

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

E. Z.,

Claimant,

and

North Los Angeles County Regional Center,
Service Agency.

OAH No. 2013060977

DECISION

Administrative Law Judge Ralph B. Dash heard this matter on February 10, 2014, at Van Nuys, California.

Rhonda Campbell, Contract Officer, represented North Los Angeles County Regional Center (NLACRC, Regional Center, or Service Agency.)

E.Z.'s mother (mother) represented E.Z. (Claimant).

ISSUE

Is Claimant eligible to receive services from NCLARC?

1. Claimant was born on September 25, 2002. He is seeking Regional Center benefits based on a diagnosis of autism. Claimant had been receiving special education services from the Los Angeles Unified School District (District) based on a diagnosis of Specific Learning Disability. District re-evaluated Claimant on November 29, 2012 (Exhibit 5), and continued his special education services, but this time those services were based on Claimant having autism. The evaluation

noted Claimant's significant and unusual behaviors, most of which appear to be psychological in nature. The report, which is the only evidence submitted that supports a finding that Claimant may have autism spectrum disorder reads, in part:

In 4/10, at age seven, [Claimant] was given an initial psycho-educational assessment for special education services (see test results in appendix). In class, the psychologist noted that he was off-task, fiddled with objects and, did his own thing during instruction and work periods. Based on results from the Cognitive

[Claimant]'s cognitive function was estimated to fall within the average range. His thinking, reasoning and problem solving problems fell within the average range. He was able to retain and recall visual and auditory information. He demonstrated weakness in sound discrimination, phonological awareness and sound-symbol association as yielded on the Comprehensive Test of Phonological Processing; however, he also demonstrated the ability to process, retain and recall information he heard. Attention and concentration were areas of weakness and he had difficulty planning and organizing tasks. His visual-motor integration skills were within the low average range. Processing deficits were determined to be present in auditory processing and attention.

[Claimant] was able to verbally express his needs but, while his articulation was clear, the tone of his voice was immature and babyish. Results from the Bilingual Verbal Ability Tests indicated low average to average language skills with equal scores in English and Spanish. His Picture Vocabulary and Verbal Analogies fell within the average range. [Claimant]'s fine motor skills were age-appropriate with low average performance on the Visual Motor Integrations test. His academic performance on the Woodcock Johnson Test of Academic Achievement-III fell within the low and very low range with low average and average performance on math tasks. According to the psychologist's report, [Claimant]'s social and emotional functioning appeared to be age appropriate with some concerns expressed in his interactions with other students. He was described as immature compared to peers and lacking skills such as listening and interacting appropriately with others. He sometimes exhibited aggressive acts toward students. He was respectful towards adults and liked to show off when he did something well. [Claimant] was found eligible for special education services with a Specific Learning Disability with Resource Specialist

Program support along with a Behavior Support Plan. He would also receive Occupational Therapy.

In 5/12, following a Student Success Team meeting, the psychologist completed a social-emotional assessment to consider adding DIS counseling to his ongoing school counseling. His report noted that his mother indicated that [Claimant] has fears of insects, being alone, taking a bath by himself, the dark and the shower. She also reported that he recently had begun to state that he sees or hears monsters and has difficulty going to sleep. In third grade, he received community-based counseling services for one year. His teacher reported that he complained excessively about headaches and stomach pain. On the Behavior Assessment System for Children-Second Edition, his teacher's responses yielded clinically significant range concerns in the scales of Attention, Hyperactivity, Aggression and Conduct Problems. When interviewed, [Claimant] was expressive about his difficulty with peers and their treatment of him. He also shared that he saw and heard things and reported that "things were present in the room but they were not saying anything. He described these things as half human and half animal." According to the psychologist, [Claimant] tended to be a sensitive child who became

easily upset and would shut down and had frequent complaints of physical pain usually incited when he had social conflicts or when he wanted to avoid or escape a task. On the Piers Harris-2 Self Concept Scales, his overall self-concept score fell with the low average range with a negative appraisal of his self-concept and an indication of low self-esteem.

Test Behavior — [Claimant] was dressed neatly and groomed, typical of age. Upon being greeted, he displayed variable eye contact and entered the test environment willingly. Rapport was easily established and [Claimant] was able to engage in conversation with the examiner. During the assessment process, he presented as a cooperative, respectful and friendly student who tried his best. He approached most tasks in a careful manner. He was compliant and did not refuse to complete any tasks. In general, [Claimant] was able to stay focused and on task throughout the assessment. He was attentive and engaged throughout testing session. He put forth variable effort on all tasks presented but completed them to the best of his ability. [Claimant] inconsistently used different strategies with variable effectiveness (labeling, repeating, tapping, clarifying, checking, looks all choices).

