

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022040737

DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by video conference on January 26, 2023.

Thompson Kelly, Ph.D., Director of Clinical Services, represented the Westside Regional Center (Service Agency). Claimant was represented by his mother (Mother). Titles are used to preserve confidentiality. Claimant was not present at the hearing.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on January 26, 2023.

ISSUE

Is Claimant eligible for services from the Service Agency?

EVIDENCE RELIED UPON

Exhibits: Service Agency exhibits 1-15; Claimant exhibits A-H. Testimony of Dr. Rita Eagle, Service Agency psychologist, and Mother.

SUMMARY

Claimant is 12 years old. He has received diagnoses of autism from a school psychologist and Autism Spectrum Disorder (ASD) from a regional center psychologist. However, the Service Agency denied eligibility for several reasons: descriptions of Claimant's behavior during testing and a recent observation did not conform with the criteria for ASD; even if his ASD diagnosis is supported, Claimant is not substantially handicapped by ASD; and Claimant's behavior and symptoms are consistent with a mental health impairment and not a developmental disability.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a twelve-year, four-month-old boy who lives with Mother and his younger brother within the catchment area of the Service Agency. He has been diagnosed with ASD.

2. In late 2021, Mother requested Claimant be assessed by the Service Agency for eligibility for services. Possible services from the Service Agency would fall under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act). (All further statutory references are to the Welfare and Institutions Code (Code), unless otherwise noted.) ASD is a developmental disability for which services may be available under the Lanterman Act. A second requirement to receive services is that the consumer must be substantially disabled due to the eligible developmental disability. This is determined by reference to seven areas of major life activity, discussed in more detail below. A psychological disorder or a learning disability is not an eligible condition for services.

3. On March 4, 2022, Service Agency Intake Counselor Maritza Cortés wrote a letter, and the Service Agency issued a Notice of Proposed Action including its determination Claimant did not meet eligibility requirements and the request for services was denied. (Exhibit 2.)

4. Mother filed a Fair Hearing Request dated April 4, 2022. A hearing was scheduled. As part of a motion to continue the hearing, Claimant waived applicable time deadlines. This hearing was then scheduled.

Assessments and Testing of Claimant; Reports

5. According to Mother's testimony, Claimant has exhibited challenging behaviors for many years, has been difficult to manage, and has been removed from many schools due to difficulties in classroom settings and inability to provide a safe environment for him and other students.

DR. ROBERT ROME REPORT, 2017

6. The earliest document in evidence is a Psychological-Educational Evaluation by Robert J. Rome, Ph.D., psychologist, dated November 20, 2017. Mother stated Claimant's school "required" her to obtain an evaluation, and she arranged and paid for it. Claimant was age seven years, two months, and attending a Montessori school, "Grade 2.3." (Exhibit 13.) Dr. Rome observed Claimant at school, administered several tests, and interviewed Mother. Claimant attended a Montessori preschool, enrolled in kindergarten at another Montessori school, and then was immediately moved to the first grade. At the time of the evaluation in November 2017 he was in second grade and his work was exemplary. However, he showed some unusual behaviors and was disruptive, including use of profanity and disrespect of peers and teachers.

7. On the Wechsler Intelligence for Children—Fifth Edition, Claimant's Verbal Comprehension Index was 98, his Perceptual Reasoning Index was 100, and his Full-Scale IQ was 95, all considered in the average range. On the Woodcock-Johnson—Fourth Edition Test of Achievement, Claimant's scores were within the age-appropriate range except for a low score in Writing Samples. Language Development Index Scores ranged from average to slightly above average. On the Behavioral Assessment Scale for Children—Third Edition, based on reports from Mother and his teacher, Claimant was at-risk for numerous behaviors, including aggression, conduct, externalizing problems, depression, withdrawal, adaptability, functional communication, and adaptive skills.

8. In his Discussion section, Dr. Rome noted Claimant's intellectual and academic functioning were generally in the average range, with written language and reading comprehension skills at the low end of the low average range, and writing

samples in the borderline range. His Diagnostic Impressions included Adjustment Disorder with mixed Disturbance of Emotions and Conduct, and Specific Learning Disorder with Impairment in Written Expression. Dr. Rome recommended educational therapy to strengthen writing, and counseling/therapy to address problems in emotions (depression) and behavior (aggression).

9. Rita Eagle, Ph.D., reviewed materials relating to the case and agreed she could support the Service Agency's decision during a hearing. Dr. Eagle received her doctorate in 1964 and most of her work experience was and is concentrated on children with developmental disabilities, specifically ASD. Dr. Eagle has served on the eligibility team for the Service Agency but was not on the team that determined Claimant was not eligible for service.

10. Dr. Eagle reviewed Dr. Rome's 2017 report and testified there was support for his diagnoses. She also opined there was "no hint" Claimant demonstrated ASD symptoms or concerns based on the information in the report.

