BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CLAIMANT vs. NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2017090809

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 15, 2018, in Chatsworth, California.

Claimant was represented by his parents. Family members' names are omitted to protect privacy.

North Los Angeles County Regional Center, the service agency, was represented by Erin Donovan, Musick Peeler & Garrett, Attorneys at Law.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 15, 2018.

ISSUE

Whether Claimant is eligible for services from the service agency.

SUMMARY

Claimant, nine years old, has problem behaviors, which have been noted by medical providers for several years. He receives services at school, and his behaviors have improved. He has great difficulty making friends, especially because of his

aggression. But he is able to engage with other people. He has good verbal abilities. His condition does not fit any of the five categories of developmental disability set out in the pertinent law and regulations. Claimant therefore does not quality for services from the service agency.

FACTUAL FINDINGS

1. Claimant is nine years old. He lives with his parents and a younger sibling. He attends a public school, a special education class. A one-on-one teacher's aide is assigned to him.

2. On August 29, 2017, the service agency sent claimant's mother a notice of proposed action (NOPA), advising that her application did not meet criteria for its services. Claimant timely appealed the NOPA, requesting a fair hearing. (Exhibit 1.)

CLAIMANT'S EARLY MEDICAL HISTORY

3. Exhibit 6 is a July 29, 2010 Occupational Therapy (OT) Feeding Evaluation from Wellness Works, Inc. in North Hollywood, California. Claimant's mother sought the evaluation because he would cough, gag, and choke when eating. Under medical history, Lisa Hickey, OTD, OTR/L, noted no unusual circumstances. There were no complications during claimant's mother's pregnancy or after she gave birth to him. Claimant had once been taken to an emergency room for distressed breathing, but otherwise his "health has been unremarkable, with no notable medical illnesses or injuries." (Exhibit 6, p.1.) Claimant's problems with eating were attributed to an aversion to food textures and poor oral motor awareness, causing claimant to overstuff his mouth at times.

4. Exhibit 7 includes a Physical Therapy (PT) Initial Evaluation dated August 26, 2010 by Jenny Mauldin, MPT, CMP. The therapist noted mother's report that claimant's eating had improved with OT over the past month. He was referred to PT for

difficulty walking and problems with balance resulting in frequent falls since he learned to walk when he was 14 months old. The therapist diagnosed developmental delay and planned therapeutic exercises and activities twice a week for 10 to 12 weeks. In a November 4, 2010 Physical Therapy Progress Report, the therapist noted improvement, but also that claimant still fell occasionally "due to decreased core strength and stability." (Exhibit 7, p. 2.) She recommended an additional six to eight weeks of therapy.

5. Exhibit 8 includes an August 26, 2010 Speech and Language Evaluation – Pediatric prepared by Karen L. Mandel, MS, CCC. Mother expressed her concern to Ms. Mandel that claimant "is not able to communicate and exhibits frustration during his communication attempts." (Exhibit 8, p. 1.) Ms. Mandel also noted that claimant occasionally used unintelligible jargon, but with appropriate intonation. His mother said that he had fewer than 10 words in his expressive vocabulary. Ms. Mandel tested claimant with the Rossetti Infant-Toddler Scale, designed to assess both pre-verbal and verbal skills in six categories: (i) Interaction-Attachment; (ii) Pragmatics; (iii) Gesture; (iv) Play; (v) Language; and (vi) Comprehension. Claimant's skills in Play and Gesture were rated equivalent to those of a child of 15 months, while in the other four categories his skills were rated

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equivalent to those of a nine-month-old. The diagnosis was moderate receptive and expressive language delays with oral motor problems. Ms. Mandel recommended speech and language therapy twice weekly for three to four months.