ACADEMIC ACHIEVEMENT:

[Claimant]'s teacher reports that he is able to decode but lacks comprehension skills. He had a hard time learning how to read new words which further limits his comprehension. He is easily distracted and has a very difficult time focusing and paying attention when reading. [Claimant] can write very simple sentences but has trouble with spelling and punctuation and lacks organization skills for writing assignments. Although [Claimant] is able to write, his penmanship is sloppy and difficult to read. In math, he is able to do simple addition and subtraction problems but has difficulty learning new concepts, or mastering what he has been taught previously many times (e.g., has not been able to pass his multiplication facts beyond 2's). [Claimant] is somewhat able to apply himself and attempt to understand a concept depending on his motivation; however, he has much trouble understanding new information and seems to lack the ability to retain new information.

LANGUAGE/COMMUNICATION SKILLS SUMMARY

[Claimant]'s quality and quantity of spontaneous language is age appropriate with no evidence of grammatical errors. He is able to communicate

effectively with peers. According to his report card history he has received grades of [grades deleted in original] in Listening and Speaking skills.

[Claimant] is able to engage in basic interpersonal communication and conversation skills. Although he had problems approaching or resolving them, he can articulate problems, concerns, needs and issues related to daily experiences. He is able to retell short stories told to him including specific details or theme. [Claimant] can answer questions about information or details presented in sentences and short passages. Despite limited and variable eye contact or notice of social cues, he most easily communicates or is more able to converse with adults.

[Claimant] presents difficulty with language-based problem solving and critical thinking skills based on language strategies using logic and experience including understanding of emotions, judgment, consequences, conversation and the perception of others in various social situations. His ability to follow directions of increasing complexity and length is limited and he is easily overwhelmed with large amounts of language input especially if not directly related to his knowledge or concrete experiences.

[Claimant] struggles with social communication and understanding verbal as well as nonverbal cues. He also has difficulties with initiating and maintaining topics in conversation unless he is interested in the topic. During conversation with peers, with topics of interest, [Claimant] tends to dominate the exchange and has difficulty with a reciprocal dialogue. His effective communication skill with peers is limited. Per teacher report, if interested in a topic, he will focus on, listen to and even sometimes participate in class instruction and activities. He can express himself and communicate simple non-academic ideas.

2. Exhibit 5 then summarizes [Claimant]'s scores on certain tests designed to help determine the presence of autism. With respect to these tests, Exhibit 5 states:

The Autism Spectrum Rating Scales (ASRS) is a standardized instrument designed to measure behaviors of children and youth aged 2 through 18 years, reported by parents and/or teachers, that are associated with the Autism Spectrum Disorders (ASD). The ASRS includes items related to Autistic Disorder, Asperger's Disorder and Pervasive Developmental Disorder. Differences between teacher and parent reflect differences in demands, expectations, and

environmental structure between school and parent.

The Total Score is derived from the ASRS Scales which include:

Social/Communication (Inappropriate use of verbal and non-verbal communication to initiate, engage in, and maintain social contact), Unusual Behaviors (Has trouble tolerating changes in routine, engages in apparently purposeless, stereotypical behaviors and/or overreacts to certain sensory experiences), and Self-Regulation (Has deficits in attention and/or motor/impulse control:

ASRS Scales: Per mother's ratings, the TOTAL T-Score falls in the Elevated range, indicating that [Claimant] does exhibit many symptoms associated with an ASD. He manifests symptoms of ASD within the Very Elevated range on the Unusual Behaviors scale as well as on the Social/Communication scale and, at the Slightly Elevated range on the Self-Regulation scale.

DSM-IV-TR Scale: [Claimant] falls in the Elevated range (frequently avoids looking at people who speak to him, has a strong reaction to any change in routine; very frequently has social problems with children of the same age; needs things to happen just as expected; occasionally shares fun activities with

others, keeps a conversation going, starts conversations with others, becomes upset if routines change; rarely understands the point of view of others or shows good peer interactions indicating that he does exhibit symptoms consistent with a DSM-IV-TR diagnosis of ASD.

Treatment Scales: [Claimant] falls in the Very Elevated range on the Atypical Language, Peer Socialization, Sensory Sensitivity, and Behavioral Rigidity scales. He falls in the Slightly Elevated range for Attention, Stereotypy, Adult Socialization, and Social-Emotional Reciprocity scales. Based on parent ratings, [Claimant] does present with symptoms of an ASD at home

ASRS Scale Summary as rated by Eduardo' teacher:

Per teacher's ratings, the TOTAL T-Score falls in the Very Elevated range indicating that [Claimant] exhibits many of the associated features characteristic of an Autism Spectrum Disorder at school. His teacher rated him as falling within the Very Elevated range on Social/Communication, Unusual Behaviors and Self-Regulation scales.

