recommending an “ADOS-model 2 vs 3” suggests a recognition her diagnosis required substantiation. The April 22, 2019 IEE incorporating results from administration of Module 2 of the ADOS-2 to Claimant failed to substantiate Dr. Steinberg-Epstein’s diagnosis Claimant presents with ASD. Minimum weight is accorded Dr. Steinberg-Epstein’s March 28, 2019 diagnosis.

52. Mother’s testimony at the administrative hearing was consistent with prior reporting of her observations about Claimant’s behaviors. Mother’s testimony is accorded significant weight.

Evidentiary Finding

53. In sum, multiple administration of the ADOS-2 yielded results supporting a finding Claimant does not present with ASD. In addition, application of less stringent standards in Claimant's educational setting did not find Claimant presents with ASD. A preponderance of the evidence establishes Claimant does not present with the symptoms or identifying characteristics of ASD as delineated in the DSM-5. Consequently, Claimant does not present with "autism," a disabling condition required to establish his eligibility for Lanterman Act services and supports.

LEGAL CONCLUSIONS

1. As Claimant is seeking to establish eligibility for government benefits or services, he has the burden of proving by a preponderance of the evidence that he has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325, original italics.) In meeting the burden of proof by a preponderance of the evidence, the complainant "must produce substantial evidence, contradicted or un-contradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 339.)

2. Claimant must establish by a preponderance of evidence he has a qualifying "developmental disability." Welfare and Institution Code section 4512, subdivision (a), defines "developmental disability" to mean the following:

[A] disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17 (CCR), section 54000 further defines "developmental disability" as follows:

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

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual . . . ;

(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 need for treatment similar to that required for intellectual disability.

4. Establishing the existence of a developmental disability within the meaning of section 4512, subdivision (a), requires Claimant additionally to establish by a preponderance of evidence the developmental disability is a "substantial disability," defined in section 4512, subdivision (h), to mean "the existence of significant 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: (1) Self-care. [¶] (2) Receptive and expressive language. [¶] (3) Learning. [¶] (4) Mobility. [¶] (5) Self-direction. [¶] (6) Capacity for independent living. [¶] (7) Economic self-sufficiency."⁷

⁷ CCR section 54001, subdivision (a), similarly defines "substantial disability" as follows:

(1) A condition which results in a 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;

5. Claimant failed to produce a preponderance of evidence establishing his eligibility for Lanterman Act services and supports under the qualifying category of autism. The more convincing evidence establishes Claimant presents with no or minimum symptoms or identifying characteristics of ASD. (Factual Findings 15 through 19 and 40.) In addition, Claimant failed to produce a preponderance of evidence establishing he presents with significant functional limitations in three or more areas of major life activity across multiple settings. The more convincing evidence establishes Claimant presents with and consistently demonstrated a higher level of skills in receptive and expressive language, learning, self-care, and self-direction than the skill levels Mother reported.⁸ (Factual Findings 15 through 17, 24 through 30, 34, 40, and 42 through 45.)

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

CCR section 54002 defines "cognitive" as "the ability of an individual to solve problems with insight to adapt to new situations, to think abstractly, and to profit from experience."

⁸ Claimant's mobility skills are not disputed. He is mobile. Given Claimant's age, any assertions regarding his capacity for independent living would amount to speculation. Similarly, with respect to economic self-sufficiency, the credible evidence establishes Claimant does not present with a disability requiring remediation that

6. By reason of Factual Findings 1 through 53 and Legal Conclusions 1 through 5, cause exists to deny Claimant's appeal. Claimant has not met his burden of establishing by a preponderance of the evidence his eligibility for Lanterman Act services and supports under the qualifying category of "autism" as provided for in section 4512, subdivision (a) of the Welfare and Institutions Code.

ORDER

1. Claimant's appeal is denied.

2. The determination by the Regional Center of Orange County that Claimant is ineligible for services and supports pursuant to the Lanterman Developmental Disability Services Act under the qualifying category of "autism" is affirmed.

DATE:

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings

otherwise threatens his acquisition of knowledge, competencies, and training for employment to achieve independence in adulthood.

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.