MARISA PERRY REPORT, 2020 AND 2021

11. The next document in chronological order is a Psycho-Educational Evaluation Report by Marisa Perry, M.A., L.E.P. (Licensed Educational Psychologist), after an initial evaluation on November 18 and 19, 2020, and then updated on July 18, 2021. (Exhibit 12.) Mother stated she arranged and paid for this evaluation after Claimant's school required him to have a behavior contract. Mother also testified she had to drive Claimant to Los Angeles (apparently from a home to which they had moved in the desert), and it was difficult to manage Claimant. Claimant was age ten years, two months, at the time of the first evaluation, and ten years, ten months at time of the second. Ms. Perry noted the initial evaluation in November 2020 was due

to concerns with Claimant's sustained attention, behavioral difficulties, struggles with academics and motivation, and the update in July 2021 was due to increased frequency and intensity of behavioral concerns. Ms. Perry noted Claimant attended kindergarten and first grade at a Montessori school, then first grade at an elementary school in Westminster, and third grade starting at an elementary school in Rancho Mirage, then continuing at another elementary school in Rancho Mirage. Due to COVID-19, Claimant was home-schooled for fourth grade. He was back at the second elementary school in Rancho Mirage for fifth grade.

12. Ms. Perry reviewed records, observed and interviewed Claimant, interviewed Claimant's parents, and administered numerous tests. Her report is extensive. Some of the behaviors she referenced are consistent with ASD (e.g., responding well to tasks broken down to manageable portions, standing and pacing), while other behaviors are not consistent with ASD (e.g., engaged in casual conversation as well as relevant conversation with the examiner, displayed appropriate eye contact). Mother stated concern with Claimant's frustration and anger levels and stated desire to hurt himself, but also stated he relates well to friends and wants people to feel included. On cognitive tests Claimant scored in the average range, with the exception of the TONI-4 non-verbal index, where his score was in the superior range. On tests of academic ability, Claimant scored generally in the low average range, with some scatter in subtest scores. Of note, he received low scores in some areas related to visual processing and visual motor integration. His score on delayed recall was well below average, indicating difficulty retrieving data after time intervals and verbal interference.

13. Ms. Perry tested Claimant's social and emotional functioning using the Behavior Assessment System for Children—Third Edition and Parent Rating Scale

(BASC-3). Outcomes can be in the normal range, at-risk range (either a significant problem not severe enough to require formal treatment, or a potential to develop a problem requiring monitoring), or the clinically significant range (a high level of maladjustment). Based on Mother's report, Claimant was assessed in the normal range for somatization, atypicality, adaptability, adaptive skills, social skills, leadership, activities of daily living, and functional communication. Claimant was assessed in the at-risk range for externalizing problems, hyperactivity, aggression, conduct problems, behavioral symptoms, and attention problems. He was assessed in the clinically significant level for internalizing problems, anxiety, and depression. The Conners 3—Long Form assesses behaviors related to Attention-Deficit/Hyperactivity-Disorder (ADHD). Claimant's parents' scores were very elevated for defiance aggression (argumentative, poor anger control, physically or verbally aggressive) and inattention (poor concentration, easily distracted), elevated for hyperactivity and impulsivity, and average for peer relations, learning problems, and executive functioning.

14. In the July 2021 evaluation, Ms. Perry administered the Autism Spectrum Rating Scales to Mother, yielding the following results: in the average range for peer socialization; in the slightly elevated range for social communication, social/emotional reciprocity, stereotypy; in the elevated range, unusual behaviors, atypical language; and in the very elevated range for self-regulation, adult socialization, behavioral rigidity, sensory sensitivity, and attention.

15. In the section of her report on Diagnostic Impression, Ms. Perry diagnosed Claimant with Specific Learning Disorder with Impairment in Reading and Written Expression, ADHD-Combined Type, and ASD, without accompanying intellectual or language impairment. Specific to her ASD diagnosis, and with reference to the criteria from the Diagnostic and Statistical Manual of Mental Disorders, Fifth

Edition (DSM-5), Ms. Perry noted Claimant presented with persistent moderate deficits in social communication and social interaction across multiple contexts, and moderate restricted, repetitive patterns of behavior, interest, or activities.

16. Ms. Perry listed numerous educational interventions to address Claimant's Learning Disability. She made additional recommendations for interventions after providing the ASD diagnosis, including designated instruction services counseling, a positive behavior support plan, occupational therapy, and assessment by an assistive technology specialist.

17. In her comments on Ms. Perry's report, Dr. Eagle was particularly critical of the ASD diagnosis, noting Ms. Perry's credentials as an educational psychologist with a master's degree did not qualify her to make the diagnosis. Dr. Eagle also noted the requirements for special education services include autistic-like behavior, which requires fewer elements than a DSM-5 diagnosis of ASD that is necessary to establish eligibility for services under the Lanterman Act. Dr. Eagle noted the test instrument used, the Autism Spectrum Rating Scales, is not among the best practices to make an ASD diagnosis; rather, it is a "screeener" used to determine if other testing is needed to make the diagnosis. Dr. Eagle also noted several of the observations and other test results referenced by Ms. Perry were inconsistent with ASD, including Claimant's relationships with friends and inclusivity.