The responses from [[Claimant]'s] mother and his teacher on the ASRS indicated Elevated and Very Elevated levels in the majority of areas with some areas on the parent scale indicating Slightly Elevated levels. Based on the overall Total and DSM-IV scores, [Claimant] has symptoms directly related to the DSM-IV diagnostic criteria as well as many of the associated features characteristic of Autism Spectrum Disorder. Based on observations, parent comments, and teacher reports and ratings, [Claimant] generally does present as a child with characteristics of an autism spectrum disorder.

[¶] . . . [¶]

Based on parent, teacher and self-responses to questionnaires, [Claimant] exhibits symptoms of high anxiety and depression. He tends to frequently complain about physical problems and, at home, cries easily or becomes immobile when does not want to do something requested and he is difficult to motivate. His mother reported that he also cries and is easily frightened (e.g., child challenged him to fight, kids who behave badly). Once, he did not want to walk home as he was frightened of the animals on the ground. He would cry and scream each time he took a

step because he did not want to step on the animals. When arriving at home from school, [Claimant] goes to his room and will not come out stating that he doesn't like noise and that he does not want his sister around. He is often tired as he reports seeing or hearing things at night that awaken him. He also states that he sees things during the day. He insists that what he sees and hears are real and it scares him. Sometimes he wants to sleep with mother because there is a boy in his room behind the door.

[¶] . . . [¶]

Academic assessment results, including, review of records, district assessments, teacher information, Progress Reports, parent information, and KTEA scores, [Claimant] is having significant academic difficulties and is not meeting grade level standards in reading written language and, mathematics.

[Claimant] continues to struggle in all academic areas and is having significant difficulties accessing the core curriculum.

3. While Claimant showed certain elevated autism rating scores, Exhibit 5 does not state unequivocally that Claimant has autism. Rather, it concludes with the following statement which takes into account Claimant's emotional problems:

Thus, based on a review of records, observations, interviews and rating scales, [Claimant] presents behavior suggestive of mild autism or Asperger's Disorder and appears to meet eligibility as a student with autism and may be in need of special education services. His behavior related to mild autism impacts his performance and participation in the instructional process and can prevent him from becoming engaged in the learning process. In addition, he exhibits some indications of emotional issues (unusual fears, hearing voices, seeing things such as shadows) of unknown or unclear origin which needs monitoring. Although he reports seeing and hearing things at school, this behavior along with other emotional issues such as anxiety and depression appear secondary to his autistic behaviors at this time. [Claimant's] eligibility of autism is compounded by variable attention and emotional factors which impacts his academic as well as social functioning and ability to access instruction and the curriculum in the general education setting. (Emphasis added.)

4. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is a generally-accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. Since 1917, the predecessor of the American Psychiatric Association has developed and published standards for

and nomenclature of mental disorders. The American Psychiatric Association Committee on Nomenclature and Statistics developed and published the first edition of Diagnostic and Statistical Manual: Mental Disorders (DSM-I) in 1952. Subsequent editions were the DSM-II, DSM-III (1980), DSM-III-R (1987), DSM-IV (1994), and DSM-IV-TR (2000). The most recent edition is the DSM-5, published in May 2013.

5. Before DSM-5 was published, John Lamont, Ph.D., examined Claimant on behalf of Regional Center “to determine [Claimant’s] current level of cognitive and adaptive functioning and the presence or absence of Autistic Disorder” (Exhibit 8). Dr. Lamont concluded Claimant did not have Autistic Disorder but rather had Anxiety Disorder. In Exhibit 8, Dr. Lamont went through the elements required by DSM-IV TR vis-à-vis Claimant, and found the following, showing that Claimant does not have autism:

[Claimant] was referred for psychological evaluation to determine current levels of cognitive and adaptive functioning and the presence or absence of Autistic Disorder.

TESTS ADMINISTERED

Vineland Adaptive Behavior Scales – II

Wechsler Intelligence Scale for Children - IV

Developmental Test of Visual-Motor Integration

Autism Diagnostic Interview - Revised (ADI-R)

[Claimant], who is age 10-6, is on no medications and has no history of significant head trauma or loss of consciousness. He is reportedly eligible for special education services, but his mother cannot recall the basis for his eligibility. He tells his mother the other kids at school are mean to him and he cries. He sees shadows or "bugs on the ground" when nothing is there, and he hears vague voices or whispers that he cannot understand. He is quite fearful and must have the doors in the house closed when he walks by as he is fearful of what might be inside the rooms. He wants the lights on and gets up at night and turns them on. His mother states that she was told by school personnel at a previous school that he may have "a little autism." His mother says he behaves like a five year-old child. He is friendly but other children reject him as he doesn't follow rules. He "always wants to dominate the conversation," according to his mother, "and kids get fed up." His teacher says he "just talks and talks and won't let the other kids talk." He likes to poke other children, and this annoys them. He has trouble socializing with peers and he would stay in the classroom at recess and teachers had to make him go outside. Other children would laugh at him and tease him. He "can't function" in his after school program,

according to his mother, and goes home instead of participating. He doesn't want to leave the house and has no friends.

