BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: CLAIMANT, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH Case No. 2017040835

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on July 27, 2017, in Culver City.

Claimant, who was not present, was represented by her mother.[1]

Westside Regional Center (service agency) was represented by Lisa Basiri, M.A., Fair Hearing Specialist.

The record was held open after the hearing for the parties to submit closing argument briefs, which were timely received, considered, and marked for identification as exhibits 11 and C22. The record was closed and the matter submitted for decision on August 16, 2017.

ISSUE

Is claimant eligible for services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

[1] Names are omitted to protect the privacy of claimant and her family.

The short answer is yes. Claimant established by a preponderance of the evidence that her expert witnesses' opinions that claimant has autism spectrum disorder sufficiently refuted the service agency's expert opinion that claimant does not. Claimant also established by a preponderance of the evidence that her eligible condition causes her a substantial disability.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. The service agency determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Act, among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.) [2]

2. Claimant is a 10-year-old girl who was referred to the service agency for an eligibility determination on the basis of suspected autism. As explained in greater detail below, claimant has been previously diagnosed with autism spectrum disorder (ASD) and was thus referred to the service agency.

3. After conducting assessments and evaluations in early 2017, the service agency issued a Notice of Proposed Action, dated March 22, 2017, in which claimant's parents were advised that the service agency concluded claimant was not eligible for regional center services because she did not have autism or any other qualifying developmental disability.

4. On April 19, 2017, the Fair Hearing Request was submitted to the service agency by claimant's mother, which appealed the eligibility denial and requested a hearing.

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[2] Undesignated statutory references are to the Welfare and Institutions Code.

5. On April 24, 2017, the parties participated in a telephonic Informal Conference to discuss the matter. No resolution was reached.

6. In connection with the continuance of the hearing initially scheduled for June 8, 2017, 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.

CLAIMANT'S BACKGROUND INFORMATION

7. Claimant lives with her parents and three siblings. Her grandmother lives with them and provides care and supervision for the children when needed. Claimant and her siblings are homeschooled by their mother, however, they also attend classes with other children approximately six times per month at a private school.

8. Claimant's early developmental milestones were reached in typical fashion. She walked independently at approximately 12 months. She said her first word at six months and then her second by nine months. At 19 months, claimant spoke her first sentence. She was toilet trained by 2.5 years of age. She had no history of speech regression or echolalia when very young. However, since claimant has been very young, she has been characterized as oppositional, in that she refuses to follow directions, especially for disliked tasks.

9. Claimant is a smart little girl. She loves to read and she does very well at school, academically. She is witty, can converse with people, and shows interest in making friends and playing with other children. However, she also displays a number of serious behavior issues and unusual sensitivities, summarized below, which causes her family concern about her developmental situation and future.

a. Claimant continues to be oppositional. When told not to do something, claimant will still do it. She will talk over teachers and tutors in class.

Claimant is given consequences for misbehavior, such as a timeout, abdominal crunches, chores, or losing privileges. But the consequences only mildly work.

b. Claimant has difficulty remaining seated during class time and she is impulsive. She fidgets when seated and often times will get up from her seat and elope. She says rude and embarrassing things to other people. Claimant has an ability to take over a classroom and seek attention. In this regard, she can be characterized as "a leader." When admonished for such behavior, claimant will say, "I am trying to behave." She frequently interrupts others. When asked why, she will say that she cannot help it. Claimant is also overly friendly to strangers. She has invited many to come to her house, to her mother's consternation. Claimant also elopes from her home and goes into strangers' homes. She has been found several blocks away from her house on occasion.

c. Claimant tends to be bossy and direct play with other children. She is also physically rough on other children. When she is interested in a boy, she will forcefully tackle him to the ground and lay on top of him to pin him down. She is also rough on animals and family pets, not intending to hurt them, but unable to control her force.

d. She has difficulty attending to things she does not care for or staying on task. The same is true for conversations. If she is not interested in a topic of discussion, she will tune out and go her own way. Anything she is told to do must be followed up to ensure claimant has done it, which most times she has not.

e. Claimant repetitively bites objects, including her toenails and her arm. Chewing her toenails has caused injuries requiring medical attention. She recently chewed on a piece of hard candy so long she broke a tooth. She also makes an audible hissing or growling sounds when she first meets strangers. She is fixated on lizards, snakes, spiders and insects, so much so that it dominates her conversation and areas of interest.

f. She is very sensitive to noise. She refuses to eat with the family because she cannot tolerate hearing her brother chew his food. She does not like loud noises either. She sometimes screams when she wants to control the noise level in the house. She has limited food interest and can be a picky eater, e.g., she does not eat vegetables. She also is sensitive about clothes, as she does not like clothing with tags or scratchy texture. She does not like to be touched in general.

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10. Some evidence was presented concerning claimant's status before she was five years old. Claimant's mother essentially testified that claimant engaged in many of the above-described behaviors by or before the age of five, albeit some not as pronounced then as now. Her description of claimant's early development to the service agency's consulting psychologist, Dr. Karen E. Hastings, was similar. (Ex. 4, pp. 2-5.) Claimant's mother told service agency staff during the intake process about incidents of overly aggressive play when claimant was very young. (Ex. 5, pp. 3-4.) A paternal aunt suggested having claimant "checked out" because of her behavior at that time. (*Ibid.*)

11. The earliest documentation concerning claimant's development is a report from a Learning Disability Specialist employed at the private school claimant has attended since being very young. (Ex. 9.) The report in question was generated

when claimant was seven years old. It provides a description of claimant similar to her current profile. For example, the report indicates claimant's mother was concerned that her daughter had trouble following her teachers and "wants to do things her way." (*Id.* at p. 1.) Claimant was described as being overly active; too invasive of other children; constantly chewing on objects; not obeying commands; having difficulty remaining seated; and having a passion for insects, birds and reptiles. (*Id.* at pp. 1-2.)

CLAIMANT HAS BEEN DIAGNOSED WITH ASD AND REFERRED FOR ASD-RELATED SERVICES

12. A. Claimant's family has health care coverage with Kaiser Permanente (Kaiser). Out of concern for the problems described above, claimant was taken to see Dr. Rumie Su, a Kaiser childhood development pediatrician, on January 9, 2017.

B. In her report from that visit, Dr. Su noted many of the same behaviors described above. She also elaborated that although claimant had a few friends, she tries to intimidate them, and annoys other children she does not like. Dr. Su also described claimant as having poor social boundaries, an inability to pick up on social clues, being very loud, and having no filters. Dr. Su noted claimant had good eye contact and no social inhibition.

C. Dr. Su analyzed the diagnostic criteria for ASD specified in the *Diagnostic and Statistical Manual of Mental Disorders*, fifth edition (DSM 5). Because she believed claimant met the requisite number of criteria, including stereotypical or repetitive movements, use of objects or speech, as well as highly restricted, fixated interests that are abnormal in intensity or focus, Dr. Su diagnosed claimant with ASD. Dr. Su also noted in the conclusion of her report that, "[i]n the past, [claimant] would have satisfied criteria for Asperger's disorder. She also has symptoms of ADHD, but I

feel these behaviors may be part of [ASD] behaviors." (Ex. C2, p. 30.)

13. A. Based on claimant's diagnosis of ASD, she was referred to Kaiser speech therapist Elva Caballero for an evaluation on February 6, 2017. Ms. Caballero met with claimant and her mother on that date, interviewed both, and administered tests to claimant. In her chart notes for that encounter, Ms. Caballero reported claimant presented with deficits in social pragmatic skills, demonstrated reduced eye contact, reduced interpersonal skills and did not greet or bid her good-bye without major prompting. (Ex. 8, p. 42.) Testing results indicated to Ms. Caballero that claimant demonstrated signs of severe deficits in social pragmatic language skills and could benefit from skilled speech therapy. (*Id.* at p. 43.) These are deficits commonly associated with an autistic child.

B. Ms. Caballero recommended goals for the therapy to include maintaining appropriate eye contact, increase greetings and salutations, better turn-taking, and more appropriate body language when communicating with others (e.g., not hiding under tables or turning her back when communicating). (*Id.* at p. 40.) These are goals commonly included in programs for autistic children.

14. A. As a result of Dr. Su's ASD diagnosis, Kaiser referred claimant to Easterseals Southern California Autism Services (Easterseals) for an ABA (applied behavior analysis) assessment. Easterseals' ABA services are designed "to remediate core deficits associated with [ASD]." (Ex. C9, p. 9.) Claimant first met with Easterseals staff on January 23, 2017, and was observed, evaluated, and administered tests over four days. A report by Easterseals was issued on February 22, 2017, by Ellen Slaton, a licensed clinical social worker who is also a board certified behavior analyst (BCBA).

B. Claimant was given a functional behavior assessment (FBA), the Vineland adaptive behavior scales, second edition (Vineland 2), and an assessment of

functional living skills (AFLS). The tests were done at home and school. The results of the Vineland 2 showed claimant was in the moderately low range of development for communication and daily living skills, and in the low range for socialization. Overall, it appeared to Ms. Slaton from the Vineland 2 results that claimant has significant difficulty functioning at home and in the community. As part of the FBA, Ms. Slaton observed claimant hide under a desk at school, yell loudly, tear up tissues, and receive constant prompting to direct her focus. Ms. Slaton also heard and saw claimant make inappropriate comments to others and engage in inappropriate social behaviors with other children. She also saw claimant frequently elope from school and home, and chew on small, hard objects.

C. In the summary and conclusion part of her report, Ms. Slaton noted claimant demonstrates deficits in receptive communication, social interaction skills, self-help, daily living routines, and safety skills. Examples listed were claimant's excessive and agitated behaviors, poor following of directions, biting hard objects to the point of injury, and eloping. Ms. Slaton concluded that Easterseals' ABA services, which are intended for those with autism, were appropriate for claimant, in the amount of 15 hours per week.

D. Ms. Slaton recommended the following problem areas to be targeted by an ABA program: following the sequence of academic instruction; more consistently transitioning away from topics of her choosing to other subjects without going onto tangents; remaining calm under challenging circumstances; keeping a comfortable distance between herself and others; moving away from things that will harm her; not taunting, teasing or bullying others; decreasing improper comments to others; avoiding being overly friendly to strangers; limiting rough play with peers; increasing compliance with adult instructions; decreasing chewing or biting on hard

objects; and completion of self-care tasks, such as brushing her hair and toileting.

E. Ms. Slaton did not expressly diagnose claimant with ASD in her report. However, given Ms. Slaton's employer, the scope of her evaluation, and her credentials, it is inferred from her report that she views claimant as someone with behaviors consistent with autism, who can benefit from services commonly used with autistic people.

15. As a result of the Easterseals's ABA assessment report, claimant was referred for ABA services to Autism Learning Partners (ALP) in March 2017. As the name indicates, ALP provides services, including ABA, to those with ASD. After an initial evaluation period in late March and early April 2017, ALP began providing ABA services to claimant in April 2017. The targeted behaviors and goals in the ALP program are consistent with those recommended by Ms. Slaton of Easterseals. A report from ALP was submitted (ex. C11), but the program had just begun and progress then could not be measured. There is nothing in the report indicating ABA services are inappropriate for claimant or questioning the ASD diagnosis. In fact, ALP clinical supervisor, Chad Morris, wrote a letter dated July 20, 2017 (ex. C12), in which he noted claimant so far has responded well to the ABA.

16. A. After the service agency evaluated claimant and concluded she was not autistic (discussed in more detail below), claimant's mother brought claimant back to Kaiser for further evaluation. On April 10 and May 17, 2017, claimant was evaluated by Angelica Morrow, a Kaiser psychologist. Dr. Morrow later issued a report. (Ex. C4.)

B. Dr. Morrow administered a number of tests to claimant, some of which are well-known tests used for assessing traits consistent with autism. For example, the results of the Checklist for Autism Spectrum Disorder (CASD) placed claimant in

the range of ASD. Claimant's score on the Childhood Autism Rating Scale, second edition- high functioning version (CARS 2-HF), placed her in the severe group of mild-to-moderate symptoms of ASD. Specifically, Dr. Morrow noted claimant had limited ability to converse about another person's interests, and mild-to-moderate problems sharing interests, responding to social initiations from others, making friends with same age peers, and perspective taking. Claimant's mother's responses to the Gilliam Autism Rating Scale 3 (GARS 3) yielded results placing claimant in the very likely category for autism.

C. Other tests given to claimant, while not specifically focused on autism, still involved examining for traits that can be present in someone with ASD. For example, while giving claimant the Mental Status Examination (MSE), Dr. Morrow noticed claimant's eye contact was inconsistent; she made some spontaneous verbalizations and had limited reciprocity; and her speech was rapid, with odd rhythm and intonation. In the Social Responsiveness Scale 2 (SRS 2), the report of claimant's mother showed claimant had a severe deficit in everyday social interactions, which Dr. Morrow believed provided strong evidence of the presence of ASD.

D. As part of her interview and assessment of claimant, Dr. Morrow noticed claimant came into her office wrapped in a blanket with her head covered, and remained so during much of the remaining time. She hissed and growled at first. She frequently moved around and often exhibited a facial grimace. Dr. Morrow noted in her report the observations of claimant's mother that her daughter is rough with other children, has difficulty with social cues, elopes from the classroom and home, talks over her teachers, growls and makes faces, grabs people, and invades their personal space.

E. Dr. Morrow described the visit as a referral to clarify Kaiser's previous diagnosis of ASD for claimant. She referenced the DSM 5 and commented, "unlike other disorders, all autism symptoms are considered relevant to the extent they are present. Thus a symptom is not exclusive to a particular disorder." (Ex. C4, p. 5.) Dr. Morrow opined that claimant exhibits persistent deficits in social communication and interaction across contexts as well as restricted, repetitive patterns of behavior, interests or activities. She concluded that claimant "appears to meet the [DSM 5] full criteria for the diagnosis of [ASD]." (*Ibid.*)

F. Dr. Morrow wrote a letter at the request of claimant's mother for use at the hearing. (Ex. C13.) In her letter, Dr. Morrow confirmed her prior diagnosis of ASD for claimant, this time opining that claimant "presents with symptoms that are consistent with [ASD]" and she "appears to meet full diagnostic criteria for the diagnosis of [ASD] in accordance with the [DSM 5]." (*Ibid.*)

17. A. Although claimant is homeschooled, she is still eligible for special education services if she has an eligible condition. Claimant's mother advised her local school district that she wanted claimant evaluated for such services due to her concerns over claimant's social interaction, attention, behavior, impulse control, and sensory sensitivity.

B. On June 15, 2017, claimant was seen by Erin Rieger, a school psychologist (M.S., LEP, LMFT) and member of the local school district's special education services eligibility team. As part of her initial evaluation, Ms. Rieger administered a number of tests to claimant, interviewed her mother and one of her teachers, and observed claimant interact with peers in physical education (PE) class. She thereafter issued a report dated June 20, 2017. (Ex. C5.)

C. Ms. Rieger reviewed many of the reports generated by Kaiser and

Easterseals, and noted many of claimant's problematic behaviors described above. She interviewed claimant's mother and also was told of the problems described above. Ms. Rieger interviewed a PE teacher at a YMCA claimant attends, and was told claimant did not seem to understand other students did not like her rough play with them. Claimant also reportedly hissed like a cat and did not engage in much conversation with other children. While claimant can show sincere caring and empathy for others, she did not follow rules and "falls to the floor" when she does not get her way. (Ex. C5, pp. 5-6.) Ms. Rieger also observed claimant in her PE class at her school. Claimant appeared unable to initiate proper social interaction with peers, including rough play.

D. During her clinical observation of claimant, Ms. Rieger noted claimant hissed and growled at her, crawled under her desk multiple times, and had to be continually prompted during testing. Claimant was noted to struggle significantly with taking another person's perspective, as she did not appear to understand how her behavior made other people feel. Claimant told Ms. Rieger she loves reptiles and amphibians; she has a hard time knowing how to connect with other kids; and she hisses and growls when meeting a new person because she feels nervous, angry or upset.

E. Cognitive testing shows claimant is above average generally, and superior in certain areas such as crystallized knowledge and reading. Ms. Rieger describes claimant as an "extremely bright young girl. Her actual abilities are likely even higher than the presented score as attention, anxiety and behavior impacted her performance." (Ex. C5, p. 13.) Claimant's mother's responses to the GARS 3 resulted in a score indicating autism was very likely; claimant's school PE teacher's responses to the same test were similar. Her mother's responses to the Autism

Spectrum Rating Scale (ASRS), which is used to quantify observations of a youth associated with ASD, were scored as showing claimant was elevated or very elevated across every area, and that she had many behaviors similar to a youth with ASD. Claimant's PE teacher's responses to the same test were scored as showing claimant was slightly elevated in that regard. Claimant's adaptive behavior was assessed using the Adaptive Behavior Assessment System, third edition (ABAS 3). She scored in the extremely low range in overall adaptive functioning. On the Vineland 3, claimant's parents' responses indicated they perceived claimant demonstrated low to extremely low adaptive functioning across most areas, except written and expressive communication.

F. In summary, Ms. Rieger described testing as showing claimant was high-average to superior in cognitive ability, but that she struggled with adaptive functioning in all domains, except written and expressive communication and functional academics. However, responses to the autism testing suggest claimant exhibits difficulty with social interaction, taking the perspective of another, repetitive vocalization, perseverating about a particular topic, difficulty with change, and deficits in reciprocal social communication. Based on the above, Ms. Rieger concluded claimant meets the eligibility criteria as a student with autism. Although claimant also meets many of the criteria for eligibility for an emotional disturbance, Ms. Rieger concluded her emotional symptoms appear to be the result of autism, and therefore she is not eligible as a student with an emotional disturbance. Due to claimant's inattentiveness and hyperactivity at home and school, Ms. Rieger did not disagree with a diagnosis of ADHD for claimant made by the service agency's consulting expert.

18. In addition to creating problems at home, claimant's poor behaviors

have interfered with her ability to access programs and receive services. For example, claimant was removed from a therapeutic skills building class provided by Kaiser for children with "high-functioning ASD" due to "disruptive behaviors including stealing other children's tickets, using inappropriate language and climbing under the table during the group." (Ex. C14.) Claimant was also removed from her YMCA PE class "for unsafe actions." (Ex. C15.) She was welcomed back to that class weeks later, only after being joined by her ABA aide. (*Ibid.*) The Director of the private school claimant attends wrote a letter chronicling the problems in class caused by claimant's interrupting instructors, rough play with other children, and becoming upset when she cannot have her way. (Ex. C16.) Claimant's mother also described in her testimony claimant's removal from a Tae Kwon Do class due to the same poor behaviors.

SERVICE AGENCY'S EVALUATION OF CLAIMANT

19. A. As referenced above, after Kaiser staff first diagnosed claimant with ASD, claimant was referred to the service agency for an assessment. On January 24, 2017, claimant and her mother met with service agency Intake Coordinator Yolanda Cora, MSW, for a psychosocial evaluation. Ms. Cora wrote a report from that evaluation. (Ex. 5.)

B. Claimant's mother related to Ms. Cora many of her concerns summarized above in Factual Finding 9. Ms. Cora noted that claimant tapped her (Ms. Cora) foot to gain attention and then made eye contact with her. When they spoke to each other, claimant told Ms. Cora about her dream of being a herpetologist, which specializes in studying amphibians, lizards, and snakes. Ms. Cora also noted claimant "is perceived as being matter of fact, experiencing limited sensory and often saying things which may be embarrassing." (Ex. 5, p. 5.)

C. Ms. Cora analyzed claimant's current functioning in many domains. Claimant's communication is appropriate. In terms of self-care, claimant can brush her teeth, with many reminders, and dress herself. Socially, claimant has friends, but she hugs them in a way peers try to avoid. Her removal from other programs was also noted. As for independent living, claimant can cook simple things.

D. Based on this evaluation, Ms. Cora recommended that claimant be assessed by a clinical expert for eligibility on the basis of autism.

20. The service agency referred claimant to Karen E. Hastings, licensed psychologist, for a psychological evaluation. Dr. Hastings saw claimant over parts of three separate days in February 2017. Dr. Hastings later rendered a report on a date not established, in which she concluded claimant did not have ASD, and instead diagnosed her with ADHD. (Ex. 4.)

21. Dr. Hastings is well qualified to render an opinion on developmental disabilities. She has been licensed since 1977. She consults for two regional centers, including the Service Agency, and most of her work the past several years has been in evaluating whether those she examines are qualified for regional center services. Dr. Hastings spent much time with claimant and her mother, observed claimant in different settings, administered appropriate tests to claimant, and wrote a thorough and thoughtful report on her findings. (Ex. 4.) Her testimony was also clear, concise and well supported by reference to the record.

22. A. When interviewing claimant's mother, Dr. Hastings received a summary of claimant's problem behaviors and social deficits similar to those discussed above.

B. Dr. Hastings also reviewed documents from school and Kaiser concerning claimant. Dr. Hastings was critical of Dr. Su's report diagnosing claimant

with ASD because the report was unclear to her. She was also critical of Dr. Su making an ASD diagnosis when she described claimant in her report as being communicative, understanding jokes and sarcasm, and having a good imagination. Although Dr. Su referenced the DSM 5, Dr. Hastings was critical of Dr. Su's failure to give specific references of qualifying behavior meeting the requisite criteria. Dr. Hastings was also dubious of Dr. Su's disregard for signs of ADHD displayed by claimant.

C. During the course of administering various tests to claimant, Dr. Hastings noted her observations of claimant. Claimant seemed shy at first, but that wore off over time, and she was able to maintain eye contact with Dr. Hastings. Claimant's speech was fluid and her face was expressive. While claimant had trouble remaining still, she also seemed to want attention, rather than avoid it. Dr. Hastings felt she was able to easily gain rapport with claimant and found her to be an interesting, reciprocal conversation partner. Although claimant appeared anxious at times, Dr. Hastings concluded that was related to her perceived failure in aspects of the testing. Nonetheless, claimant seemed to be able to transition among tasks. Dr. Hastings also believed claimant was able to pick up on subtle social cues during the testing. Dr. Hastings believed those social and communication abilities shown by claimant were inconsistent with ASD.

D. Dr. Hastings also observed claimant in class at her private school. She was fidgety and did not pay attention to her teacher. She left her seat often and interrupted her teacher. But claimant initiated conversations and play with other children in the class. In the playground, claimant was seen engaging in play with other children. While she appeared to intrude on other children's personal space, she also appeared to enjoy interacting with them. Dr. Hastings believed claimant's

behavior at school was like a child with ADHD, not ASD.

E. Dr. Hastings opined the test scores did not reveal someone with ASD. For example, claimant scored very highly on cognitive testing. In terms of adaptive functioning, claimant's score on the Vineland 2 was average in the communication domain, average in daily living skills, and only borderline-delayed in socialization. The issue in that last domain was that, although she was interested in friends or engaging with others, claimant was impulsive and did not know how to stop herself from unwanted behaviors. Otherwise, she appeared to display empathy. Claimant was given the ADOS 2, module 3, which is used for children with fluent language skills. Dr. Hastings was impressed with claimant's language and communication abilities, and saw no sign of idiosyncratic or repetitive speech. She was similarly impressed with claimant's reciprocity, self-awareness, and imagination. Dr. Hastings was unaware of any stereotypical behavior for claimant, and viewed her passion of amphibians and bugs as a special interest that did not interfere with social communication. Claimant's overall score on the ADOS 2 was below the cut-off for an ASD diagnosis.

F. Dr. Hastings analyzed the DSM 5 diagnostic criteria for ASD. In category A, all three specified factors must be met. Dr. Hastings concluded claimant met none of the three. For example, she felt claimant did not have deficits in reciprocity, non-verbal communication behaviors (such as lack of expression or eye contact), or developing, maintaining and understanding social relationships. In category B (repetitive or restricted behaviors or interests, etc.), two of the four factors must be met. Dr. Hastings concluded claimant met factor one, i.e., stereotypical or repetitive speech, because claimant made grunting noises, facial contortions, and always bites on things. She concluded claimant met factor three, i.e., highly fixated and restricted

interest abnormal in intensity, because of claimant's fascination with bugs and reptiles since she was very young. Dr. Hastings also concluded claimant met factor four, i.e., hypersensitivity to sensory input, because she is very sensitive to sound (heavy breathing or loud chewing of food) as well as clothing that is scratchy. Thus, Dr. Hastings concluded claimant satisfies category B. However, Dr. Hastings concluded claimant does not meet category C, requiring symptoms in early development, noting simply that per "history and observation" this was not met. (Ex. 4, p. 19.) Dr. Hastings also concluded that because claimant's symptoms did not show clinically significant impairment in social, occupational or other areas of life functioning, claimant did not meet category D either. Because claimant did not meet all of the requisite categories, Dr. Hastings concluded claimant could not be diagnosed with ASD.

G. Instead, Dr. Hastings opined that claimant meets virtually all of the elements of an ADHD diagnosis under the DSM 5. Namely, claimant is inattentive, impulsive, and hyperactive. Those behaviors have been observed for her before she was 12 and have been seen at school, home and in the community. Dr. Hastings believes ADHD better explains many of claimant's symptoms and problems than ASD. Thus, Dr. Hastings diagnosed claimant with ADHD.

23. During the hearing, Dr. Hastings amplified her findings. She does not believe claimant has ASD. Social and communication deficits are the hallmarks of autism. Claimant has good skills in both facets. In fact, Dr. Hastings believes claimant has many features inconsistent with autism, such as good eye contact, attention seeking, interest in social interaction with others, and fluent verbal and written language skills. At times, claimant asked Dr. Hastings about her feelings, which showed empathy and the ability to relate to what other people are thinking.

Claimant also showed insight into her own problem behaviors, which is rare for someone with autism. Dr. Hastings attributes claimant's social problems to her impulsive behaviors caused by ADHD. Dr. Hastings found claimant to be delightful, bright, forthcoming, quirky, and interesting, but not autistic.

24. Dr. Hastings raises a number of valid concerns about a diagnosis of ASD for claimant. However, on balance, it was established by a preponderance of the evidence that the expert witnesses' opinions that claimant has ASD sufficiently refuted Dr. Hastings' opinion that claimant does not (see Legal Conclusions 1-4 below), as follows:

a. Dr. Hastings is the only expert witness presented in this case who opined that claimant does not have ASD. This is not to say that counting experts on each side of the equation will yield accurate results. However, claimant's experts come from various disciplines, and observed claimant in different contexts. Specifically, claimant was seen by two developmental doctors and one speech therapist at Kaiser (among others), a school district psychologist, and two ABA service providers, one who did an ABA assessment of claimant and one who has provided her with ABA services. All of those experts either diagnosed claimant with ASD, recommended that she receive services commonly used by those with ASD, and/or observed behaviors or noted deficits consistent with ASD. The DSM 5 suggests the same, where it states "[d]iagnoses are most valid and reliable when based on multiple sources of information, including clinician's observations, [or] caregiver history." (DSM 5, p. 53.)

b. While Dr. Hastings spent an impressive number of hours with claimant, she still did not acquire the depth and variety of observational and anecdotal

evidence that the combination of other experts obtained. Put another way, while Dr. Hastings may have believed claimant was capable of certain things an autistic person generally cannot do, all of the other experts involved in this case had the opposite experience with claimant. Moreover, the opinions of the other experts are more consistent and congruent with the evidence of claimant's behaviors, abilities, and deficits, especially the observations of her relatives at home and teachers at school or other programs. For example, where Dr. Hastings' described a reciprocal conversation with claimant, many of the other experts had a contrary experience. The same is true concerning claimant's ability to maintain eye contact.

c. The fundamental problem with Dr. Hastings' set of opinions is the template she used in analyzing ASD. Her expressed view was essentially that ASD involves social and communication delays and deficits. From that template, she found claimant's abilities or interests in certain areas of socialization or communication to belie a diagnosis of ASD. For example, Dr. Hastings was struck by claimant's attention seeking and interest in engaging with other children, and argued those traits tended to show claimant was not autistic. However, as claimant's mother correctly points out, ASD is an elastic condition, the diagnosis of which can take many shapes and forms. The DSM 5 does not suggest ruling out ASD because a child seeks attention or is interested in social interaction. In fact, the DSM 5 specifies an autistic person can have deficits in maintaining or understanding relationships demonstrated by either a lack of interest in shared social play "or inappropriate approaches that seem aggressive or disruptive." (DSM 5, p.

54.) Claimant's social approaches with family and friends is highlighted by aggressive, disruptive, and unwanted physical and verbal actions, which claimant often times does not seem to understand. This subtle coloration of the types of behaviors or deficits needed to meet the criteria of ASD somewhat undercuts Dr. Hastings' opinions. Dr. Morrow expressed the problem better: "unlike other disorders, all autism symptoms are considered relevant to the extent they are present. Thus a symptom is not exclusive to a particular disorder." (Ex. C4, p. 5.)

d. Dr. Hastings' critiques of the Kaiser experts' reports are well taken but insufficient to invalidate their expressed opinions. While Drs. Su and Morrow failed to specify how claimant meets each of the requisite DSM 5 criteria in their reports, they each clearly diagnosed claimant with ASD pursuant to the DSM 5 criteria. As licensed practitioners in developmental fields employed by a reputable healthcare facility, it can be reasonably inferred that both experts analyzed the DSM 5 criteria relative to claimant and found that she met the requisite categories. To find against the Kaiser experts simply because their reports are not as comprehensive as Dr. Hastings', or because they did not testify at the hearing to amplify their findings, would foist form over substance. Moreover, the school psychologist, Kaiser speech pathologist, and two ABA service experts, who did not specifically diagnose claimant with ASD in their reports, can be reasonably viewed as corroborating the reports and opinions of Drs. Su and Morrow. The fact that claimant has been referred for services commonly provided to those with ASD is also corroborative.

e1. The lack of clear references to specific qualifying DSM 5 criteria in the Kaiser report should not be a barrier. As discussed above, in category B, one must meet only two of the four specified factors. In her report, Dr. Hastings concluded claimant meets three of the four factors, i.e., stereotyped or repetitive movements or speech (grunting noises, facial contortions, biting things); highly fixated interests (fascination with bugs and reptiles); and hypersensitivity to sensory input (loud noises and textured clothing).

e2. While Dr. Hastings concluded claimant meets none of the three factors in category A, there is a preponderance of evidence indicating claimant does. For example:

a. Factor one involves social-emotional deficits, which can be demonstrated by various things, including abnormal social approach or reduced sharing of interests. The other experts presented in this case either opined claimant demonstrated such deficits to them or their testing results suggested the same.

b. Factor two involves deficits in nonverbal communicative behaviors used for social interaction, which can be manifested by various things, including poorly integrated verbal or nonverbal communication, abnormal body language, or deficits in understanding or using gestures. Claimant is physically rough with family and friends. She says things to them that are blunt and hurtful. The other experts presented in this case opined claimant demonstrated such deficits.

c. Factor three involves deficits in developing, maintaining or understanding relationships, which can be manifested by difficulties adjusting behavior to

suit various social contexts, or difficulties in making friends. The other experts presented in this case found deficits in this area. An abundance of evidence shows claimant, while interested in making friends, has difficulty maintaining her friendships, and she lacks an understanding of the cause and effect between her actions and unpopularity with many peers.

e3. Finally, Dr. Hastings opined category C of the DSM 5 criteria for ASD is not met, in that there was insufficient information indicating the above symptoms were present during claimant's early developmental period. However, the DSM 5 itself warns that symptoms "may not become fully manifest until social demands exceed limited capacities." (DSM 5, p. 50.) In addition, the DSM 5 cautions that "the stage at which functional impairment becomes obvious will vary according to characteristics of the individual. . . . Core diagnostic features are evident in the developmental period, but intervention, compensation, and current support may mask difficulties in at least some contexts." (*Id.* at p. 53.) This cautionary language and the lack of definition of the term "early developmental period" indicate that this too is an elastic category. In this case, claimant's superior cognitive skills and fluent language no doubt masked her other problems. The fact she has been homeschooled and thus limited in her contacts with peers also may have masked her problems. In any event, there is documentation of her problems no later than age seven, and the anecdotal information provided by her mother indicates many of claimant's current problems were manifested to some degree when she was very young. Thus, category C of the DSM 5 criteria for ASD is met by a preponderance of the evidence.

IMPAIRMENTS IN CLAIMANT'S IMPORTANT AREAS OF LIFE FUNCTIONING

25. As discussed in more detail below, eligibility for regional center services under the Lanterman Act also requires demonstrating that the eligible condition in question causes a substantial disability. In making that determination, the seven specific areas of major life activity listed below must be analyzed. That analysis loosely follows diagnostic criteria D of the DSM 5 for ASD, which requires that symptoms cause clinically significant impairment in social, occupational, or other important areas of life functioning.

26. Receptive and Expressive Language. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in receptive and expressive language. There must be impairment in both receptive *and* expressive language, not one or the other. Interestingly, the Kaiser speech pathologist, Ms. Caballero, noted in her report that claimant "did not present with receptive or expressive language deficits." (Ex 8, p. 42.) However, while other experts presented in this case found claimant has deficient receptive language skills, they also found claimant has average or adequate expressive language. In terms of her academic language skills, claimant routinely tests in the above average range. Claimant's mother argues that her daughter's poor behaviors adversely affect her communication. However, those are issues related to her behavior, not language.

27. Learning. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in learning. As Dr. Hastings' persuasively testified, cognitive and academic testing shows claimant is bright, has had high achievement in learning, has the capacity to learn, and has learned. Claimant's mother argues her daughter is not cognitively impaired, but her learning is impaired by limitations in social functioning that adversely affect her ability to

learn in a setting with peers. The DSM 5 does discuss this concept. (DSM 5, p. 57.) Claimant obviously has social interaction problems with peers and difficulty obeying her teachers. However, it is hard to conclude those problems have caused a significant impairment in her learning, especially where testing shows she has done quite well in learning. It is true that claimant has been removed from private settings, such as a YMCA class, Tae Kwon Do, and a Kaiser social skills class. But so far she has made it through her homeschooling and private school, and has thrived in terms of learning the offered content. Thus, her social behaviors, while problematic on their own terms, have not significantly impacted claimant's learning.

28. A. Self-Care. Claimant established by a preponderance of the evidence that she has a significant functional limitation in self-care. According to California Code of Regulations, title 17, section (Regulation) 56002, subdivision (a)(42), "'Self Care' means providing for, or meeting, a consumer's own physical and personal needs in the areas related to eating, dressing, toileting, bathing and personal hygiene."

B. In this case, claimant has significant limitations in her ability to acquire and perform basic self-care skills, relative to her age. She will not brush her hair on her own and must be required to do so. She chews on inedible objects and has broken a tooth. She bites her toenails to the point of injury. On occasion, she has injured herself when she becomes frustrated. Sometimes she leaves the house inappropriately dressed. She eats bugs and handles insects, spiders, or snakes, whether or not they are poisonous.

C. Some of the testing administered to claimant has substantiated these problems. For example, the ABAS 2 given to claimant by Dr. Morrow, a tool designed to measure daily living skills, shows claimant is currently functioning in the extremely

low range. The ABAS 3 administered by Ms. Rieger shows claimant scored low in self-care and extremely low in health and safety. In the same evaluation, the Vineland 3 shows claimant functioning moderately low in personal and low in both domestic and daily living. The Vineland 2 administered by Ms. Slaton of Easterseals also shows low scores in domestic daily living skills. Finally, the goal target areas recommended by Easterseals for claimant's ABA program include the skills of consuming a healthy variety of foods, improved toileting, combing or brushing her hair, and maintaining safe behavior.

29. Mobility. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in mobility. No evidence presented indicates claimant cannot ambulate, walk or otherwise move her body. While claimant's mother contends her daughter is impaired in almost all of her other major life activities, she does not contend claimant is impaired in mobility. Dr. Hastings agrees.

30. Self-Direction. Claimant established by a preponderance of the evidence that she has a significant functional limitation in self-direction. Claimant is immature and lacks the capacity for reasonable social judgment and decisions, as demonstrated by her alienating and aggressive behaviors with family and peers. This has caused significant limitations establishing and maintaining relationships. She also demonstrates a significant inability to cope with frustration. She can get physically or verbally aggressive when she does not get her way. At times it can take extreme efforts to teach claimant at school, because she needs constant redirection by tutors and teachers. The same is true at home, especially when she is asked to do chores or tasks she does not like. Such requests require constant redirection by her mother. In addition, claimant has significant deficits in safety awareness. She leaves

or tries to leave her classroom repeatedly. Claimant will leave home without permission and has traveled many blocks away from her home. She has approached strangers and invited them to her home and has gone into strangers' homes. Thus, it is no surprise that the results of the ABAS 3 administered to claimant by Ms. Rieger show claimant scored extremely low in self-direction, health and safety, and social domains. During the hearing, even Dr. Hastings admitted claimant was significantly impaired in this major life activity.

31. A. Capacity for Independent Living. Claimant established by a preponderance of the evidence that she has a significant functional limitation in her capacity for independent living. Dr. Hastings' opinion is unpersuasive that this major life activity does not apply to claimant due to her age. As claimant's mother correctly recites, section 4512, subdivision (*l*), provides that the "areas of major life activity" should be applied "as appropriate to the age of the person." This indicates it is appropriate to consider a child's age in relation to this category. Moreover, as claimant also demonstrated, the service agency has contended in prior eligibility cases that capacity for independent living was applicable to individuals ages six and older. (See, e.g., *J.B. v. WRC* (2014) OAH No. 2014090759, p. 2.)

B. In light of the above, claimant should be viewed in comparison to the independent living skills of a typically developing 10-year-old child. Such a comparison shows a major impairment. Claimant is not at an age to live independently, but she is at an age where an average functioning adolescent of equivalent age would be able to be left home alone for brief periods of time. Claimant's parents would never do this because of her unsafe behaviors and vulnerability to manipulation by strangers. She does not make sound choices. As documented above, she has no fear of strangers or of wandering away from her

house. She also needs close supervision to maintain safe behavior. For example, she enjoys lighting matches when she can find them and has lit fires with a magnifying glass.

32. Economic Self-Sufficiency. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in economic self-sufficiency. Notwithstanding the discussion above concerning capacity for independent living, this major life activity is not applicable in this case, given claimant's age. Claimant's mother does not argue otherwise.

33. Though unfamiliar with the services and supports available under the Lanterman Act, claimant's mother requested during the hearing and in her closing brief the following services: a) psychological/counseling from a therapist who specializes in ASD children; b) psychological/counseling for claimant's siblings; c) advocacy assistance with the school district; d) assistance of a classroom aide when claimant attends her private school; and e) one-to-one aid services at claimant's tutoring group. Some of those services may not be available under the Lanterman Act, or may fall under the purview of special education. However, claimant is currently receiving ABA and social skills services, which are clearly services supported by the Lanterman Act. Regardless, the constellation of the requested and currently received services indicates claimant would benefit from service coordination by the service agency.

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LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. An administrative hearing to determine the rights and obligations of

the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (§§ 4700-4716.) Claimant's mother requested a hearing to contest the service agency's proposed denial of claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-6.)

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

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

B. Regarding eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (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.)

C. In this case, claimant bears the burden of establishing she is eligible for services because she has a qualifying condition that is substantially disabling. In that regard, claimant's evidence regarding eligibility must be more persuasive than the service agency's evidence in opposition.

4. 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.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

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DOES CLAIMANT HAVE AUTISM?

5. A. The Lanterman Act and its implementing regulations contain no specific definition of the neurodevelopmental condition of "autism." However, the DSM 5, which came into effect in May 2013, provides ASD as the single diagnostic category for the various disorders previously considered when deciding whether one had autism, i.e., pervasive developmental disorder not specified (PDD-NOS), Asperger's Disorder, and Autistic Disorder. Therefore, a person diagnosed with ASD should be considered to be someone with the qualifying condition of "autism" pursuant to the Lanterman Act.

B. In this case, claimant has been diagnosed by at least two credible sources as having ASD, i.e., Drs. Su and Morrow of Kaiser. Their expert opinions were corroborated by several other experts presented in this case, who have similarly opined that claimant either has autism or would benefit from services routinely

provided to those who have ASD. The service agency's expert witness, Dr. Hastings, provided an expert opinion that was not as persuasive as claimant's expert witnesses, for several reasons discussed in detail. The diagnosis of ASD for claimant is supported by sufficient anecdotal evidence of behaviors and deficits consistent with autism since early in her developmental history. Under these circumstances, claimant established by a preponderance of the evidence that she has autism within the meaning of the Lanterman Act. (Factual Findings 1-24.)

IS CLAIMANT SUBSTANTIALLY DISABLED?

6. A qualifying condition must also cause a substantial disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) A "substantial disability" is defined by California Code of Regulations, title 17, section 54001, subdivision (a), 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.

7. A. Claimant established by a preponderance of the evidence that her condition results in major impairment of her social functioning, which requires interdisciplinary planning and coordination of special or generic services. (Cal. Code Regs., tit. 17, § 54001, subd. (a)(1).) Claimant is already receiving services commonly received by those suffering from ASD. Her mother described other services she would like claimant to receive in the future. Whether all of the requested services are appropriate under the Lanterman Act is an issue to be decided at a later time. In any event, it is clear that claimant will require, and benefit from, a coordination of special and generic services. (Factual Findings 1-33.)

B. Claimant also established by a preponderance of the evidence that she has significant functional limitations in three areas of major life activity, i.e., self-care, self-direction, and the capacity for independent living. (Cal. Code Regs., tit. 17, § 54001, subd. (a)(2).) By doing so, she established that her eligible condition is substantially disabling. (Factual Findings 1-33.)

IS CLAIMANT ELIGIBLE FOR SERVICES?

8. Since claimant established she has the qualifying developmental disability of autism, and that her condition is substantially disabling, it was established by a preponderance of the evidence that she is eligible for regional center services under the Lanterman Act. (Factual Findings 1-33; Legal Conclusions 1-7.)

ORDER

Claimant's appeal is granted. Claimant is eligible for regional center services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act.

DATED:

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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.