POLICE REPORTS, 2021 AND 2022

18. Mother submitted numerous police reports to demonstrate instances of the family's calls for help due to Claimant's behaviors. (Exhibit A.) Mother stated there were several more calls made but it takes too long to get the records. The records are of eight phone calls from September 6, 2021, to January 28, 2022. Three of the calls

relate to Claimant. On September 7, 2021, Mother reported to police Claimant was suicidal, asking for a rope to hang himself, and had a prior suicide attempt. Mother was described as "hysterical." (*Id.* at p. B9.) During the call on January 17, 2022, Claimant was described as irate and hitting his parent. An officer stayed until Claimant was calm, and reported Mother was to take him to UCLA the next day to see his doctor. (*Id.* at p. B1.) The call on January 24, 2022, reported a verbal altercation between Claimant and his grandmother. (*Id.* at p. B4.)

UCLA HOSPITAL, 2021 AND 2022

19. Claimant's medical documents include a record of an appointment on September 7, 2021, due to suicidal ideation (Exhibit B), a discharge summary of Claimant's hospitalization at the UCLA Resnick Neuropsychiatric Hospital (UCLA Hospital) from October 7 to 21, 2021 (Exhibit C), and a letter dated October 21, 2021, from Rama Yasaei, M.D., a psychiatry fellow at UCLA Hospital (Exhibit D.) The September 7, 2021 record, from Providence Torrance Emergency Center, notes Claimant was to follow-up the next day with his primary physician or outpatient pediatric psychology or psychiatry. The discharge summary contains no information about Claimant's treatment at UCLA Hospital. It is noted Claimant was hospitalized for "RESOLVED: Aggression, GAD (generalized anxiety disorder), and Autism spectrum." (Exhibit C, p. B24.) Claimant and Mother were to follow-up with psychiatry and therapy appointments, and Claimant was waiting for availability at the UCLA Hospital ABC program, described in more detail below. The October 21, 2021 letter from Dr. Yasaei referenced Claimant's hospitalization and diagnosis of ASD and generalized anxiety disorder, and notes Claimant needs supports in his education program and should be evaluated for an IEP (Individualized Education Program). (Exhibit D, p. B30.)

20. Tara Peris, Ph.D., is a child and adolescent psychologist at UCLA Hospital's Program for Enhancement of Achievement, Behavior, and Cognition (UCLA Hospital ABC), where she attended to Claimant from his entry on November 22, 2021, and for the next approximately four months. Dr. Peris wrote a report dated January 20, 2022, referencing Claimant's treatment and diagnosis, and her recommendations. (Exhibit 9.) The section on pertinent history refers to the diagnoses made by Ms. Perry. With regard to the ASD diagnosis, Dr. Peris noted Claimant presents with the following:

[D]ifferences in social communication, characterized primarily by difficulties with social-emotional reciprocity, and challenges with developing, maintaining and understanding relationships. [Claimant] also exhibits restricted, repetitive behaviors and interests. Mother noted that [Claimant] is insistent on sameness and exhibits resistance to change, requires intensive previewing, exhibits emotional dysregulation when routines are changed, has difficulties with transitions, and demonstrates rigid thinking patterns. Mother also reported sensory sensitivities in [Claimant], characterized primarily by his difficulty tolerating loud noises. These behaviors have been observed over the course of [Claimant's] development. His ASD diagnosis is without accompanying intellectual or language impairment and his deficits resulting from his ASD diagnosis can be characterized as mild-moderate.

(Id. at p. A47.)

21. Dr. Peris also referred to Claimant's symptoms of ADHD and generalized anxiety disorder, as well as some of his school functioning, which had deteriorated due to his mental health difficulties, social-emotional challenges, and insufficient supports at school.

22. Claimant's treatment program at UCLA Hospital ABC was described on detail. He attended Monday through Friday, 8:15 a.m. to 2:15 p.m., in various small group activities with a highly structured, supervised, and therapeutic hospital setting. Activities included occupational therapy, recreational therapy, task groups, cognitive behavioral therapy, social skills group, individual therapy, and the specialized hospital school program. The program treated six to eight children with at least two or more staff present. Claimant's parents received training, and Claimant had an individual positive behavioral support plan. The report notes several areas and behaviors where Claimant continued to struggle, and others where he showed improvement.

23. In addition to confirming the continued presence of diagnoses of ADHD and Generalized Anxiety Disorder, Dr. Peris noted her clinical observations of Claimant supported the diagnosis of ASD according to the DSM-5.

[Claimant] has a longstanding history of and continues to demonstrate qualitative differences and inconsistencies in his use of communication for social purposes. [Claimant] also shows evidence of restricted and repetitive patterns of behaviors and interests and rigid thinking patterns and behaviors. This has led to significant functional impairment in his life both at school and at home.

(Exhibit 9, p. A49.)

24. Dr. Peris included numerous recommendations for Claimant's school program, based on the combination of his three diagnoses which manifest in his "significant emotional reactivity, a low frustration tolerance, and cognitive inflexibility that interfere with his ability to cope and with his emotions. Combined with his difficulties in both expressive and reciprocal communication, taking the perspective of others, and inattentiveness, these conditions are significantly impacting his functioning at home, school and with peers. . . For [Claimant] to be successful at school, he requires significant support from staff and in the structuring of his school program." (Exhibit 9, p. A50.) The recommendations were for a small, highly structured and supervised school setting with individualized therapeutic guidance, specific supports and accommodations, and communication and coordination with his parents.