Please see [Claimant]'s Social Assessment for a more detailed developmental, health and educational history.

[Claimant] is a neatly dressed and groomed male who makes good eye contact and smiles easily. He volunteers information and he is quiet and cooperative. There are no oddities of speech or behavior. Attention, effort and perseverance are sufficient for valid test scoring.

[Claimant] was administered the Wechsler Intelligence Scales for Children - IV, on which the Full Scale IQ was in the low average range. The Verbal Comprehension Index was in the low average range; the Perceptual Reasoning Index was in the average range; the Working Memory Index was in the low average range; and the Processing Speed Index was in the low average range.

[Claimant] was administered the Vineland Adaptive Behavior Scales - II, with his mother as the informant.

On the Communication Domain, he scored within the borderline deficient range.

[Claimant] was also rated on the Daily Living Skills Domain of the Vineland Adaptive Behavior Scales - II, and scored in the low average

[Claimant] was rated on the Socialization Domain of the Vineland Adaptive Behavior Scales - II and scored in the borderline deficient range.

On the Developmental Test of Visual-Motor Integration, a measure of graphomotor ability, [Claimant] scored within the average range.

The items comprising the scoring algorithm of the Autism Diagnostic Interview - Revised (ADI-R) were administered with [Claimant]'s mother as respondent. The results are scored in accord with DSM-IV-TR criteria for Autistic Disorder. He scored at or above the cutoff scores for Autistic Disorder in one area, Restricted, Repetitive and Stereotypic Patterns of Behavior. However, he scored below the autism cutoff in the areas of Reciprocal Social Interaction and Communication.

The DSM-IV-TR gives 12 criteria for the diagnosis of Autistic Disorder, six of which must be present

(including at least two in the area of social interaction, and one each in communication and restricted or repetitive activities). The criteria are listed below. Beneath each is a summary of the evidence found on this date as to their presence or absence:

SOCIAL INTERACTION

Marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures and gestures to regulate social interaction.

[Claimant] makes good eye contact, and he uses smiling and gestures to regulate social interaction. He has no difficulty in this area.

Failure to develop peer relationships appropriate to developmental level.

[Claimant] is friendly, but has much difficulty getting along with peers. He reportedly has no friends, and he has difficulty in this area.

A lack of spontaneous seeking to 'share enjoyment, interests or achievements with other people (e.g., by a lack of showing, bringing or pointing out objects of interest).

[Claimant] readily shares interests and experiences with his mother, and he has no difficulty in this area.

Lack of social or emotional reciprocity

[Claimant] shows emotional reciprocity. If his mother cries or is hurt, he will hug her. He seems anxious tells her, "I don't want you to die." He shows good social reciprocity currently, and he has no difficulty in this area.

COMMUNICATION

Delay in, or total lack of, the development of spoken language.

[Claimant] said his first word by two, and used phrases by three. He has no difficulty in this area.

Despite adequate speech, marked impairment in the ability to initiate or sustain a conversation with others.

[Claimant] will initiate and sustain conversations. He has difficulty staying on topic, but this is a pragmatic problem, and he has no difficulty in this area.

Stereotypic and repetitive use of language or idiosyncratic language.

[Claimant] shows no evidence of stereotypic or repetitive use of language or of idiosyncratic language, and has no difficulty in this area.

Lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

[Claimant]'s mother states that he engaged in pretend play when younger. He would imitate family members in the home, and he has no difficulty in this area.

RESTRICTED/REPETITIVE ACTIVITIES

Apparently inflexible adherence to specific nonfunctional routines or rituals.

[Claimant] has no nonfunctional routines or rituals, and no difficulty in this area.

Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.

[Claimant] has no encompassing preoccupation with any stereotyped or restricted patterns of interest, and has no difficulty in this area.

Stereotyped or repetitive motor mannerisms.

[Claimant] likes to wring his hands in front of his abdomen, and he likes to walk on his toes. He spins in circles when standing in a line. He has difficulty in this area.

Persistent preoccupation with parts of objects.

[Claimant] shows no persistent preoccupation with parts of objects, and has no difficulty in this area

SUMMARY OF DIAGNOSTIC IMPRESSION

A diagnosis of Autistic Disorder requires six of the twelve diagnostic criteria above, with at least two in the area of social interaction and one each in the areas of communication and restricted/repetitive activities. Since [Claimant] has only two of the twelve diagnostic criteria above, he does not qualify for a diagnosis of Autistic Disorder. The lack of a severe and pervasive impairment in the development of reciprocal social interaction (defined as the presence of at least two of the diagnostic criteria in that category) also precludes a diagnosis of Pervasive Developmental Disorder NOS or of Asperger's Disorder.