PSYCHOLOGICAL AND OTHER TESTING AT SCHOOL

6. On September 25, 2015, when claimant was in first grade and was six years, seven months old, the Los Angeles Unified School District (LAUSD or the District) tested claimant and produced a Resource Specialist Assessment Report, Exhibit 9. Mother was concerned over his lack of academic progress. The report noted that

claimant "exhibits extremely aggressive behaviors and can be unpredictable from time to time. He has been defiant toward his classroom teacher and other students. He is physical when things do not go his way and will refuse to follow directions." (Exhibit 9, p. 1.) The report remarks that on more than one occasion claimant would run to be near and to talk to a resource specialist, at other times he would leave the classroom in search of the school psychologist. The District administered to claimant the Woodcock-Johnson III Tests of Achievement, Form A, during a 45-minute session. Claimant cooperated in taking the tests, which covered reading, writing, and mathematics. Claimant's skills were found to be in the low or very limited range, average in areas of mathematics and written expression, below average in basic reading skills. He was to be considered for special education services.

7. Gayane Ghazaryan, an LAUSD Resource Specialist, prepared a December 1, 2015 Functional Behavior Assessment Report, Exhibit 10. Both his teacher and mother were concerned about claimant's aggressive behavior, lack of safety awareness, tantrums, and his practice of leaving the classroom without permission. After interviewing claimant's mother, teacher, and the school principal, and from her own observation of claimant in the classroom, Ms. Ghazaryan noted that claimant was often distracted in class, so that he was not learning as he should. He would roll about on the floor and yell "no" in disagreement with others, including adults. He often ran after and hit other students. Ms. Ghazaryan wrote that "the function of [claimant's] behaviors, for aggression is to gain peer attention, and for tantrums is to escape." (Exhibit 10, p. 2.) She also set out various strategies to help claimant learn skills and to curb the tantrums and other misbehavior.

EVALUATION BY SCHOOL PSYCHIATRIST STEVE WODA

8. Exhibit 11 is a December 5, 2015 Psycho-Educational Assessment prepared for the District by School Psychologist, Steve Woda. Both parents sought the assessment

because they were concerned claimant might have "significant attention, Autism, learning, safety, and social-emotional problems that are impacting his day-today [*sic*] behavior at home and school, with friendship making, educational performance and learning." (Exhibit 11.) With the parents, claimant's teacher, and school administration, Mr. Woda stated that as a team they were considering "Autism, Emotional Disturbance, Other Health Impairment (OHI), and Specific Learning Disability (SLD)." (*Id.,* p. 1)

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A. Under the heading, Social Emotional Status, claimant is reported "to show an escalating pattern of assaults and aggression toward adults and students, which are of great safety concern." (*Id.,* p. 12.) Using Autism Spectrum Rating Scales (ASRS), which guide persons who know the person being evaluated, such as claimant's parents, in measuring behaviors associated with autism spectrum disorder (ASD), Mr. Woda noted, among other things:

> Parent's ratings on the Autism Spectrum Rating Scales were Very Elevated for Unusual Behaviors, Self-Regulation, Peer Socialization, Stereotypy, Behavioral Rigidity, Sensory Sensitivity, and Attention. Ratings were Elevated for Social/Communication, Social/Emotional Reciprocity, while Slightly Elevated for Adult Socialization and Atypical Language. [Claimant] very frequently becomes bothered by some fabrics and tags in clothes, argues and fights with other children, has problems waiting his turn, has strong reactions to changes in routine[,] gets into trouble with adults and children, has social problems with same age children, becomes obsessed with details, insists on doing things the same way each time, overreacts to touch,

> overreacts to common smells, becomes distracted, has problems paying attention when doing homework or chores, talks too much about things that adults and children don't care about, does not understand why others don't like him, leaves homework or chores unfinished, insists on certain routines, has problems paying attention to fun tasks, becomes fascinated with parts of objects, fails to complete tasks, asks questions that are off-topic, interrupts or intrudes on others, become upset if routines are changed, and very frequently appears fidgety when asked to sit still.

(Exhibit 11, pp. 12-13.)

B. Mr. Woda administered the Behavior Assessment System for Children, Second Edition (BASC-2). BASC-2 is designed broadly to assess a variety of social-emotional and behavioral concerns. Mr. Woda summarized the results:

> Parents' ratings . . . indicate Clinically Significant classification range ratings for Hyperactivity, Conduct Problems, Anxiety, Depression, Somatization, Attention Problems, Adaptability, and Activities of Daily Living. Parent ratings were within the At-Risk classification range for Aggression.

(Exhibit 11, p. 14.)

C. Balancing the broad assessment of BASC-2, Mr. Woda administered the focused assessment tool, the Connors 3 Rating Scales/ADHD Rating Scale-IV. He found: "On the Connors 3 parent ratings were Very Elevated in all areas, Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Defiance/Aggression, and Peer Relations. (Exhibit 11, p. 14.)

D. Mr. Woda administered the Children's Depression Inventory, 2nd Edition (CDI-2), which is designed to assess depressive symptoms as observed by persons who know the person assessed. Mr. Woda found indications that claimant might be experiencing several depressive symptoms, negative mood, negative self-esteem, ineffectiveness, interpersonal problems, and problems interacting with peers and maintaining school performance.

E. Based on the tests described above, Mr. Woda found indicators for Educationally Related Intensive Counseling Services (ERICS), commenting that claimant was physically assaultive daily. The goal of such counseling services was to have claimant comply with directives and instructions from adults.

F. On Mr. Woda's recommendation, claimant's parents completed the Survey Interview Form that is part of the Vineland Adaptive Behavior Scales-II (VABS-II). The results included that claimant's Daily Living Skills were in the high average range, but that claimant struggled with making friends and other social skills, tending to use intimidation, physical assault, and threats to get peers to follow his directives.

G. Mr. Woda summarized his overall findings, stating in part: "[Claimant] poses a significant safety risk to himself and others. . . . He meets the special education eligibility criteria as a student with an Emotional Disturbance due to his inability to build and maintain friendships, long standing depression, and inappropriate types of behavior under normal circumstances, and his tendency to develop physical symptoms or fears associated with . . . personal or school problems." (Exhibit 11, p. 16.) Regarding claimant's qualifying for special education based on autism, Mr. Woda noted that, "[a]ccording to parent and teacher ratings and interviews, [claimant's] communication skills are generally good and an area of relative strength. At times he will make fleeting eye contact and was slightly elevated for Atypical Language on the parents['] ASRS ratings." (*Ibid.*) Mr. Woda also noted claimant's "[e]ngagement in repetitive activities and

stereotyped movements." He found no indications of unusual responses by claimant to sensory experiences, though claimant's father reported Very Elevated ratings for Sensory Sensitivity, being bothered by certain fabrics and tags in clothes. Mr. Woda concluded that claimant "may meet the eligibility criteria for Autism." (*Id.,* p. 17.)

IEP

9. Exhibit 12 is an Individualized Education Program (IEP) following an initial IEP team meeting on December 9, 2015. It noted, "No special needs related to health." (Exhibit 12, p. 3.) It continued: "Impact of Disability: [claimant's] emotional disturbance negatively impacts his day to day functioning within the school environment, which makes it difficult for him to read grade level appropriate single syllable words. This impedes his ability to participate and progress in the general education curriculum." (*Id.,* p. 4.) The IEP also noted claimant's tantrums, frustration, and aggression toward others. It described claimant as a "very bright and capable child." (*Id.,* p. 7.) It observed, however, that claimant "was unable and at times unwilling to complete testing. He put forth poor effort on the visual processing test and did not complete the tests. At other times he appeared disinterested, inattentive, and unmotivated to sustain mental effort on the test and would just make obvious guesses instead of thinking through the answers. Therefore his performance on this test was within the below average range." (*Id.,* p. 7.) A stated goal for claimant was that, when stressed, he would learn self-calming strategies or ask for help from an adult, or both, which the IEP team expected would lead to better behavior in the classroom and academic progress.

10. Exhibit 13 is the IEP that an IEP team, including claimant's special education teacher, Mary Lizarde, prepared as an annual review following a November 18, 2016 meeting. Claimant had been placed in a different school, Sunland Elementary, by virtue of special education placement. Claimant had made some progress in counseling, ERICS, but it was not consistent. He continued to exhibit oppositional

behaviors, was easily frustrated, and lacked coping skills. He met some of the goals set in his previous IEP in part, sometimes asking for adult help. His aggression reportedly had decreased and tantrums were more brief. He made some academic progress. In the IEP's Least Restrictive Environment Analysis, the conclusion was that claimant should continue in a Special Day Program at his current school, a General Education site.

11. Exhibit 15 is a Behavior Treatment Plan: Function Based Intervention Strategies from the District's Division of Special Education. The document is undated, but was prepared when claimant was in the second grade taught by Ms. Lizarde during the 2016-2017 academic year. It lays out strategies for teaching claimant, including by alleviating emotional reactions.

COMMUNICATIONS WITH AND EVALUATIONS BY THE SERVICE AGENCY

12. On April 17, 2017, mother submitted Exhibit 16, an Intake Application, to the service agency. Mother's response to why the application was submitted was: "Emotional disturbance disorder – autism spectrum." (Exhibit 16, p. 3.) She wrote that claimant was "academically very good," and "speaks well, just repetitive," but socially "has no friends" and "is completely unaware of his boundaries." (*Ibid.*) She states that claimant has "emotional outbursts . . . many times a day, crying, yelling, throwing objects, obsesses on subjects, anxiety." (*Ibid.*)

ASSESSMENT BY MS. ZEBBERMAN, LCSW

13. Exhibit 17 is the service agency's June 6, 2017 Social Assessment, conducted by Hillary Zebberman, LCSW (licensed clinical social worker). She recommended gathering medical and school records and scheduling medical or psychological evaluations.

A. The assessment notes claimant's mostly unremarkable early medical history. Claimant did have early difficulties with eating and reflux. Records of claimant's

treatment for these symptoms in mid-2015 by Cynthia C. See, M.D., at West Valley Pediatric Gastroenterology and Nutrition, are Exhibit 23.

B. Under Early Development, the assessment states that: "Parents were first concerned with [claimant's] development when he was age three and mother tried to put him in preschool. Because of his behavioral issues and inability to get along with other children, he was asked to leave three preschools." (Exhibit 17, p. 1.) Mother testified to the same facts relating to preschools at the fair hearing.

C. Under Educational History, the assessment noted that claimant has a one-on-one aide who rides the bus with him to school and stays with him during the school day. Claimant also had the benefit of a behavioral specialist at school. In addition, as the assessment states, claimant was "mainstreamed on the play yard, and he has counseling at school." (*Id.,* p. 2.) At hearing, mother observed that claimant will usually miss school if his one-on-one aide is not available.

D. Under Cognitive, the assessment states:

> [Claimant] will respond to his name, however, it usually has to be said several times. He can provide his first and last name. He does know his age and birthday. He recognizes colors and shapes. He can count 1-100; however, has a problem with recognition of both numbers and letters. He is learning basic addition and subtraction. He can recognize most of the letters of the alphabet, however, sometimes will switch them around. He can read a short sentence. He can write his first name. He cannot print a sentence, unless he is copying one. He does know his address and phone number. He does not know the days of the week, months of the year, or the seasons. He does know most of the major holidays. He

> does not know current or past presidents. He can keep his attention focused for one minute. He can follow routine at home and at school. He does need prompting to remember instructions.

(Exhibit 17, pp. 3-4.)

E. Under Communication, the assessment states in part that claimant is "verbal and can speak in complete sentences. He can be repetitive and perseverate at times. . . . He can have reciprocal conversation with others. He may speak out of context and speak about what he would like [to] talk about instead of the subject at hand." (Exhibit 17, p. 4.)

F. Under Social Behavior, the assessment states in part: "He does initiate interactions with others; however, he is over bearing in his socializing. . . . He can be protective of his 2-year-old sister, and worry about her safety . . . . He does not really play with other children, and mainly plays by himself. . . . He does give limited eye contact, not for an entire conversation. . . . He does not have repetitive behaviors. . . . Handling change to regular routines is difficult for him." (Exhibit 17, pp. 4-5.)

OPINION OF DR. DEANTONIO

14. Exhibit 18 is two pages of the service agency's interdisciplinary (I.D.) notes. In the I.D. note dated July 3, 2017, Carlo DeAntonio, M.D., Fellow of the American Academy of Pediatrics (FAAP), stated that from information available to him at that point, there was "no indication of substantially handicapping cerebral palsy, epilepsy or chronic major medical condition." (Exhibit 18, p. 1.) He recommended a "psychological evaluation to determine Lanterman eligibility." (*Ibid.*) In the note dated January 12, 2018, Dr. DeAntonio stated he had reviewed records from a gastroenterologist and neurologist, an audiology evaluation, and laboratory reports from the office of

claimant's regular physician.

PSYCHOLOGICAL ASSESSMENT BY DR. LEVI

15. Exhibit 19 is a Psychological Assessment performed by clinical psychologist Anna Levi, Psy.D, who evaluated claimant on July 27. 2017. Dr. Levi had reviewed, among other materials, school psychologist Steve Woda's December 5, 2015 report regarding claimant (Finding 11), which Dr. Levi referred to as a DIBELS Assessment (Dynamic Indicators of Basic Early Literacy Skills). She noted that the DIBELS Assessment "showed well below average scores." (Exhibit 19, p. 1.) Dr. Levi administered: (i) the Wechsler Abbreviated Scale of Intelligence – Second Edition (WASI-II); (ii) the Autism Diagnostic Observation Schedule – 2, Module 3 (ADOS-2, Module 3); (iii) Autism Diagnostic Interview – Revised (ADI-R), for which the interviewee was claimant's mother; and (iv) the VABS-II, to which claimant's mother responded. Under Summary of Impressions, Dr. Levi described her tests and observations under several subheadings:

A. Under Behavioral Observations, the assessment stated that claimant had "shared enjoyment and reciprocity in joint play with the examiner." (Exhibit 19, p. 2.) She asked claimant questions, such as the difference between a friend and someone he just goes to school with. Claimant answered that you have fun with friends, as opposed to people with whom you simply talk. Dr. Levi concluded under this subheading that, "Overall testing results appear to accurately reflect [claimant's] current functioning." (*Id.*, p. 3)

B. Under Intellectual Functioning, the assessment stated that the WASI-II was used to assess claimant's cognitive level of functioning. "Based on these testing results, his overall intellectual abilities are in the average range, perceptual reasoning abilities are average, and his verbal comprehension abilities are in the high average range. All his intellectual abilities were in the average to high average range with a strength in verbal reasoning and vocabulary." (Exhibit 19, p. 3.)

C. Under Adaptive Functioning, the assessment, based on claimant's mother's responses to the VABS-II, stated claimant's "adaptive skills ranged from borderline to moderate deficit range on the VABS-II." (Exhibit 19, p. 3.) Claimant's communication skills were rated in the mild deficit range, his social skills in the moderate deficit range, and his daily living skills in the borderline range.

D. Under Autism Spectrum Testing, the assessment, based on administration to claimant of the ADOS-2, Module 3, stated that, "The overall score fell below autism or autism-spectrum range and indicated minimal-to-no evidence of symptoms." (Exhibit 19, p. 4.) Claimant's mother's responses to ADI-R showed claimant to be below the autism cutoff in communication and repetitive behavior, but his social interaction score reached the autism cutoff. Dr. Levi summarized that "overall the measures were not indicative of autism spectrum disorder." (*Ibid.*)

E. Under Intellectual Disability, Dr. Levi assessed claimant using the criteria of the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition). She stated that a "diagnosis of intellectual disability requires intellectual and adaptive functioning deficits in conceptual, social and practical domains. [Claimant's] adaptive skills ranged from moderate deficit to borderline range, but his intellectual abilities were overall in the average range. Thus, he does not have intellectual disability." (Exhibit 19, p. 4.) The pertinent excerpt from DSM-5 on intellectual disability is Exhibit 37.

F. Under Persistent Deficits in Social Communication and Social Interaction, the assessment stated that claimant had sustained deficits in social-emotional reciprocity, due to lack of cooperation and aggression and in developing, maintaining, and understanding relationships, based on parental and school reports. Dr. Levi found no sustained deficit in nonverbal communicative behaviors.

G. Under Restricted/Repetitive Patterns of Behavior, Interests, or Activities, Dr. Levi found claimant to have a sustained deficit in reactivity to sensory input or unusual

interest in sensory aspects of the environment, as reported by his mother. Dr. Levi found no sustained deficits in: (i) stereotyped or repetitive motor movements, use of objects, or speech; (ii) insistence on sameness, inflexible adherence to routines, or ritualized patterns of behavior; and (iii) highly restricted, fixated interests that are abnormal in intensity or focus.

H. Dr. Levi concluded that claimant "appeared to have three sustained deficits, which does not meet the DSM-5 criteria for the diagnosis of Autism Spectrum Disorder." (Exhibit 19, p. 5.) Her DSM-5 diagnosis was Oppositional Defiant Disorder. She had four recommendations: (i) special education services for emotional disturbance; (ii) a team sport or a group activity with his peers; (iii) psychotherapy; and (iv) a professionally guided social skills group for children with emotional and behavioral issues.

SERVICE AGENCY'S INTERDISCIPLINARY REVIEW

16. Exhibit 20 is an August 28, 2017 note on the services agency's interdisciplinary review of: (i) Dr. DeAntonio's July 3, 2017 report (Finding 14); (ii) Dr. Levi's July 27, 2017 report (Finding 15); and (iii) Hillary Zebberman's June 6, 2017 report (Finding 13). Members of the Interdisciplinary Eligibility Committee were (i) Margaret Swaine, M.D., Supervisor of Medical Services, (ii) Heike Ballmaier, Psy.D., Board Certified Behavior Analyst (BCBA), Supervisor of Psychological and Intake Services, (iii) Sandi Fischer, Ph.D., also a Supervisor of Psychological and Intake Services (as set out below, Dr. Fischer testified at some length at the fair hearing), (iv) Kanh Hoang, Ph.D., a Staff Psychologist, and (v) Carla Cortes, B.A., Intake Service Coordinator Clinical Services/Intake. The committee determined that claimant was not eligible for services. In an August 29, 2017 letter, Exhibit 21, Ms. Cortes advised claimant of the Interdisciplinary Eligibility Committee's determination and of the right to appeal.

17. In Exhibit 22, an October 4, 2017 letter to claimant's mother from Jennifer Williamson, the service agency's Fair Hearing and Administrative Procedures Manager, Ms. Williamson summarized their informal meeting regarding an appeal of the ineligibility determination. Ms. Williamson summarized reports the service agency had reviewed and reminded claimant's mother that she had agreed to provide the service agency a new psychological evaluation and neurological report once they were available. She also provided a records request form for claimant's mother to return, in case she wished the service agency to review a diagnosis by a Dr. Foos, which was discussed in an LAUSD Psycho-Educational Assessment. She enclosed in the letter information on services from other agencies which claimant might pursue.

18. Exhibit 24 includes records of claimant's treatment by Sonal G. Patel, M.D., at West Coast Neurology in Pasadena in 2017 for migraines and related symptoms.

RECORDS AND OPINION OF DR. WOODALL

19. Exhibit 25 includes a November 16, 2017 letter "to whom it may concern" from Linda Woodall, M.D., Diplomate, American Board of Psychiatry and Neurology, Diplomate, Child and Adolescent Psychiatry, M.C.L.A. Psychiatric Medical Group in Glendale, California, stating that claimant "has been diagnosed with Autism Spectrum Disorder. I have recommended that he be given Regional Center services." (Exhibit 25, p. 5.) There is no indication that Dr. Woodall examined claimant. Her letter is supported only by notes, a medical history, and clinical notes, which stated:

> Autism Spectrum Disorder
>
> A. Social Communication
>
> 1) Deficits in social-emotional reciprocity
>
> Poor reciprocity to other's conversations. Only interested in discussing his subject

2) Non-verbal communication deficits

Poor eye contact

3) Relationships – no friends

B. Restricted patterns of behavior, etc.

1) Repetitive speech, use of objects

Obsessive speech – his choice of subjects only

Organizes kitchen cupboards and Legos

2) Insisting on sameness, rigidity – clothing, food;

tantrums if plans are not his way

3) Restricted interests – science or TV, Legos, youtube

(certain subjects only) mindcraft

4) Sensitivity to sensory input – elastic pants, tight

socks, tight velcro shoes; easily overwhelmed by

groups and noise; food textures

C. Symptoms present in early development

D. Clinical Impairment in social, etc., functioning

E. Not explained by delays, etc. with language

impairment,

Behavioral disorder

(Exhibit 25, pp. 3-4.)

DR. FISCHER'S OBSERVATION AND FOLLOW-UP

20. On October 17, 2017, Dr. Fischer, a member of the service agency's Interdisciplinary Eligibility Committee (Finding 16), observed claimant at school between 9:45 and 10:50 a.m., about which she wrote a School Observation, Exhibit 26.

A. Dr. Fischer noted that claimant's regular teacher, Mrs. Carroll, was absent during her observation and a substitute teacher was in charge. Claimant was seated next to another boy in a group of students when Dr. Fischer started observing. He and the other boy played rock, paper, scissors at times. She saw claimant make good eye contact with an instructor in the classroom. He followed some instructions, spoke to adults, wrote things down, and whined at times. The classroom was noisy, but claimant did not react to the noise. He was at one point disrespectful to an instructor, and used profanity about other children, but after he was talked to outside the classroom, he returned and apologized. At one point during a game, he suggested how many cards each player should have, but another child disagreed. Claimant threatened to hit her. A teacher intervened, and supported claimant's suggestion about the number of cards to distribute, because claimant was correct about how many cards were available. During play outdoors, claimant participated in a ball game, but used profanity, such as when he missed a shot.

B. Under the heading, Diagnostic Impressions, Dr. Fischer wrote that claimant does not meet the eligibility criteria for a diagnosis of Autism Spectrum Disorder. She also wrote: "There was no suggestion of inflexible adherence to routines or ritualized patterns of behavior during the observation. . . . [Claimant's] mother reported sensory issues but none were observed during the school observation . . . ." (Exhibit 26, p. 11.)

C. Under the heading, DSM-5 Diagnoses, Dr. Fischer wrote:

> [Claimant's] presentation and his records suggest the presence of serious emotional/behavioral problems. It is this psychologist's impression that [claimant] has tremendous difficulty with emotion regulation. He also has significant problems with impulse control. Dr. Levi diagnosed [claimant] with Oppositional Defiant Disorder which is likely but this psychologist also believes that diagnoses such as Intermittent Explosive Disorder and possible Disruptive Mood Dysregulation Disorder should be considered by his mental health team.

(Exhibit 26, p. 11.)

Dr. Fischer's testimony at the fair hearing was consistent with her School Observation. Notwithstanding claimant's emotional difficulties, Dr. Fischer agreed with the assessment that claimant is bright and capable, as set out in his initial IEP in late 2015 (Finding 9). She supported her opinion by pointing in particular to claimant's language ability as a reliable indication of good cognitive functioning.

21. Dr. Fischer had a follow-up telephone conversation with claimant's teacher, Mrs. Carroll, on November 2, 2017, as indicated in an I.D. note, Exhibit 27. They discussed the difficulties that claimant continued to have, such as expressions of anger, that impede his academic progress. Mrs. Carroll stated that claimant "makes good eye contact" and "does well verbally." (Exhibit 27.) She did not believe that he exhibits repetitive behaviors or symptoms of ASD. The service agency's Interdisciplinary Eligibility Committee considered Dr. Fischer's School Observation and records newly available and found that claimant was ineligible for services. (Exhibit 28.)

22. On November 27, 2017, Dr. Fischer discussed by telephone claimant's ERICS (Finding 8E) with Sean Tran, who had provided the counseling for the past two years. Her I.D. note on the discussion is Exhibit 29. Mr. Tran stated that claimant shows some symptoms of ASD, including that he shows rigidity and "perseverates on things." (Exhibit 29.) For instance, the past year claimant insisted on playing a game involving Legos dinosaurs, and nothing else, during counseling. As Mr. Tran elaborated, however, claimant's presentation was "not as severe as someone with full-blown Autism." (*Ibid.*) Mr. Tran commented further that a diagnosis of ASD was inconsistent with claimant's ability to show empathy, his eye contact with others, and his making cognitive connections. The service agency's Interdisciplinary Eligibility Committee considered Dr. Fischer's discussion with Mr. Tran and found that claimant was ineligible for services. (Exhibit 30.)

OTHER COMMUNICATIONS WITH THE SERVICE AGENCY

23. In a November 28, 2017 letter, Exhibit 31, Dana Lawrence, Contract Officer at the service agency, informed claimant's mother of records newly available and considered by the Interdisciplinary Eligibility Committee. The records included those of Dr. Woodall and information from Mr. Tran. Ms. Lawrence advised that claimant's "condition does not meet the definition of a developmental disability found in law and regulations." (Exhibit 31, p. 7.)

24. Dr. Fischer notes that on December 1, 2017, she spoke by telephone with Victor Saldana, the principal at claimant's school, who has known and observed claimant a few times per week over an academic year and a half. Mr. Saldana reported that claimant's explosive behavior has decreased and all of his problematic behaviors are more manageable. He did not report "any behaviors that are typical for someone on the Autism Spectrum." (Exhibit 32.) Dr. Fischer concludes her I.D. note: "Mr. Saldana's description of [claimant] does not meet the diagnostic criterion for an Autism Spectrum

Disorder." (Exhibit 32.)

25. Exhibit 33 is Dr. Fischer's I.D. note of her December 12, 2017 telephone conversation with Irene Whitney, claimant's one-on-one school aide. She told Dr. Fischer that claimant has made progress at school, including being able to read a good amount of words. He has made progress in that he is less physically aggressive.

26. Exhibit 34 is Dr. Fischer's I.D. note of her December 14, 2017 telephone conversation with a Mr. Tan, who developed claimant's school's behavioral treatment plan. Mr. Tan is studying to be a BCBA and works under the supervision of a BCBA. "Mr. Tan's description of [claimant] suggests serious acting out behaviors that have responded to his behavioral plan but does not support a diagnosis of an Autism Spectrum Disorder." (Exhibit 34.) The service agency's Interdisciplinary Eligibility Committee considered Dr. Fischer's discussion with Mr. Tan and found that claimant was ineligible for services. (Exhibit 35.)

27. In a January 2, 2018 letter, Exhibit 36, Dana Lawrence, Contract Officer at the service agency, followed up on Ms. Williamson's October 4, 2017 letter (Finding 17). Ms. Lawrence informed claimant's mother of records that had been considered by the Interdisciplinary Eligibility Committee. She summarized the records. She advised claimant's mother again that claimant's "condition does not meet the definition of a developmental disability found in law and regulations." (Exhibit 36, p. 10.)

EVIDENCE PRESENTED BY MOTHER

28. As claimant's mother stated, he has struggled a great deal at every school he has attended. She believes this and other characteristics indicate that claimant has autism, as Dr. Woodall noted. (Finding 19.)

A. Claimant's difficulties were already marked when he was of preschool age. He was asked to leave preschools because of his behaviors. He has at times acted so badly at school that LAUSD have called the police to report his activity.

B. Any change in his schedule or routine hits claimant hard. He is inflexible. He is unable to deal with simple things that other children deal with, such as the feel of his clothes and the textures of foods.

C. Claimant insists that things be done his way. He will not tolerate a different way.

D. Claimant has no friends and no social life. Many family members refuse to interact with him. He does not care what other people think or how they feel. He is unable to deal normally with other children. His behaviors and problems must be considered extreme, and not confined to the school environment, given that the lives of all the people in his household are forced to revolve around him.

E. Because of his many behavioral issues, claimant should be evaluated further by the District. Mother has asked for further evaluations, but the District has refused because the evaluations already performed have, in the District's judgment, provided claimant such services as he needs and the District is able to provide.

F. Mother believes that the service agency should provide services at home. Claimant needs help there as well as at school. At others' suggestions, she has inquired into insurance coverage for services, but believes that no such services are available to claimant.

LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that he is eligible for services under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act). (Evid. Code, §§ 115, 500.) Claimant did not carry his burden of proof in this case.

FIVE CATEGORIES OF DISABILITIES THAT QUALIFY A PERSON FOR SERVICES

2. To be eligible for services under the Lanterman Act, a claimant must have a qualifying developmental disability, one 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. . . ." (Welf. & Inst. