

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL

CENTER,

Service Agency.

OAH Case No. 2013110351

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on May 13 and August 26, 2014, in Alhambra. The record was closed and the matter submitted for decision on August 26, 2014.

Claimant was represented by Matthew M. Pope, Esq. Claimant's parents, who were also present, were assisted by a Spanish interpreter.<sup>1</sup>

The Eastern Los Angeles Regional Center (Service Agency) was represented by Edith Hernandez.

ISSUE

Does Claimant have a developmental disability (autism or a fifth category condition) making him eligible for regional center services under the Lanterman

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<sup>1</sup> Initials and family titles are used to protect the privacy of Claimant and his family.

Developmental Disabilities Services Act?

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## EVIDENCE RELIED ON

In making this Decision, the ALJ relied on exhibits 1-23 submitted by the Service Agency, exhibits A-I submitted by Claimant, and the testimony of Rachael Orlik, MSW, ACSW, Randi Bienstock, Psy.D., Claimant's mother and father and paternal aunt, and Claimant.

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a 23-year-old male on whose behalf regional center services were requested from the Service Agency in August 2013.

2. By a letter dated October 17, 2013, Claimant and his mother were advised that Service Agency staff had concluded Claimant was not eligible for regional center services.

3. On October 29, 2013, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, by which the decision denying his eligibility was appealed.

4. This matter was initially scheduled to be heard on December 4, 2013. However, the hearing was continued at the request of Claimant's mother. In connection with her continuance request, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

5. The matter was next scheduled to be heard on March 4, 2014. However, the hearing was continued at the joint request of the parties. In connection with that continuance request, Claimant's attorney executed another time waiver.

6. At the outset of the hearing on May 13, 2014, Claimant's attorney stated that the sole basis for eligibility was autism. Both parties thoroughly litigated that issue during the hearing. During closing argument, Claimant's attorney urged that Claimant could be alternatively eligible for services based on a fifth category condition. The Service Agency's hearing representative did not object to that issue being considered by the ALJ. The hearing concluded, the record was closed and the matter was submitted for decision.

7. While reviewing the record, however, it became apparent to the ALJ that based on the sequence of events during the hearing, the parties did not sufficiently litigate the issue of Claimant's eligibility for services based on a fifth category condition. The ALJ solicited responses from the parties concerning reopening the record to give the parties an opportunity to offer evidence and argument on that limited issue. After considering the parties' responses, the ALJ ordered that the record would be reopened for a second hearing day (August 26, 2014) to receive evidence and argument concerning Claimant's eligibility for services based on a fifth category condition. These events are more fully described in exhibit 23.

#### CLAIMANT'S BACKGROUND

8. Claimant lives at home with his parents and two younger brothers.

9. At an early age, Claimant exhibited expressive language delays. His mother testified that he did not speak until he was three and thereafter had difficulty using complex sentences.

10. In 1993, when Claimant was three years old, he was taken to White Memorial Medical Center's (White Memorial) Communication Disorders Department for

a speech and language evaluation. His parents told clinicians that Claimant had “normal comprehension.” It was reported that Claimant was very shy and used only single words. His hearing was found to be within normal limits, but the screening revealed severe expressive language- speech delays. It was recommended that Claimant be placed in a preschool and that he receive speech therapy in the public school system.

11. In 1995, when Claimant was approximately five years old, he was given a pediatric screening at White Memorial. His cognitive ability was noted to be “within normal limits,” but his speech and language skills were still delayed. It was recommended that he receive speech therapy at school.

12. Claimant received special education services through the public school system. An individualized education plan (IEP) was developed for Claimant by no later than January 1995. Another IEP was created in 1996. Those IEPs show Claimant’s special education services were targeted at “moderate articulation deficits.” He was deemed eligible for services based on “speech/language” delays. His social skills were described as “basically good.” No cognitive deficits were noted, nor were descriptions of behaviors suggestive of an autism spectrum disorder.

13. Claimant’s mother testified that she “mistakenly” took Claimant out of special education when he was in middle school due to a recommendation by a teacher that Claimant be placed in the least restrictive environment, i.e., a regular classroom.