[Claimant] does not qualify for a diagnosis of Mental Retardation. Specifically, he has produced a Full Scale

IQ on a comprehensive measure of intelligence which is in the low average range. In addition, three of three ratings of adaptive functioning were above the deficient range.

[Claimant] is quite fearful and anxious, and his anxiety gives rise to the vague visual and auditory experiences described above which could mistakenly be labeled as psychotic hallucinations. He warrants a diagnosis in this regard.

AXIS I: Anxiety Disorder NOS (300.00)

AXIS II: No Diagnosis on Axis II (V71.09)

6. After the LAUSD and Dr. Lamont examined Claimant, but before Regional Center conducted a re-evaluation of Claimant, DSM-IV-TR was succeeded by DSM-5. DSM-5 no longer recognized a specific diagnosis of autistic disorder. Instead, it established a diagnosis of autism spectrum disorder which encompassed disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder. (DSM-5, p. 53.) The diagnostic criteria for Autism Spectrum Disorder in DSM-5 differ to a certain degree from those of Autistic Disorder in DSM-IV-TR.

7. As part of Regional Center's re-evaluation of Claimant, Sandi J. Fisher, Ph.D., the only expert who testified in this matter, conducted a school observation of Claimant on October 7, 2013, and prepared her report thereon (Exhibit 14). Dr.

Fisher testified in conformity with her report. Claimant was referred for a school observation to obtain additional information about his behavior. Dr. Fisher did an exhaustive review of Claimant's records and recapitulated the same in Exhibit 14 before getting to her actual observation and impressions:

BEHAVIORAL OBSERVATIONS:

[Claimant] was observed on October 7, 2013 at Robert Fulton Middle School.

[Claimant] . . . was casually but appropriately dressed for school. He is overweight as are some of the other students in the class. [He] is not the most overweight student in the class. When [I] entered the classroom, [Claimant] was sitting on a desk adjacent to a computer. He was talking with and gesturing to the boy who was working on the computer. Another male classmate was standing on the other side of the computer. The teacher said, "Ok guys time to stop." He (and the rest of the class) returned to their seats. Some of the students left the classroom for the Communication Skills Group. [Claimant] remained in the class with five other students. [The teacher,] Miss Garcia and one other adult (who this observer refers to as the assistant teacher) were present. The teacher called the students to a front table and [Claimant] sat with the group. . . . [Dr. Fisher then gives a detailed

review of exactly what she observed while watching Claimant interact with other students and with his teacher.]

[I] spoke briefly with Miss Garcia after the students left the classroom for lunch. . . . Miss Garcia indicated that [Claimant] has been in her class since August when he started at the school. She reported that [Claimant] is doing "good" overall. She estimated that [Claimant] is "at a fifth grade level academically." He is "stronger in English than Math." Miss Garcia reported that [Claimant] could be enrolled in a general education class except for his behavior. She is most concerned about his 'provoking' other students; [Claimant] is having trouble with teasing and bullying. . . . Miss Garcia also reported that [Claimant] can be argumentative in order to get out of doing academics. Miss Garcia did not spontaneously report any behaviors related to Autism. The observer asked her directly about this and she reported that she has not observed [Claimant] engaging in any repetitive language or making any repetitive movements. She stated that she is not able to make eligibility decisions but she "hasn't seen Autism [in Claimant] particularly."

DIAGNOSTIC IMPRESSIONS:

[Claimant] was referred for a school observation in order to obtain more information about his behavior. Based on the current testing, interviews, behavioral observations, and previous reports, the most appropriate diagnosis is Anxiety Disorder and a possible Parent/Child Relational Problem.

[Claimant] does not meet the eligibility criteria for a diagnosis of Intellectual Disability. His teacher estimated that his academic skills are at the fifth grade level with stronger English than Math skills. While this suggests a slight delay, it would not indicate Intellectual Disability. Testing by Dr. Lamont indicated that [Claimant's] skills ranged from the low average to the average range of functioning.

[Claimant] does not meet the eligibility criteria for a diagnosis of Autism Spectrum Disorder.

In order to receive a diagnosis of Autism Spectrum Disorder, one must have deficits in social-emotional reciprocity. [Claimant] interacted with his peers during class and while they were outside. He sometimes rambled on when talking during class and might have been less aware of his impact on his listeners than would be age appropriate, however, this was commensurate with his delayed level of maturity.

There was no opportunity to observe emotional reciprocity during the observation. Dr. Lamont did not note deficits in this area. [Claimant] does not seem to have significant impairment in social and emotional reciprocity.

[Claimant] sometimes made eye contact with his teacher and he used appropriate gestures in class (e.g. raising his hand when he wanted to answer a question, gesturing when talking with his peer at the computer.) [Claimant] also used gestures while speaking with his peers outside. Dr. Lamont noted that [Claimant] made good eye contact and smiled during the assessment. His mother reported during the Social Assessment that [Claimant]'s eye contact is "good." There does not appear to be significant impairment in his use of nonverbal communication used to facilitate social interactions.