25. Dr. Eagle testified she reviewed Claimant's UCLA Hospital records, and noted they did not contain any independent screening or testing for ASD. Rather, they relied on Ms. Perry's report of that diagnosis. Dr. Eagle stated she did not agree with the ASD diagnosis. However, Dr. Eagle agreed observing Claimant over a period of four months would provide an adequate basis on which to form diagnostic impressions.

IEPs AND ERIKA SANCHEZ REPORT, 2021 AND 2022

26. Next, chronologically, is the record of Claimant's IEP meeting dated October 28, 2021, for the Palm Springs Unified School District. (Exhibit 11.) Claimant was in the fifth grade. This initial IEP indicates Claimant is being considered for eligibility based on Autism and, due to his ADHD, Other Health Impairment. Claimant's parents communicated his strengths as having excellent vocabulary, a sense of humor, high level thinking skills, creativity, and inclusivity. Their concerns included his behavioral challenges, lack of success in school, anger, and anxiety. Teachers reported

poor performance in reading, writing, and math. Testing indicated Claimant's receptive and expressive language skills were in the normal range, but poor skills in social and personal interaction. Gross and fine motor development was good, with some issue noted on an evaluation for occupational therapy related to Claimant's distractibility and social interaction. Under "Social/Emotional/Behavioral," the IEP notes Claimant can work with a partner he chooses but not otherwise, bullies others, is non-compliant and cannot control his impulses, and requires adult intervention to remain on task. Claimant was to attend regular classes 24 percent and special education classes 76 percent of his time, and receive group and individual counseling. He would receive one-to-one support, and a psychoeducational assessment by the school district. The IEP includes notes of subsequent meetings, referenced below.

27. On behalf of the school district a Psychoeducational Case Study Report was prepared by Erika Sanchez, M.S., Ed.S. (Educational Specialist), school psychologist, dated November 5, 2021. (Exhibit 10.) Ms. Sanchez noted Claimant attended fourth grade online. Ms. Sanchez reviewed records, observed Claimant in school, interviewed teachers, and administered tests and assessments, many of which included input from teachers and Mother. Academically, Claimant's ability was within the low average to average range. His general memory was in the extremely low range. On the BASC-3, measuring behavioral and emotional development, there was some difference in ratings by Mother and a teacher, however both sources rated Claimant at the clinically significant (highest) level in numerous areas, and at-risk (moderate concern) in several other areas. On the Conners-3, clinically significant or at-risk ratings were given for inattention, hyperactivity, impulsivity/defiance, aggression, and learning and executive function. Input from a teacher and Mother was used for the Autism Spectrum Rating Scale and, again, there were some differences by source, but the differences were minimal. The pattern of scores indicated Claimant has symptoms directly related to the

DSM-5 diagnostic criteria and exhibits many of the features that are characteristic of ASD.

28. Ms. Sanchez related the assessment results to the requirements for eligibility for special education services found in Education Code section 56361 under the 13 specific categories set forth in California Code of Regulations, title 5, section 3030. In her determination Claimant did not meet requirements for a Specific Learning Disability, Ms. Sanchez noted Claimant did not have a severe discrepancy between ability and achievement in the areas of oral expression, listening comprehension, basic reading, reading comprehension, written expression, math calculation, and math reasoning. Claimant did not meet requirements for Emotional Disturbance; Ms. Sanchez noting he exhibited many of the criteria, but the team could not determine this occurred over a long enough period of time. If the behaviors persisted, his eligibility for Emotional Disturbance could be revisited. Claimant met requirements under Other Health Impairment, as his ADHD adversely affected his educational performance. Claimant met requirements under Autism, based on the diagnosis contained in the UCLA Hospital records and the rating scale results from Mother and the teacher. It was recommended Claimant receive special education services.

29. The IEP team met again on November 16, 2021, after receiving the Sanchez report (Exhibit 11, p. A108), and there are notes of additional meetings December 9, 2021, and February 7, 2022. (*Ibid.*, pp. A112-A115). In the November meeting Ms. Sanchez stated school districts do not diagnose disabilities but can identify characteristics of autism. The meeting participants agreed autism was Claimant's primary disability affecting his ability to access his education, and his secondary eligibility category was Other Health Impairment. The discussion of developing the IEP began and was continued at the subsequent meetings. These notes

reference Claimant had been attending and was in his last week at UCLA PHP where he benefited from small group instruction. (The UCLA PHP is the same program as the UCLA Hospital ABC.)

PSYCHOSOCIAL ASSESSMENT, 2021

30. The Service Agency arranged for a Psychosocial Assessment, performed by Intake Counselor Maritza Cortés on November 10, 2021. Ms. Cortés noted, among other things, Claimant's developmental milestones, the current status of his strengths and supports needed, family history, and health and medical status. Many troubling behaviors are noted. It was noted Claimant had been diagnosed with ASD. Ms. Cortés recommended a referral for psychological evaluation and obtaining medical and school records.

DR. JEFFREY NISHII REPORT, SERVICE AGENCY DETERMINATION, 2022

31. To gather further information, the Service Agency referred Claimant for a psychological evaluation by Jeffrey Nishii, Psy.D., who evaluated Claimant remotely via telehealth on January 5 and February 1 and 15, 2022. His report is dated February 18, 2022. (Exhibit 5.) Dr. Nishii included some information not seen in the other prior documents, such as Claimant's parents were going through a divorce, three years ago Claimant had been in the proximity of a shooting and started reacting to some noises and exhibited nocturnal enuresis, and Claimant had been hospitalized at Little Company of Mary in Torrance for 24 hours for suicidal ideation (it is inferred this is the same interaction as depicted in the medical summary, Exhibit B). Dr. Nishii reviewed records, interviewed Claimant and observed him in a park, interviewed Mother, spoke with two people at the UCLA Hospital ABC program, administered tests and assessments, and presented his diagnostic impression, summarized below.

32. In the Background Information section, Dr. Nishii reported, with regard to social functioning, Claimant was reported to miss social cues, speak without a filter, display inconsistent eye contact, and have difficulty with perspective taking. He displayed frequent emotional outbursts, extreme anger and rage, and oppositional behavior. Regarding repetitive behaviors, claimant displayed rocking, jumped on trampolines, listened to the same song repeatedly, and played with a yoyo. Rigid preferences related to clothing, including wearing only certain fabrics, wearing the same outfit repeatedly, and being intolerant of clothing tags. Several rigid food preferences related to textures are noted, and he is sensitive to noise. Claimant has difficulty adjusting to sudden changes in plans and routines.

33. Observations by videoconference and later at a park yielded many behaviors inconsistent with some aspects of ASD, such as good communication skills, ability to express thoughts, no repetitive or stereotyped mannerisms or forms of speech, reports of having friends, good eye contact, and reciprocal verbal engagement.

34. The therapists from the UCLA Hospital ABC program reported to Dr. Nishii that Claimant had recently completed the program. They noted numerous examples of behavior by Claimant consistent with his ASD and other diagnoses, including intrusive social behaviors and insensitive remarks, social exchanges dominated by his own personal interests and preferred topics, limited awareness and sensitivity to whether others lost interest in such topics, extreme sensitivity to rejection by reacting with outbursts of aggression, perseveration on certain words or phrases uttered by his peers, veering off topic or switching to inappropriate topics, rigidity in social situations, difficulty tolerating things that did not go as expected, and struggling when plans or schedules could not be carried out.

35. Claimant's cognitive function was assessed with the portion of the Wechsler Intelligence Scale for Children—Fifth Edition for verbal comprehension, resulting in a score of 95, in the average range. On the Raven's 2 Progressive Matrices, a nonverbal assessment of cognitive abilities, Claimant's score of 92 was in the average range. Adaptive functioning, assessed by the Vineland Adaptive Behavior Scales—Third Edition, yielded results in the average range for communication, daily living skills, and adaptive behavior composite, and in the low range for socialization. Examples of significant behaviors were listed in each domain. Of note, he engaged in eye contact and in conversations on preferred topics and did not move easily from topics. He interrupts and could be rude, did not recognize the likes and dislikes of others, and did not respond to social hints or indirect cues. Claimant needs adult supervision around peers, displays frequent outbursts, and is aggressive when triggered, including property destruction without considering consequences before acting.

36. Dr. Nishii administered the Autism Diagnostic Interview—Revised (ADI-R), with Mother as the source, to assist in determining whether Claimant met criteria of ASD. Dr. Nishii reported on the three areas tested. He did not find qualitative abnormalities in communication. Dr. Nishii concluded Claimant met the DSM-5 criteria regarding qualitative abnormalities in reciprocal social interaction, and restricted, repetitive, and stereotyped patterns of behavior.

37. More specifically, with regard to persistent deficits in social communication and social interaction, Dr. Nishii cited the following: "back and forth conversation limited to matters of personal interest, while often monopolizing the conversation by speaking at length with reduced concern for thoughts and opinions of other; limited ability to communicate about emotions without resulting [resorting] to aggression; [P] displays some strengths in areas of eye contact and use of gestures;

clear deficits and [in]ability to observe and understand gestures and cues from others; [P] difficulty sharing in social situation, limited interest in peers, gravitates more toward adults; challenges with initiating and sustaining friendships.” (Exhibit 5, p. A34.)

Claimant’s ADI-R score for this subject area was 10, where 10 is the diagnosis cut-off. Dr. Nishii determined the severity level was 2, requiring substantial support.

38. Specifically with regard to restricted, repetitive patterns of behavior, interest, or activities, Dr. Nishii cited the following: “interests in activities with repetitive quality (e.g., drumming and yoyo); listens to the same song repeatedly; repetitive speech; [P] rigidity in matters relating to clothing and food; [P] pattern of perseverative focus and ideation; [P] [hyperreactivity to] sound, tactile (clothing, avoidance of sand, rigid preferences relating to his hair), specific food preferences relating to texture.” (Exhibit 5, p. A34.) Claimant’s ADI-R score for this subject area was 5, above the diagnosis cut-off of 3. Dr. Nishii determined the severity level was 2, requiring substantial support.

39. Dr. Nishii made several recommendations, including Claimant would benefit from Applied Behavioral Analysis (ABA) intervention, occupational therapy, and mental health treatment, and for the Service Agency’s eligibility team to consider providing services.

40. Dr. Eagle noted Dr. Nishii had observed behavior of Claimant that was not consistent with ASD and Claimant had behavioral issues related to his other diagnoses. Dr. Eagle testified she spoke with Dr. Nishii about his report, and Dr. Nishii told her he did not observe any perseverative behaviors, contrary to what was noted in his report.

41. The Service Agency eligibility team met on February 23, 2022, and determined Claimant was not eligible for services. In the Comments portion of the form, it is noted Claimant is diagnosed with ASD, "however descriptions of observations do not match criteria for ASD; seems primarily health informed." (Exhibit 6, p. A38.)

42. As noted above, the Service Agency issued the Notice of Proposed Action dated March 4, 2022, and Mother filed a Fair Hearing Request dated April 4, 2022.

MULTIDISCIPLINARY OBSERVATION, 2022

43. Following the filing of the Fair Hearing Request, the Service Agency arranged for a multidisciplinary team to observe Claimant. The observation occurred on March 13, 2022, via Zoom, and was followed by a report. (Exhibit 7.) The multidisciplinary team consisted of Dr. Kaely Shilakes, Psy.D., the Service Agency staff psychologist, Mayra Mendez, Ph.D., L.M.F.T., a psychology consultant, and Ms. Cortés, the Service Agency Intake Counselor who had performed the psycho-social assessment in 2021. These three observers had also been three of the five members of the eligibility team who determined previously Claimant was not eligible for services. Dr. Shilakes wrote the report. Three paragraphs describe observations of Claimant, two paragraphs relate to discussions with Mother, and the report also addresses the seven areas of major life activity found in California Code of Regulations, title 17 (Regulations), section 54001, discussed in more detail below.

44. It was noted during the observation Claimant did not use any stereotyped, repetitive speech or exhibit any restricted, repetitive behaviors or sensory issues. He engaged in appropriate back and forth conversation and described his

schoolwork and play time. Claimant stated his mother would not let him play at the park because people would bully him and, when asked why, he said it was because he was fat. Claimant stated he has some friends and is learning to box from someone who teaches him at home. He stated he can prepare snacks and can cook certain foods, describing how to cook a steak. Claimant listed his chores and described his morning routine. He spoke of the reasons the family had moved to different locations, and asked the questioner where she lived. He was not a "big fan" of his prior therapist but was going to have an interview with another therapist the following day.

45. The report reflects Mother's concerns, starting with problems in Claimant's different school settings, including students who called him names and taunted him. Friends had also turned on him. Finding a therapist to work with Claimant in person and not virtually had been difficult, but the new therapist planned to come to the home and take walks with Claimant. She described many of Claimant's challenging behaviors which have worsened over time.

46. The report references the seven areas of major life activity. Due to Claimant's age, only five areas apply. Learning: Claimant's cognitive functioning appeared average to above average; he did not have an IEP at that time. Self-direction (social, emotional, self-regulation): Claimant referenced wanting to play basketball with peers, and a trip to Las Vegas with a friend; transitions after waking up take a long time, and Claimant engages in behavioral episodes that have involved aggression. Movement: typical. Language: no deficits or issues were reported. Self-care: did not appear to be an area of concern.

47. In the report Summary, Dr. Shilakes wrote the consensus of the team was Claimant's "overall presentation did not reflect a child substantially disabled by a developmental disability, particularly autism spectrum disorder." (Exhibit 7, p. A42.)

Rather, possible emotional disorders should be considered, in the realm of Bipolar Disorder, Major Depressive Disorder, or Disruptive Mood Disorder. Recommendations included a mental health evaluation, mental health support, and parenting supports. (*Id.* at pp. A42-A43.)

48. On May 19, 2022, Dr. Shilakes wrote a letter to the family's attorney, noting some details from the observation and that it was the team's opinion Claimant "is not substantially disabled by an eligible regional center diagnosis . . . [and] we were able to observe behaviors that are not usually associated with a developmental disability." Several examples were given. "These strengths are not typically observed with individuals who are substantially disabled by Autism Spectrum Disorder. Additionally, [Claimant] did not demonstrate any stereotyped, repetitive speech and he did not engage in any sensory, repetitive, restricted behaviors." (Exhibit 8, p. A45.)

BEHAVIORAL SERVICES REPORT, 2022

49. Through his health insurance provider, Claimant began receiving behavioral services from A Happy Family Behavioral Services Inc., which provided a report dated November 10, 2022, written by Ione Smith, Board Certified Behavior Analyst and Clinical Manager. (Exhibit E.) According to the report, Claimant was diagnosed with Autism on July 18, 2022. No further information on the nature of that diagnosis is in evidence. The VABS-3 and FAST (not otherwise described) were administered in June 2022 and Claimant was observed twice in July 2022 to establish baselines. Claimant began receiving services in July 2022 and he receives 28 hours per week of ABA therapy in the home and community, described as adaptive behavior treatment. Parent training is provided from four to six hours per month. Referral behaviors were outbursts with self-injury and severe aggression, and deficits were identified in self-help and social skills. The report indicates Claimant was enrolled for

school in Fusion Academy, described by Mother as a 1:1 student-teacher setting where there is also an aide from A Happy Family Behavioral Services Inc. The behavioral services are authorized through February 10, 2023.

50. Social skills goals include identifying complex emotions, expressing his emotions, advocating for himself, initiating conversations with peers, and identifying solutions to social scenarios. Self-help goals include identifying zones of regulation, recalling information about his day, attending to a non-preferred activity, tolerating changes to his routine, engaging in physical activity, identifying the size and scale of problems, matching behavior to the scale of a problem, and following objectives concerning outbursts. Several behavior reduction strategies are included, many relating to tantrums or outbursts as well as providing replacement behaviors.

51. Although there had been a reduction in Claimant's outbursts within the session time, Mother reported that outbursts continued outside of sessions and they have increased in intensity.

Testimony

52. As noted above, Dr. Eagle did not agree with the diagnosis of ASD made by Ms. Perry or Dr. Nishii. She had not observed Claimant but was familiar with the documents provided to the Service Agency. Based on those documents, Dr. Eagle emphasized the behaviors and test scores that were not consistent with ASD, and also was of the opinion that, even if Claimant had ASD, he was not substantially handicapped by it. For example, she provided examples of positive reports and behaviors concerning Claimant's language skills, learning and cognition, self-care, and social skills. Dr. Eagle did agree generally Claimant had a mental health disorder and agreed with some of those disorders with which he was diagnosed, specifically anxiety

and depression. She explained Claimant had a lot of stressors, which would contribute to his condition and to his emotional problems.

53. Dr. Eagle was familiar with the process of the Service Agency arranging for a multidisciplinary observation and had been involved in some observations, although she was not included in the observation of Claimant. In her experience, such an observation would generally take 45 minutes to one hour or more. She did not believe a 15-minute observation would be adequate.

54. Dr. Eagle testified about the seven areas of major life activity that are evaluated to determine if someone is substantially handicapped by a developmental disability. These areas are listed in a statute and a regulation discussed in the Legal Conclusions below. The seven areas are: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency. Dr. Eagle noted that, because of Claimant's age, major life activity areas (6) and (7) do not apply. At least three of the remaining major life activity areas must be found for a consumer to have significant functional limitations and be considered as "substantially disabled." If so, the consumer is eligible for services under the express language of the Lanterman Act.

55. Considering all of the test scores and observations noted in the reports, Dr. Eagle opined Claimant had a limitation in his self-direction which she believed was largely a function of the factors that support his ADHD diagnosis and other diagnoses. Dr. Eagle testified Claimant's behaviors and presentation were atypical of a person with ASD, noting specifically his capacity for engagement. She noted Claimant had numerous serious stressors that contributed to his aggression, other behaviors, and emotional problems. Dr. Eagle also noted Claimant's conduct improved quickly in a highly structured environment, which she stated was also atypical of persons with ASD.

56. Mother provided extensive history of Claimant's family and living situations, problems in school settings, assessments and hospitalizations, and extreme aggression and other disruptive behaviors at home. Claimant's father, a musician, traveled and was often not home to help with raising him. He and Mother are now divorced and he does not provide any care for Claimant. Mother, a licensed acupuncturist and herbologist, has given up work to care for Claimant. She described a very difficult process of moving to different locales to access schooling and services, and that she often had to locate and pay for assessments and testing because she could not find other resources.

57. Mother noted Claimant had been "kicked out" of four schools and questioned the accuracy of the tests indicating his cognitive and academic abilities were in the average range. On the other hand, she believed Claimant was very intelligent and agreed with the TONI-4 score in the superior range obtained by Ms. Perry in 2021. Mother believes Claimant has difficulty expressing himself verbally due to his ASD and many of his aggressive behaviors are a result of frustration at his inability to communicate his needs. Claimant's behavioral outbursts are extreme. He has broken glasses and plates, and Mother now uses paper plates and plastic utensils; she cannot have a knife in the house.

58. Mother questions the reasons the Service Agency has determined Claimant is not eligible for services as based on Claimant's appearances that are not indicative of his disabilities. For example, reports note Claimant can brush his teeth as an example of self-care, but, without much prompting, he has no concept of when to brush. Claimant has wet the bed profusely and defecates in the bath. She believes these are examples of being handicapped in the area of self-care. Observers noted Claimant could communicate that he has been bullied because he is fat, when Mother

stated the real reason for the bullying is Claimant's behaviors and inability to connect with his peers. When Dr. Eagle dismissed the reference by Dr. Nishii to Claimant's drumming as an activity that is necessarily repetitive, Mother stated Claimant drums constantly, on multiple surfaces, for hours.

59. Mother testified the portion of the multidisciplinary team observation where Claimant was alone with the team lasted 15 minutes, after which Claimant came to get her for her interview. Mother expressed legitimate concerns about Claimant's history, his disability and challenging behaviors, and his need for services. Mother gave several other examples of Claimant's challenging behaviors and deficits, including in the areas of self-care, communication, and self-direction.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Code, § 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's denial of eligibility for Claimant. Jurisdiction in this case was thus established. (Factual Findings 1-4.)

2. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) A consumer seeking to become eligible for services has the burden to demonstrate that the services should be provided, because 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 proof regarding his request for eligibility.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (Code, § 4501.) These services and supports are provided by the state’s regional centers. (Code, § 4620, subd. (a).)

4. In order to be eligible for regional center services, a person must have a qualifying developmental disability. As applicable to this case, Code section 4512, subdivision (a), defines “developmental disability” as “a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . This [includes] autism.”

5. To prove the existence of a developmental disability within the meaning of Code section 4512, a claimant must show he has a “substantial disability.” Pursuant to Code section 4512, subdivision (1)(1):

“Substantial disability” means the existence of 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.

6. Very similar language is found in California Code of Regulations, title 17 (Regulations), sections 54000 and 54001. Regulations section 54000 repeats the requirement that an eligible developmental disability must “constitute a substantial disability for the individual” Substantial disability is defined in Regulations section 54001, subdivision (a)(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.” Subdivision (a)(2) repeats the seven areas of major life activity to be examined, again “as appropriate to the person’s age.” Under subdivision (b), the assessment of substantial disability shall be made by regional center professionals. Under subdivision (c), those professionals may consult other knowledgeable persons such as parents and educators.

7. In determining eligibility, “the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS [California Department of Developmental Services] and regional center professionals’ determination as to whether an individual is developmentally disabled.” (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In this case, the Service Agency determined that while Claimant has a diagnosis of ASD, he does not have significant functional limitations in at least three of the seven areas of major life activity, as required to be eligible for services. (Factual Findings 1-55.)

8. Mother presented as a capable and caring person. Claimant has numerous challenges, as well as strengths, and his daily life can be difficult. Mother provided numerous examples. Mother, Father, and schoolteachers provided information for numerous tests administered to Claimant. Whether those challenges are of clinical significance is the issue.

9. Claimant presented sufficient evidence to support the conclusion ASD is an appropriate diagnosis. Testing by Ms. Perry and Dr. Nishii used screening and substantive assessments validating the diagnosis. Whether or not clinicians attending Claimant during his months-long hospitalization at UCLA Hospital and later attendance at the UCLA Hospital ABC Program did independent testing, their observations confirm and validate the ASD diagnosis. References to the presence of symptoms and diagnosis of ASD are also found in reports by Ms. Sanchez and A Happy Family Behavioral Services. No one from the Service Agency eligibility team explained the reasoning behind the determination against eligibility, less than one week after Dr. Nishii issued his report, and the team's conclusion the descriptions of observations of Claimant do not match criteria for ASD. Dr. Nishii used a valid test to reach an opposite conclusion.

10. Dr. Eagle's opinion the diagnosis was not supported relied on selectively crediting contrary information without having a sufficient basis to do so. She relied heavily on an observation that, by her own experience, took significantly less time than would be necessary to provide valid information. Her discussion with Dr. Nishii is problematic. She reported Dr. Nishii contradicted information he put in his report. Yet Dr. Nishii did not testify to offer his reasons behind such a contradiction. Dr. Eagle downplayed the significance of Dr. Nishii's observations, for example her comment that drumming is an inherently repetitious activity, without further analysis. As testified by Mother, Claimant's drumming can be extended and incessant, which would validate Dr. Nishii's reliance on it as an indicator of the type of repetitive pattern of behavior significant in supporting an ASD diagnosis. Although Dr. Eagle's qualifications and experience cannot be questioned, her conclusions on the ASD diagnosis do not withstand scrutiny.

11. The next step in determining whether Claimant is eligible to receive services under the Lanterman Act is to examine the evidence whether his developmental disability "constitutes a substantial disability" for him. This phrase, as used in Code section 4512, subdivision (a), is further defined in Regulations section 54001, subdivision (a)(1), as described in Legal Conclusion 6, above. At most, the evidence supports the conclusion Claimant has a major impairment of social functioning in the identified subject area of self-direction. Claimant was assessed at different times with some challenges in some areas of self-care, however these difficulties do not rise to the level of a major impairment. His abilities in the subject areas of receptive and expressive language, learning, and mobility were generally in the average range, or slightly below or above and, again do not rise to the level of major impairments. Although Mother noted Claimant has had difficulties in various schools, the evidence supports the conclusion his difficulties were not the result of any significant deficiency in his ability to learn. Rather, and as noted in many reports, such as from the UCLA Hospital ABC Program, it was often the effects of Claimant's mental health disorders that contributed to many of his behaviors, symptoms, and difficulties.

12. Claimant is not substantially disabled by his ASD. Therefore, a behavior which is noticeable to Claimant's parent or teachers may not be viewed as clinically significant by those who, by their training and experience, are qualified to make the eligibility determination. There are no convincing opinions by qualified clinicians that establish Claimant is currently substantially disabled by his ASD. Further, the law provides that deference is to be given to the Service Agency professionals' evaluation and determination of Claimant's eligibility for services.

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13. Claimant has several challenging behaviors and other symptoms of his ASD and other diagnoses. However, Claimant has not met the legal requirements to establish that his ASD is substantially disabling based on the evidence available at this time. Claimant did not establish the Service Agency's decision denying him eligibility is incorrect.

ORDER

Claimant is not eligible for regional center services under the Lanterman Developmental Disabilities Services Act.

Claimant's appeal from the Service Agency's determination that he is not eligible for regional center services is denied.

DATE:

DAVID B. ROSENMAN

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.