14. Little documentary evidence was presented concerning Claimant’s developmental history between 1997 and 2008, except for records from the Los Angeles County Department of Health Services indicating that Claimant received treatment for substance abuse sometime during that period. Claimant’s mother testified that during those years she was overwhelmed and preoccupied by Claimant’s youngest brother’s health problems.

15. In June 2008, Claimant's parents sent a letter to Claimant's high school principal, advising him that Claimant had a "possible diagnosis of mental retardation," and demanding that school authorities conduct assessments to determine Claimant's needs for special education services. The school district's Special Education Coordinator advised Claimant's parents that such assessments would be conducted at the beginning of the next school year, given the lateness of the request and the fact that school staff were on summer vacation. No evidence was presented regarding what happened the next school year. Claimant's mother simply testified that the school district did not perform any evaluation.

16. Claimant attended regular classes throughout high school and graduated in 2009. He attended a local junior college in 2009, but dropped out after three months because he was unable to concentrate or focus.

17. In 2012, Claimant attended a transition program, the results of which were not established. Claimant has never been employed and he is not participating in any vocational training at this time.

#### THE SERVICE AGENCY'S PRIOR ASSESSMENT OF CLAIMANT

18. In June 2008, Dr. Maung Maung Oo issued a written referral of Claimant to the Service Agency to determine if he had mental retardation. No other evidence explained why Dr. Oo was suspicious that Claimant had mental retardation. Claimant's mother testified that at this time, Claimant was shy, isolated, and did not have contact with others.

19. Claimant was given an intake assessment by the Service Agency in July 2008. He was 17 years old. The Service Agency Intake Counselor who met with Claimant and his parents noted in her report that Claimant was cooperative, but very quiet during the meeting. Claimant's parents stated that their son had emotional problems, poor self-esteem and depression, slept all day, had learning problems and was socially isolated.

The Intake Counselor noted that Claimant had obtained a driver's license, but recently had been arrested for driving under the influence of alcohol. (Claimant's mother advised Service Agency staff a few years later, in connection with the current eligibility request, that no criminal case was filed due to a procedural error by the police.) Claimant told the Intake Counselor that he had friends (during the hearing, he testified that he had a few "acquaintances" riding in the car with him when he was arrested) and formerly a girlfriend.

20. The Service Agency referred Claimant to psychologist Larry E. Gaines for a psychological evaluation, which was conducted in July 2008. Dr. Gaines reviewed Claimant's records, interviewed Claimant and his mother, and administered to Claimant a series of tests. Dr. Gaines made the following pertinent findings:

- A. Claimant was administered the Wechsler Adult Intelligence Scale-III (WAIS 3) and received scores of 83 in Verbal IQ, 100 in Performance IQ and a 90 Full Scale IQ, scores which Dr. Gaines described as in the average to low-average range of intellectual ability. Dr. Gaines noted that Claimant displayed some weakness in verbal tasks, which he related to Claimant's history of auditory and language processing problems.
- B. Based on the results of Claimant's performance in the Vineland Adaptive Behavior Scales (Vineland), Dr. Gaines noted Claimant had adaptive deficits, particularly in communication and socialization, which he described as in the borderline range. Claimant received a 65 as his Adaptive Behavior Composite score, which Dr. Bienstock testified showed that Claimant "was impaired."
- C. Claimant reported recent depression, nervousness, and anxiety, and he commented that those moods cycled, which Dr. Gaines believed suggested the presence of an affective disorder. Dr. Gaines also believed Claimant's profile suggested a learning disorder.

D. Dr. Gaines deferred a diagnosis of Affective Disorder(s) for further mental health evaluation, and he noted that a diagnosis of a Learning Disorder Not Otherwise Specified (NOS) should be ruled out. Dr. Gaines found no presence of mental retardation or autistic features, and made no diagnosis of a developmental disorder.