[Claimant]'s ability to develop, maintain and understand relationships appears to be more limited than would be expected for a child of his developmental level. [Claimant] has a long history of problems interacting with his peers although his relationships with adults seem to be more appropriate. His mother reported that [Claimant] "acts

like a five year old." [Claimant]'s teacher reported concerns about his peer relationships, particularly provoking, teasing and bullying peers. [Claimant] interacted with others during class and while outside. He seems immature for his age. [Claimant]'s peer relationships seem to be impaired which was also noted by Dr. Lamont.

[Claimant] engaged in a few stereotyped or repetitive motor movements, use of objects or speech during the observation. He very briefly wagged his finger on one occasion and he also rocked briefly. [Claimant] said "Ghostbusters" twice which was out of context. Miss Garcia reported that she has not observed these types of behavior. A school report noted that [Claimant] twirled in his poncho in the rain. His mother reported during the Psychological Assessment that he wrings, his hands, walks on his toes, and spins in circles when standing in line. A school report from April 2013 reported that [Claimant] flaps his hands and arms, While it appears that he engages in same stereotyped or repetitive movements it is unclear that this represents a significant impairment since it has not been observed by his classroom teacher since his placement in her class in August. The assessor observed very brief instances of stereotyped

movements. (Dr. Lamont indicated that this was a significant impairment.)

[Claimant] had no difficulty transitioning from one activity to another in the classroom or from the classroom to the yard. There were times when he was inattentive and needed to be redirected to his work by his teacher. There was no suggestion of an insistence on sameness or inflexible adherence to routines or ritualized patterns and his mother did not report these during the Social Assessment or Psychological Evaluation. Information about these types of problems was not included in his records.

[Claimant] did not present with any highly restricted or fixated interests. He spoke about Mortal Combat at times during class but this was not his only topic of conversation. [Claimant] was able to discuss his experiences related to nutrition and trying to change his eating habits although some of his comments were somewhat rambling. There is no suggestion that [Claimant] has highly restricted interests. [Claimant]'s mother reported that [Claimant] is sensitive to sounds, and the texture of his clothing. He did not exhibit any hyper or hypo-reactivity to sensory input during the observation. The classroom was sometimes noisy but

he did not seem to be bothered by this. [Claimant] seems to have sensory sensitivities.

DSM-5 DIAGNOSES:

RIO Unspecified Anxiety Disorder

RIO Generalized Anxiety Disorder

RIO Parent-Child Relation Problem

[Claimant]'s records include mental health intervention at the time when the DSM-IV-TR was in use. He was diagnosed with Anxiety Disorder Not Otherwise Specified with a rule out diagnosis of Generalized Anxiety Disorder. Anxiety Disorder NOS would now be called Unspecified Anxiety Disorder. Generalized Anxiety Disorder has remained the same, It is reported that [Claimant]'s father baby's him while his mother attempts to set limits but [Claimant] does not respect them. This information might suggest that there is a Parent-Child Relation Problem.

8. After Dr. Fisher completed the school observation, Evelin Garcia, Psy.D. did a psychological evaluation of Claimant on October 30, 2013 (Exhibit 15) "to rule out concerns of Autism Spectrum Disorder and Intellectual Disability." In particular, Dr. Garcia administered additional tests not used by LAUSD, tests which, according to Dr. Fisher, are the "gold standard" in the diagnosis of autism. After

setting forth the detailed records review she conducted, Dr. Garcia described and explained the test results she obtained:

TESTS ADMINISTERED

Autism Diagnostic Interview-Revised

Autism Diagnostic Observation Schedule-2, Module 3

Clinical Interview

Records Reviewed

BACKGROUND INFORMATION

Current symptoms include social and academic impairment, anger, depression, anxiety, difficulties with self-care, and fear of attending school. Claimant is also reported to be immature and clingy for his age. There is some reported familial discord, specifically between siblings. [Mother] stated that Claimant and his siblings "fight a lot." He also has trouble socializing with peers due to being picked on and bullied at school. He currently does not have any friends. He refuses to go to school and cries and tantrums constantly. He tantrums in public and throws himself on the floor at stores when he no longer wants to walk. He does not like to leave the house and likes to take off his clothing when at home. His mother

reported that there was an incident when he almost threw himself against traffic because he was upset and did not want to walk anymore. His mother also reported that he hears muffled voices of kids talking and sees shadows in the closet.

[¶] . . . [¶]

[Claimant] complied with all requests made by the examiner and enjoyed the testing tasks. He became interactive and responded to the examiner's questions. He engaged in creative play with testing items and engaged in reciprocal interaction. His attention, concentration, and effort were adequate; therefore, test results are considered a valid representation of his overall functioning.

EMOTIONAL / SOCIAL / BEHAVIORAL FUNCTIONING

During the ADOS-2 administration, Claimant was able to make eye contact with the examiner. He exhibited a social smile and directed a range of facial expressions to the examiner. Claimant showed an ability to sustain a conversation with the examiner. There was shared enjoyment, spontaneous verbalization, verbal requests, ability to respond to name and joint attention, and reciprocal and interactive play.

Claimant also showed ability for imaginative play. Claimant was able to describe his emotions and insight into social relationships that may cause those emotions. However, he had difficulty understanding how his behaviors may affect other people, as well as identifying the difference between a friend and a classmate. Claimant also had limited understanding of why a person might want to be involved in a long-term relationship and his own possible role in such a relationship. His overall classification for the ADOS-2 was "No Classification." The Autism Diagnostic Interview-Revised (ADI-R), a parent interview of developmental history, was also administered. [Mother] served as the informant for the interview. She reported that in regard to social development and play, when Claimant was between the ages of 4 and 5, he showed definite direct gaze and a social smile. He currently shows the ability to understand emotional cues and offer support when needed, uses appropriate overtures to gain attention, and use facial expressions. [Mother] reported that Claimant enjoyed parallel active play with others, but engaged in little or no cooperative play when he was between the ages of 4 and 5. As previously mentioned, he enjoys interacting with younger children since he is teased by

same-aged peers. [Mother] indicated that Claimant has unusual preoccupations that revolve around visual and auditory hallucinations, which interferes with his other activities. Claimant does not have circumscribed interests, does not use parts of objects repetitively, has no sensory behaviors or interests, and does not engage in compulsions or rituals.

COMMUNICATION FUNCTIONING

During the assessment session, Claimant spoke primarily in fluent word phrases. There were also instances of spontaneous vocalizations. Claimant requested verbally initiated conversation with the examiner. The use of gestures was also present during the evaluation. On the Communication section of the ADOS-2, Claimant directed several verbalizations to the examiner. He spoke in full sentences with varied intonation and no grammatical errors. Claimant gestured and explained how to perform a task with full descriptions. He was also able to tell a story from a book with many details. Claimant was able to identify the humor in the story. There was no immediate echolalia or stereotyped/idiosyncratic use of words or phrases. Claimant offered information about his thoughts, feelings, and experiences,

particularly in reference to friends, school, and siblings. He was able to sustain a conversation with the examiner. On the ADI-R Language and Communication section, [Mother] reported no significant impairment in [Claimant's] language. Claimant began speaking in phrases at 18 months, and there is no history of language loss. [Mother] indicated a history of improper pronoun usage. There is no reported trouble with articulation or intonation. The presence of echolalia or idiosyncratic language was denied. [Mother] further reported that Claimant has shown an ability to use nonverbal methods of communication, such as nodding, pointing, and gesturing.

SENSORIMOTOR FUNCTIONING

Claimant had full use of all extremities. No physical limitations were observed during the assessment session. His gross and fine motor skills appeared age-appropriate.

DIAGNOSTIC CONSIDERATIONS

Claimant was referred for a psychological assessment to rule out a diagnosis of Autism Spectrum Disorder and intellectual Disability. Based on the current

testing, past testing reports, interviews, behavioral observations, and previous reports, the most appropriate diagnoses are the following:

DSM-5 DIAGNOSES

V61.8 (Z62.891)

300.02 (F41.1)

296.24 (F32.3) Sibling Relational Problem

Rule out Generalized Anxiety Disorder

Rule out Depressive Disorder with psychotic features

9. Dr. Garcia concluded her report with the following statement:

Claimant is an engaging child who presented as shy but friendly during the assessment session. He is reported to have social, academic, behavioral, and communication difficulties. Additionally, he is anxious and experiences auditory and visual hallucinations per his and his mother's report. Through previous records, behavioral observation, assessment, and his mother's report, it is concluded that he does not meet criteria for on Autism Spectrum disorder as he is able to initiate and sustain social communication with familiar people as well as strangers. During the session, he was

able to elaborate on his thoughts and explain his ideas clearly. He reported events in his life, his interests, and some of his past difficulties with children at school. Furthermore, Claimant uses nonverbal communication such as eye contact, gestures, and directs his vocalizations to others when conversing with them. Through testing observations and parental report, it is evident that he uses nonverbal and verbal communication in an age appropriate manner. Claimant initiated joint attention, showed objects to the examiner, and exhibited shared enjoyment during the play interaction. He was able to engage in imaginary play and interchanges with the examiner when playing with dolls and miniatures or creating a story. He is reported to engage in stereotyped and repetitive motor mannerisms but these were not observed during the assessment session. Additionally, scores on the ADOS-2 and the AD1-R, indicate that although he exhibits some ASD symptoms, he does not meet full criteria for an Autism classification.

