BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. WESTSIDE REGIONAL CENTER Service Agency.	OAH No. 2017020722

DECISION

This matter was heard by Nana Chin, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), in Culver City, California, on August 23, 2017. Claimant was represented by his mother.[1] Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Regional Center).

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on August 23, 2017.

ISSUE

Whether Claimant has a developmental disability entitling him to Regional Center Services.

EVIDENCE RELIED UPON

Documentary: Exhibits 1-11 and A-E

Testimonial: Kaley Shilakes, Psy.D.; Lisa Basiri, Fair Hearing Coordinator; and Claimant's mother

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

FACTUAL FINDINGS

JURISDICTION

1. Claimant is an 11-year-old boy who was born in March 2006 and lives with his mother. In October 2016, Claimant's mother requested regional center services for Claimant.

2. On January 9, 2017, the Regional Center issued a Notice of Proposed Action (NOPA) notifying Claimant's mother of its determination that Claimant is not eligible for services. Claimant's mother filed a fair hearing request dated February 7, 2017, resulting in this hearing. Claimant has waived the time limit contained in the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section[2] 4500 et seq.

CLAIMANT'S BACKGROUND

3. Claimant is currently in the fifth grade and attends an elementary school that is part of Los Angeles Unified School District (LAUSD).

4. Claimant's initial individualized education program (IEP) was conducted by LAUSD on December 13, 2013. Claimant was found eligible for special education services under the eligibility criteria of specific learning disability (SLD) with Resource Specialist Program supports for reading, oral language, and writing.

5a. In February 2016, the IEP team referred Claimant for a psychoeducational assessment due to Claimant's difficulties with transitions and focus and due to his recent "melt downs" which had been occurring across settings. (Exhibit 5.) A school psychologist reviewed educational records, observed Claimant in interview and classroom settings, interviewed Claimant's mother and teacher, and administered various standardized tests.

5b. As part of the assessment, Claimant's mother and teacher each completed a Behavior Assessment Scale for Children (BASC-2). Claimant's mother's rating scale of

[2] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Claimant on the BASC-2 resulted in a clinically significant level of concern in the areas of hyperactivity, somatization, atypicality, attention problems, and activities of daily living. Claimant's teacher rating scale also resulted in a clinically significant level of concern in the areas of hyperactivity, somatization and atypicality. Claimant's teacher rating scale also showed a clinically significant level of concern in the area of aggression, conduct problems, depression, learning problems, and withdrawal.

5c. The assessment also noted that Claimant has difficulty using appropriate verbal and non-verbal communication for social contact, unusual behaviors, problems with inattention and motor and impulse control, difficulty relating to children and adults, and difficulty providing appropriate emotional responses to people in social situations. He also uses language in an atypical manner, engages in stereotypical behaviors, has difficulties tolerating changes in routine, overreacts to sensory stimulation, and has difficulty focusing attention.

5d. Based on the determination Claimant's verbal and nonverbal communication and social interaction were significantly affected, Claimant's special education eligibility was changed from SLD to autism.

REGIONAL CENTER DETERMINATION

6. On October 26, 2016, Rebecca Choice conducted an intake assessment of Claimant for regional center services. Ms. Choice gathered relevant documents relating to Claimant and performed an intake interview with Claimant's mother. The information included family history, Claimant's birth and developmental history, medical history, educational history, and comments on Claimant's current functioning. Ms. Choice noted in the assessment that Claimant "was in motion/moving a majority of the session and consistently bounced the ball off the wall" and that his "body occasionally made an impulsive jerking/twitching type of movement." (Exhibit 3.) Ms. Choice determined that Claimant had deficits in the social domain but a psychological evaluation would be necessary in order to identify the severity of Claimant's impairments and to render a clinical diagnosis.

7. Claimant was referred to Kaely Shilakes, Psy.D for a psychological assessment to determine Claimant's current levels of cognitive, adaptive, and social

functioning in order to rule out or substantiate a diagnosis of Autism Spectrum Disorder and to determine Regional Center eligibility. Dr. Shilakes is a licensed psychologist who works as an independent contractor for the WRC. In addition to conducting assessments for WRC, Dr. Shilakes has conducted educational assessments and is familiar with LAUSD protocols in conducting their own assessments.

8a. Dr. Shilakes conducted an assessment of Claimant in December 2016. The assessment included a review of Claimant's records from the WRC, a clinical interview with Claimant and his mother, administration of a various tests, and behavioral observations at the WRC and at Claimant's school.

8b. During her Behavioral Observation, Dr. Shilakes noted that Claimant "was talkative, used gestures, and showed a range of facial expressions." Claimant's "eye contact was mostly fleeting, however this appeared due to distractibility and inattention rather than lack of social-emotional reciprocity." Dr. Shilakes also noted that Claimant "was quite restless in his seat and shifted around often." (Exhibit 4.)

8c. To assess Claimant's cognitive functioning, Dr. Shilakes administered the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V), an intelligence test for children, and the Kaufman Test of Educational Achievement-3 Brief (KTEA-3 Brief), a measure of academic skills. On the WISC-V Claimant scored as follows: Verbal Comprehension and Visual Spatial Scales, Low Average/Borderline (SS=84); Fluid Reasoning, Low Average/Borderline (SS=82); Working Memory, Low Average (SS=85); and Processing Speed, Average (SS=92). The results of the WISC-V indicates Claimant's overall cognitive ability as measured by the Full Scale IQ (SS=76) to be in the Borderline Range. On the KTEA-3 Brief, Claimant's reading comprehension fell in the low average range (SS=85), at the third grade level, and his math computation fell in the average range (SS=97), at the fifth grade level.

8d. Claimant's everyday self-care skills were measured through parent report on the Vineland Adaptive Behavior Scales-II (VABS-II), yielding an overall adaptive functioning score of 63, which falls within the mild deficit range. Claimant's communication skills (64), daily living skills (62), and socialization skills (68) all fell within the mild deficit range.

8e. In order to assess Claimant for Autism Spectrum Disorder, Claimant's mother was administered the Autism Diagnostic Interview -Revised (ADI-R), and Claimant was administered the Autism Diagnostic Observation Schedule- 2nd Edition (ADOS-2), Module 3. Dr. Shilakes determined that although the results from the ADI-R showed Claimant exhibited some characteristics of Autism Spectrum Disorder in the areas of restricted, repetitive and stereotyped patterns of behavior, Claimant's ADI-R comparison score fell at the minimal to low level for autism related symptoms and did not meet the autism spectrum cut-off.

8f. In determining whether Claimant met the clinical diagnostic criteria for Autism Spectrum Disorder under the Diagnostic and Statistical Manual of Mental Disorders (5th edition, 2013, American Psychiatric Association) (DSM-5),[3] Dr. Shilakes considered whether Claimant exhibited: (1) persistent deficits in social communication and social interaction across multiple contexts; (2) restricted, repetitive patterns of behavior, interests or activities; (3) symptoms early in the developmental period; (4) symptoms which cause significant impairment in social or other important settings; and (5) disturbances which are not better explained by intellectual disability or global developmental delay.

8g. Dr. Shilakes acknowledged that Claimant exhibited some indicators of autism, in that Claimant struggled with speech and language, engaged in disruptive behaviors, used repetitive motor movements, such as spinning when he had to wait in line or focus on something, and experienced hypersensitivity to certain smells. These characteristics, however, were not significant or pervasive enough to currently diagnose Claimant with autism as Claimant also engaged in back and forth conversation with others and interacted and played with peers.

8h. Based on the above testing and observations, Dr. Shilakes concluded that Claimant did not meet clinical diagnostic criteria for Autism Spectrum Disorder under

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[3] The DSM-5 is a generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. Official notice of the foregoing is taken under Government Code section 11515.

the DSM-5, as "[f]ormal measures utilizing the ADOS-2 and ADI-R indicated lack of qualitative impairments in the areas of reciprocal social interactions and communication and lack of evidence of restricted or stereotyped behaviors or interests according to the DSM 5criteria for 299.00 Autism Spectrum Disorder." (Exhibit 4.)

8i. Dr. Shilakes provided the following diagnoses: V62.89 Borderline Intellectual Functioning, Rule Out 314.01 Attention Deficit Hyperactivity Disorder, and Rule Out 315.39 Language Disorder.

9. At the fair hearing, Dr. Shilakes testified credibly on behalf of the Regional Center. According to Dr. Shilakes, assessments conducted by school districts differ from those conducted by regional centers. While the assessments conducted by school districts are focused on a student's ability to access their education, a regional center's focus is on the child's clinical diagnosis. Dr. Shilakes further testified that it would be beyond a school psychologist's credential to provide clinical diagnoses. Consequently, Claimant's special education eligibility under the category of autism did not constitute a diagnosis of Autism Spectrum Disorder under the DSM-5.

10. The Regional Center's Interdisciplinary Eligibility Committee, consisting of one consulting physician, a psychologist and several counselors, met and considered all the information gathered regarding Claimant. In a letter dated January 9, 2017, Claimant's mother was advised that Regional Center determined that Claimant was not eligible for regional center services, as Claimant was "not substantially handicapped by mental retardation, cerebral palsy, epilepsy, autism or other condition similar to mental retardation as referenced in the California Welfare and Institutions Code Section 4512 and Title 17 California Administrative Code Section 54000." (Exhibit 2.)

11. Claimant did not present any evidence to establish that he suffers from cerebral palsy, epilepsy, intellectual disability, or a condition similar to intellectual disability or requiring services similar to those required by persons with intellectual disability.

LEGAL CONCLUSIONS

JURISDICTION

1. The Lanterman Act governs this case. (§ 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the Regional Center's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-2.)

STANDARD OF PROOF

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

APPLICABLE STATUTES AND REGULATIONS

3. In order to establish eligibility for regional center services, a claimant must have a qualifying developmental disability. Section 4512, subdivision (a), defines "developmental disability" as "a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature."

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

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

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

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

6b. Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not

intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Regional Center does not have a duty to serve all of them.

6c. The Lanterman Act requires that the qualifying condition be "closely related" (§ 4512) to intellectual disability or to "require treatment similar to that required for individuals with an intellectual disability." (§ 4512.) The definitive characteristics of intellectual disability include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to intellectual disability, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with intellectual disability. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with an intellectual disability. Furthermore, determining whether a claimant's condition is a disabling condition "found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training, speech therapy, occupational therapy). The criterion is not whether someone would benefit. Rather, it is whether someone's condition *requires* such treatment.

7. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (§ 4512, and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with either a psychiatric disorder, a physical disorder,

or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does *not* have a developmental disability would not be eligible.

8. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "intellectual disability." Consequently, when determining eligibility for services and supports on the basis of intellectual disability, that qualifying disability has previously been defined as congruent to the diagnostic definition set forth in the DSM-5.

9. The DSM-5 describes Intellectual Disability as follows:

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

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period. (DSM-V, p. 33.)

10. The DSM-5 notes that the "essential features of intellectual disability . . . are deficits in general mental abilities . . . and impairment in everyday adaptive functioning in comparison to an individual's age-, gender-, and socioculturally matched peers. . . . Onset is during the developmental period. . . . The diagnosis of intellectual

disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions." (*Id.* at 37.)

11a. Based on the forgoing, there is some evidence which would suggest that Claimant may suffer from Intellectual Disability as Dr. Shilakes determined that Claimant has a Full Scale IQ of 76 (in the Borderline range) and suffers from impairments in his everyday adaptive functioning. However, Dr. Shilakes did not find that Claimant's cognitive and adaptive deficits met the criteria for a diagnosis of Intellectual Disability, and Claimant did not present evidence to establish that he suffers from an intellectual disability.

11b. Additionally, there is some evidence which would suggest that based on the deficits in his cognitive and adaptive functioning, Claimant may present either as a person suffering from a condition similar to Intellectual Disability or that he may require treatment similar to that required for individuals with an Intellectual Disability. However, Claimant did not present any evidence to establish that his deficits were such that Claimant could be deemed to fall under the fifth category of eligibility.

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

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

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

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal

communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

[¶] . . . [¶]

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

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement)

[¶] . . . [¶]

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

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

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

(DSM-5 at pp. 50-51.)

14. The evidence did not establish that Claimant suffers from Autism Spectrum Disorder, and therefore, Claimant is not eligible for regional center services based on a diagnosis of autism. Claimant did not present any evidence that that he had ever received a clinical diagnosis of autistic disorder (under the DSM-IV, the prior edition of the DSM) or Autism Spectrum Disorder (under the DSM-5) by a qualified psychologist. In addition, after conducting psychological testing, Dr. Shilakes found that Claimant did not meet the criteria for a DSM-5 diagnosis of Autism Spectrum Disorder. Though Claimant had received an assessment from his school psychologist which changed his eligibility criteria from SLD to autism, as Dr. Shilakes credibly testified, the criteria considered by a school psychologist for an educational evaluation is different than criteria considered by the regional center.

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

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

ORDER

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

DATED:

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NANA CHIN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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