21. Service Agency consulting psychologist Dr. Randi E. Bienstock reviewed Claimant's case file in September 2008, including Dr. Gaines' evaluation report. Dr. Bienstock concluded that Claimant did not have any condition making him eligible for regional center services. She recommended that Claimant receive special education services, individual psychotherapy to address mental health concerns, and transition to job training.

22. The Service Agency denied the 2008 request for eligibility. Claimant's parents did not appeal.

#### THE ONSET OF CLAIMANT'S MENTAL HEALTH PROBLEMS

23. Records indicate that from September 2008 to December 2010 Claimant was hospitalized at least ten times for substance abuse, paranoia and/or aggression.

24. In December 2010, Claimant was seen by staff at Pacific Clinics Adult Psychiatric (Pacific), complaining of paranoia, anxiety and aggressive behaviors. Pacific staff diagnosed Claimant with schizophrenia and prescribed anti-psychotic medications. Claimant's intellectual functioning was described as "fair" and his memory as "unimpaired."

25. Claimant again was seen at Pacific in February 2012, this time complaining of hallucinations that "people were talking about him." He was depressed, had low self-esteem and no motivation. Claimant advised staff that his mental health problems had begun when he was 17 and thereafter were consistent. When discussing his educational history, Claimant stated he could not concentrate and was not motivated. Pacific staff

noted that Claimant's mental health history inhibited him from living independently, finding competitive employment, performing daily activities, building social relationships and continuing with his education. Pacific staff gave Claimant a diagnosis of Schizoaffective Disorder and Alcohol Abuse. Individual therapy was recommended to decrease his angry outbursts, paranoia, and increase his coping skills. Claimant was also prescribed a regimen of anti-psychotic medications.

26. In March 2012, Pacific staff changed Claimant's diagnosis to Schizoaffective Disorder, Bi-Polar Type, and Alcohol Abuse.

#### THE SERVICE AGENCY'S RECENT ASSESSMENT OF CLAIMANT

27. As discussed in more detail below, Claimant began receiving mental health care at Prototypes in 2013. Dr. Mark Powers of Prototypes diagnosed Claimant with Psychotic Disorder NOS and Autistic Disorder. For that reason, Claimant's mother was re-directed to the Service Agency for an eligibility evaluation. She approached the Service Agency in August 2013, as described above.

28. In August 2013, the Service Agency's Assessment Coordinator met with Claimant and his mother to conduct an intake assessment. The Assessment Coordinator updated Claimant's information, recommended that medical records be obtained, and referred Claimant for a psychological assessment.

29. In addition to obtaining various records, the Service Agency referred Claimant to clinical psychologist Dr. Roberto De Candia for a psychological evaluation, which was conducted in August and September 2013. Dr. De Candia interviewed Claimant and his mother, reviewed available records, and administered to Claimant a number of tests. Based on his evaluation, Dr. De Candia made the following pertinent findings:

A. As measured by the Vineland, Claimant's communication skills are below average and correspond to an 8-year-old. The results of the WAIS 4 were



scores of 72 in Verbal Comprehension, 96 in Perceptual Reasoning and 81 in General Ability; Claimant's vocabulary was measured as being significantly below average. In terms of Claimant's academic functioning, the results of the Wide Range Achievement Test, Revision 4 (WRAT 4) were scores of 89 in word reading (ninth grade equivalent) and 87 in math (sixth grade equivalent). Dr. De Candia described these scores as demonstrating high borderline or low average range intellectual functioning, but he commented that the large discrepancy between the verbal and performance scores highlighted the fact that Claimant has a verbal processing disorder. Dr. De Candia viewed his test scores as being consistent with Dr. Gaines' test scores in 2008.

B. Claimant's overall adaptive functioning as measured by the Vineland identified the presence of significant deficits in the domains of communication, daily living skills and socialization. In fact, Claimant's Adaptive Behavior Composite score was 35, which Dr. Bienstock testified showed a "severe deficit."

C. Claimant received a score of 18 on the Autism Diagnostic Observation Schedule (ADOS) test, with 10 being the minimum score suggesting Autistic Disorder. Dr. De Candia described Claimant's score as elevated, but concluded the score still did not establish Claimant was autistic. For example, Dr. De Candia felt Claimant's psychiatric conditions were causing emotional blunting, which explained Claimant's depressed manner of communicating. Dr. De Candia also noted that the ADOS test manual states that individuals with elevated scores should not receive an autism diagnosis when they do not have a history of restrictive or repetitive behaviors or if they have a different pattern of onset of symptoms or behaviors than is required for such a diagnosis. Dr. De Candia felt Claimant did not have a documented developmental history consistent with an autistic person, including the lack of

historical records indicating stereotypical patterns of behavior. Dr. De Candia also believed Claimant's history of hallucinations and increasing anxiety better explained Claimant's social and communication deficits.

D. Based on the above, Dr. De Candia diagnosed Claimant with an unspecified Mental Health Diagnosis (deferred to Claimant's mental health providers). Dr. De Candia recommended a number of mental health services for Claimant, including medication, individual behavior therapy, and participation in a mental health day treatment program.

30. In October 2013, Dr. Bienstock reviewed Claimant's case file. She agreed with Dr. De Candia's findings, and she concluded that Claimant is not eligible for regional center services because he does not have a developmental disorder.

31. A. Dr. Bienstock also testified during the hearing. She has not evaluated or met with Claimant, but she has reviewed his file and pertinent records.

B. Dr. Bienstock opined that Claimant does not have an Autism Spectrum Disorder. She believes Claimant's records are bereft of the kind of observations of autistic behaviors typical of someone with that condition. She believes that Claimant's social and communication delays are related to his verbal processing disorders and his psychiatric diagnoses, rather than autism. She also criticized the opinions to the contrary expressed by Dr. Powers and Rachael Orlik, which are discussed in more detail below.

C. Dr. Bienstock also opined that Claimant does not have a fifth category condition. Relying on the test scores obtained by Drs. Gaines and De Candia, Dr. Bienstock described Claimant's cognitive abilities as in the average to low average range. Only one cognitive measurement was in the borderline range, but Dr. Bienstock noted that was a verbal test that was probably depreciated by Claimant's language processing disorder and his psychiatric problems, both of which would restrict his verbal output. Dr. Bienstock agreed that Claimant's adaptive scores worsened between 2008

and 2013, and that his scores showed a significant impairment. Dr. Bienstock also admitted that in discussing how to diagnose someone with an Intellectual Disability, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) places heavier emphasis on adaptive deficits than cognitive deficits.<sup>2</sup> However, Dr. Bienstock testified that the adaptive scores measured only Claimant's performance, not his ability. For example, Dr. Bienstock noted that Claimant formerly had a driver's license and was able to drive, and only lost it after being arrested and losing his desire to drive due to his psychiatric problems. Finally, Dr. Bienstock opined that Claimant needs services related to his psychiatric problems, not an intellectual disability, which indicates to her that Claimant does not have a fifth category condition.

D. Based on the above, Dr. Bienstock opined that Claimant is not eligible for regional center services because he does not have a qualifying developmental disorder.

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<sup>2</sup> Official notice is taken that the DSM-5 is published by the American Psychiatric Association and is a highly respected and generally accepted tool for diagnosing mental and developmental disorders. The DSM-5 replaced the previously accepted diagnosis of "Mental Retardation" with "Intellectual Disability." According to the DSM-5, Intellectual Disability must onset during the developmental period and include both intellectual and adaptive functioning deficits in conceptual, social and practical domains. IQ scores of 75 or below typically demonstrate an intellectual disability. However, a person with a score above 75 may still have such severe adaptive functioning that the person's actual functioning is comparable to a person with a lower IQ. In any event, at least one domain of adaptive functioning must be sufficiently impaired, though the impairment must be directly related to an intellectual disability.

## CLAIMANT'S EVIDENCE

32. Claimant's mother testified that her delivery of Claimant was difficult and that forceps had to be used to extract him. She described her son as "OK in the early years," but always delayed in reaching his major milestones. He was quiet and reserved, but has always had a quick temper. He has never had many friends and has a hard time socializing. He has always had problems communicating. Currently, she describes Claimant as focused solely on himself and being possessive of his things. He is obsessed with cars and watching the same movies over and over again. He still does not have friends and spends most of his time in his room. He does not like to leave the house. Claimant has hallucinations and is schizophrenic. As he has aged, Claimant has become more violent. Many of Claimant's hospitalizations occurred after violent episodes in which the family had no other way of handling him. Claimant now sees a psychiatrist once a month and a therapist at home once a week. She believes Claimant needs services to help him achieve independent living, such as learning how to cook for himself and clean his clothes. She would also like him to receive services to help him access his community.

33. Claimant's father testified. Claimant is the oldest of his three sons, but Claimant has never acted like a mentor to his younger brothers. Claimant has always needed more explanation than his brothers, even for simple tasks. Claimant did not have friends in his neighborhood and he had few friends at school. Claimant needs to be reminded to bathe himself, he is a slow learner, he gets lost easily, and he does not know how to use public transportation. Claimant quickly loses interest in things and activities. For example, Claimant often says he would like to get a job, only to lose interest in getting one not long thereafter. In addition to services to help Claimant achieve independent living, Claimant's father would like his son to also receive job coaching.

34. Claimant's paternal aunt testified. She has known Claimant since he was a baby. Claimant also lived with her family for about one year when he was a child while one of his younger brothers was being treated for a serious illness. Claimant's aunt testified he was shy, timid and did not show much emotion. He did not understand things and was easily angered. She had to explain to him how to do simple tasks (like turning off a light) several times. He did not learn like other children. He seemed to just imitate other children.

35. Claimant also testified. He described himself as nervous, not shy. He likes to collect model cars and watch a handful of action movies repeatedly. He stays in his room and does not like to leave the house. He would like to get a job, but does not think he can get one because he "cannot manage other things."

36. Claimant began seeing psychiatrist Mark Powers of Prototypes in 2013. Claimant's mother testified that Dr. Powers told her Claimant is different from the other mental health patients he treats. Records from Claimant's more recent mental health treatment were submitted. Of particular note is an initial assessment report from Dr. Powers dated August 26, 2013. During that assessment, Claimant's mother told Dr. Powers that Claimant did not start talking until he was six years old. She also described repetitive patterns and stubbornness in many areas. Dr. Powers described Claimant as struggling with social interaction. Dr. Powers was aware of Claimant's psychiatric diagnoses and hospitalizations. In his diagnostic summary, Dr. Powers wrote Claimant had symptoms of anxiety, depression, psychoses, poor attention and concentration, sleep disturbance and "*possible* autistic symptomology according to client's mother's report." (*Emphasis added*.) Dr. Powers gave Claimant an Axis I diagnosis of Psychotic Disorder NOS and an Axis II diagnosis of Autistic Disorder.

37. Dr. Powers' diagnosis that Claimant has autism is not as persuasive as the opinions to the contrary expressed by Drs. Gaines, De Candia and Bienstock. For

example, no other information was presented concerning Dr. Powers' expertise and qualifications for diagnosing developmental disorders such as autism, other than the fact that he is a psychiatrist. Based on his comments to Claimant's mother, it appears that Dr. Powers' caseload is heavily populated by clients with psychiatric disorders only. Moreover, Dr. Bienstock testified that Autistic Disorder was an Axis I diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision (DSM IV-TR), not an Axis II diagnosis.<sup>3</sup> Such an error in classifying the diagnosis suggests lack of understanding. The fact that Dr. Powers stated in his summary that Claimant "possibly" had autistic symptoms also undercuts his diagnosis. Finally, Dr. Powers' report does not describe any autism tests given to Claimant such as the ADOS or the Autism Diagnostic Interview Revised (ADIR), or indicate that any sort of developmental record review was conducted. Those are steps usually taken by those evaluating a suspected case of autism.

38. In February 2014, Claimant was administered the ADOS by Rachael Orlik, MSW, ACSW. Ms. Orlik has experience working with autistic people and diagnosing that developmental disorder. She is also certified in administering the ADOS. While Ms. Orlik found that Claimant was able to communicate with her effectively, she found him to lack social insight. She noted that Claimant's high level of anxiety may have diminished his reciprocity with her. She also found Claimant's eye contact with her was normal. She did not observe Claimant engage in any stereotypical behaviors or restricted interests.

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<sup>3</sup> The DSM IV-TR was the immediate predecessor of the DSM-5, was also published by the American Psychiatric Association, and was also highly respected and generally accepted. By Fall 2013, psychiatrists and psychologists were expected to use the DSM-5, though many still used the DSM IV-TR in August 2013.

Claimant's combined score on the ADOS was 11, which she noted was four points higher than the threshold for an Autism Spectrum Disorder and one point higher than the threshold for Autism Spectrum Disorder. Ms. Orlik also administered to Claimant the Social Responsiveness Scale, Second Edition (SRS 2). Claimant scored above 90, which Ms. Orlik described as being in the severe range of symptoms associated with autism. Ms. Orlik reviewed Claimant's developmental records through 1996; she did not review records thereafter, including those documenting Claimant's psychiatric diagnoses and hospitalizations. Based on the above, Ms. Orlik gave Claimant a provisional diagnosis of an Autism Spectrum Disorder, without an accompanying intellectual impairment.

39. Ms. Orlik's diagnosis that Claimant has an autism spectrum disorder is not as persuasive as the opinions to the contrary expressed by Drs. Gaines, De Candia and Bienstock. By her own admission, her diagnosis was provisional because she did not do a comprehensive evaluation of Claimant, including administering an ADIR or doing a deeper record review. The ADOS manual itself states that the ADOS alone should not form the basis of an autism diagnosis, as additional information is required, including a lengthier observation, record review and other testing (such as the ADIR). Ms. Orlik has not reviewed any of Claimant's records after 1996, including his psychiatric records, which is a crucial part of his developmental history. Thus, the results of Ms. Orlik's ADOS and her provisional diagnosis of an autistic spectrum disorder are incomplete.

## LEGAL CONCLUSIONS

### JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.<sup>4</sup>) An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-7.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) 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.)

2B. With regard to the issue of eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (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 *Mason*, the court focused on whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.*, at p. 1137.)

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<sup>4</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.



2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the Service Agency's.

3. One is eligible for services under the Lanterman Act if it is established that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) A qualifying condition must originate before one's 18th birthday and continue indefinitely thereafter. (§ 4512.)

4A. Excluded from eligibility are handicapping conditions that are solely psychiatric disorders, solely learning disorders, or disorders solely physical in nature. (Cal. Code Regs., tit. 17, § 54000.) If an applicant's condition is *solely* caused by one of these three "handicapping conditions," he is not entitled to eligibility.

4B. "Psychiatric disorders" are defined as intellectual or social functioning which originated as a result of a psychiatric disorder, or treatment given for such a disorder. "Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have been seriously impaired as an integral manifestation of the disorder." (Cal. Code Regs., tit. 17, § 54000, subd. (c)(1)).

4C. "Learning disorders" are defined as a significant discrepancy between estimated cognitive potential and actual level of educational performance which is not "the result of generalized mental retardation, educational or psycho-social deprivation, [or] psychiatric disorder...." (Cal. Code Regs., tit. 17, § 54000, subd. (c)(2)).

#### DOES CLAIMANT HAVE AUTISM?

5A. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has the qualifying condition of autism. In 2008 and again in 2013, clinical psychologists experienced in diagnosing autism evaluated

Claimant and concluded that his communication and social deficits were related to expressive and psychiatric disorders, not autism. A Service Agency consulting psychologist who has reviewed Claimant's case agrees. Those professionals' opinions are credible and amply supported by the evidence. In addition, the school district Claimant attended did not find him eligible for special education services under the category of autistic-like behaviors. The records presented are bereft of the kind of observed behaviors consistent with an autistic person while Claimant was developing and before he turned 18. The kinds of obsessive and stereotypical behaviors described by Claimant and his relatives during the hearing were not documented prior to Claimant's 18th birthday and are self-serving.

5B. The opinions to the contrary expressed by Dr. Powers and Ms. Orlik were not persuasive. Dr. Powers' qualifications and experience in diagnosing autism is questionable on this record. His summary comment that Claimant "possibly" had autism undercuts his ultimate diagnosis. Ms. Orlik only gave a provisional diagnosis of autism, which standing alone is insufficient. Although her ADOS results suggest Claimant has autistic symptoms, she failed to reconcile how Claimant's psychiatric diagnoses could have affected the test results, as Dr. De Candia previously had done in his report. In fact, Ms. Orlik failed to review any records after 1996, meaning she is missing a large piece of Claimant's developmental picture. Though one could argue that Dr. Powers' autism diagnosis combined with Ms. Orlik's ADOS test results could bolster each other, the better view of that evidence is that two shaky opinions pieced together do not equal one solid opinion. Under these circumstances, it cannot be concluded that Claimant's experts sufficiently refuted the expert opinions offered by the Service Agency that Claimant is not autistic. (Factual Findings 1-39.)

## DOES CLAIMANT HAVE A FIFTH CATEGORY CONDITION?

6. The "fifth category" is described as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals." (§ 4512, subd. (a).) A more specific definition of a "fifth category" condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are specific (e.g., epilepsy or cerebral palsy), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature requires that the condition be "closely related" (§ 4512) or "similar" (Cal. Code Regs., tit. 17, § 54000) to mental retardation. "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings*, *supra*, 89 Cal.App.4th at p. 1129.)<sup>5</sup>

7A. The case of *Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462 provides more insight into fifth category eligibility. In that case, a person seeking eligibility for regional center services, Samantha C., was born prematurely and with hypoxia (oxygen deprivation). In elementary school, her cognitive abilities were measured to be in the average range, though she was provided with special education services because she had deficits in auditory processing, language, speech and memory. She was later diagnosed with attention deficit disorder. She ultimately graduated from high school and enrolled in a junior college. She received SSI disability benefits and qualified for services from the Department of Rehabilitation.

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<sup>5</sup> As noted above, the DSM-5 has replaced the diagnosis of "Mental Retardation" with "Intellectual Disability."

During the process of requesting regional center services, Samantha was given cognitive tests, which yielded scores of 92 and 87, with a full-scale IQ score of 90, placing her in the average range. The Vineland testing revealed Samantha functioned adequately in daily living and social skills, but that she functioned on a moderately low level in the area of communication. While various experts arrived at different conclusions, at least two experts (whom the court found persuasive) opined that that Samantha had major adaptive impairments and that she functioned in the range of someone with mental retardation. The same experts opined that Samantha's hypoxia affected her brain and created a neurocognitive disorder explaining her various deficits. One expert diagnosed Samantha with a Cognitive Disorder Not Otherwise Specified.

7B. The court determined that Samantha had a fifth category condition and therefore was eligible for regional center services. First, the court concluded that Samantha had a disabling developmental condition, i.e., she had "suffered birth injuries which affected her brain and that her cognitive disabilities and adaptive functioning deficits stem, wholly or in part, from such birth injuries." (*Samantha C. v. Department of Developmental Services, supra*, 185 Cal.App.4th at pp. 1492-1493.) Since the evidence established that her cognitive and adaptive deficits were related to her hypoxic birth episode, there was no substantial evidence that her disabilities were solely related to psychiatric or learning disorders. (*Ibid.*) Second, the court concluded that Samantha's disabling condition required treatment similar to that needed by individuals with mental retardation (now intellectual disability). (*Id.*, at p. 1493.) Specifically, the court found convincing an expert witness's testimony that those with mental retardation and fifth category eligibility needed many of the same kinds of treatment, such as help with cooking, public transportation, money management, job training and independent living skills, and that Samantha needed those same services. (*Ibid.*)

8A. In this case, Claimant failed to meet his burden of establishing by a preponderance of the evidence that he has a fifth category condition. When Claimant was three, he was diagnosed with expressive language delays. When he was five, his cognitive abilities were measured as within normal limits. Though he received special education services in public school, those services were targeted at moderate articulation deficits and resulting speech/language delays, which are essentially learning disorders. None of Claimant's school records suggest any cognitive impairment. In 2008, a treating physician referred Claimant to the Service Agency to rule out mental retardation; that physician had not made any diagnosis. Claimant was referred to Dr. Gaines, who measured Claimant's IQ scores to be average to low average. Dr. Gaines did not diagnose Claimant with any intellectual or cognitive disability. In 2010, while being treated for psychiatric problems by Pacific Clinics Adult Psychiatric, Claimant's intellectual functioning was described as fair. In 2013, Claimant's psychiatrist, Dr. Powers, was suspicious that Claimant had autism, but not that he had an intellectual disorder. In 2013, Claimant was again tested, this time by Dr. De Candia, who basically obtained the same cognitive measurements as Dr. Gaines. Dr. De Candia did not believe any diagnosis of an intellectual or cognitive disorder was warranted. The Service Agency's consulting psychologist, Dr. Bienstock, persuasively testified that Claimant's developmental history and test results do not suggest that Claimant has an intellectual disability, that he functions like one who does, or that he needs services similar to those who have such a disorder. Instead, Dr. Bienstock attributes Claimant's initial delays and deficits to his expressive learning disorder, which have been confounded recently by his psychiatric disorders, both of which are excluded from eligibility consideration.

8B. At first blush, there are elements of Claimant's case similar to those presented in the *Samantha C.* case. Claimant has IQ scores mostly in the low average range, but he had a few sub-test scores in the 70s and therefore at the borderline of

intellectual functioning. His adaptive functioning scores in 2008 were borderline, and by 2013 had plummeted to the significantly impaired range. Claimant received special education services. Although he graduated from high school and took junior college classes, he had been unable to advance academically and has been unable to get a job.

8C. Deeper analysis, however, reveals that there are significant differences between Claimant's and the *Samantha C.* case. Primarily, Samantha established that she had an underlying organic developmental disorder other than a learning or psychiatric disorder, i.e., hypoxia at birth which resulted in a brain injury. The *Samantha C.* court viewed that as a qualifying disabling disorder. In this case, although Claimant's mother suggested that Claimant suffered an injury from his forceps delivery, there is nothing in the record supporting her theory, particularly expert witness evidence. Moreover, school and medical records submitted in this case show no cognitive delays while Claimant was in school. The only diagnoses made for Claimant have related to learning and psychiatric disorders (aside from Dr. Powers' and Ms. Orlik's unpersuasive autism diagnoses discussed above), which cannot be considered for eligibility purposes. Although Claimant's adaptive functioning is significantly impaired, Dr. Bienstock plausibly explained Claimant's poor performance on those tests was caused by his expressive and psychiatric disorders. No meaningful contrary expert evidence on that issue was presented. Secondly, it was not established that Claimant requires services similar to one who suffers from an intellectual disability. No expert evidence was submitted on that topic, other than Dr. Bienstock's testimony that the services Claimant needs are related to treating his psychiatric disorders. While Claimant's relatives believe he needs help accessing the community, living independently, and finding/keeping a job, it was not established that the need for those services is directly related to an intellectual disability, as opposed to being related to his expressive disorders or impairments caused

by his psychiatric problems. Under these circumstances, it cannot be concluded that the *Samantha C.* case applies to Claimant's situation.

#### IS CLAIMANT ELIGIBLE FOR SERVICES?

9. Since Claimant failed to establish by a preponderance of the evidence that he has any of the five qualifying developmental disabilities, he failed to establish a basis of eligibility for regional center services under the Lanterman Act. His appeal must therefore be denied. (Factual Findings 1-39; Legal Conclusions 1-8.)

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#### ORDER

Claimant's appeal of the Eastern Los Angeles Regional Center's determination that he is not eligible for regional center services is denied.

DATED: September 9, 2014

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ERIC SAWYER

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.