10. As noted above, the DSM-5 uses somewhat different criteria than the DSM-IV TR to determine whether an individual has autism spectrum disorder. Dr. Lamont went through all of the DSM-IV TR criteria and the same will not be repeated here. The DMS-5 diagnostic criteria for Autism Spectrum Disorder are as

follows:

- A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:
 - 1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
 - 2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
 - 3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.
- B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history:
 - 1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
 - 2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
 4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sound or textures, excessive smelling or touching of objects, visual fascination with lights or movement).
- C. Symptoms must be present in early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

12. These essential diagnostic features of Autism Spectrum Disorder—deficits in social communication and social interaction (Criterion A) and restricted repetitive patterns of behavior, interests and activities (Criterion B)—must be present from early childhood and limit or impair everyday functioning (Criteria C and D). Claimant offered no expert report or testimony that he met the DSM-5 criteria of autism spectrum disorder.

13. The testing by Dr. Garcia, coupled with the school observation by Dr. Fisher, show Claimant does not qualify for the diagnosis of autism spectrum disorder as required under DSM-5. Indeed, in her testimony, mother's major complaint regarding Claimant was his tantruming—essentially, Claimant would "make a scene" regardless of his location (in a store, on the street, etc) if he did not get what he wanted. It was readily apparent that mother gave in to Claimant's

tantruming. This, according to Dr. Fisher, merely taught Claimant that he can get things he wants by throwing a tantrum so he has no reason to change his behavior. Dr. Fisher explained to mother how she should handle Claimant's tantrums. While mother appreciated the advice, it appears she was unconvinced she could do what Dr. Fisher suggested which was, in essence, "don't give in."

LEGAL CONCLUSIONS

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (citations omitted) The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) (Emphasis in original.) In meeting the burden of proof by a preponderance of the evidence, Claimant "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.) Except as otherwise provided by law, a party has the burden of proof as to each fact, the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting. (Evid. Code, § 500.) Where a petitioner seeks to obtain government benefits or services, the petitioner bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161-162 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 56-58 (retirement benefits). Claimant has not established that he suffers from a developmental disability

entitling him to Service Agency's services.

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)

3. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700-4716, and Cal. Code Regs., tit. 17, §§ 50900-50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

4. To be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

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 mental retardation, cerebral palsy, epilepsy and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

5. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

"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:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

6. California Code of Regulations, title 17, section 54001 states, in pertinent part:

- (a) "Substantial disability" means:
 - (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
 - (2) The existence of significant functional limitations, as determined by the

regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

7. In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism¹ and cerebral palsy. The fifth and last category of eligibility is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).)

8. The Legislature did not define the fifth category, requiring only that the qualifying condition be "closely related" (Welf. & Inst. Code, § 4512, subd. (a).)

¹ The plain language of the Lanterman Act's eligibility categories includes "autism," but it does not include the other PDD diagnoses in the DSM-IV-TR (Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-5 to reflect the current terminology of Autism Spectrum Disorder and Intellectual Disability (in place of Mental Retardation).

or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or that it “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512, subd. (a).) In a recent case, the appellate court decided eligibility in the fifth category may be based on the established need for treatment similar to that provided for individuals with mental retardation, notwithstanding an individual’s relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1490, 1492-1493.) The court confirmed that individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with mental retardation. (*Ibid.*)

9. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, impaired intellectual or social functioning which originated as a result of a psychiatric disorder, if it was the individual’s sole disorder, would not be considered a developmental disability. Nor would an individual be considered developmentally disabled whose only condition was a learning disability. A learning disability is “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.” (Cal. Code Regs, tit.17, § 54000.)

10. The term "cognitive" is defined as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience." (Cal. Code Regs, tit.17, § 54002.)

11. Claimant has not established that he suffers from a developmental disability entitling him to Service Agency's services. Although LAUSD suspected Claimant had autism, the testing by Dr. Lamont showed that Claimant did not have autism under the DSM-IV TR definition. Thereafter, the testing by Dr. Garcia and the school observation by Dr. Fisher show Claimant does not have autism spectrum disorder under DSM-5. Accordingly, Claimant is not eligible for Regional Center services based on a diagnosis of autism/autism spectrum disorder.

12. No one asserted that Claimant has cerebral palsy, epilepsy or mental retardation/intellectual disability. Claimant has not established that he has a "disabling condition . . . [that] requires treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).) No evidence was introduced as to what treatment is required for individuals with mental retardation, or that Claimant needed similar treatment. Accordingly, Claimant is not entitled to Regional Center Services under the "fifth category."

ORDER

Claimant's appeal is denied.

DATED: February 24, 2014

_____/s/____

RALPH B. DASH

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.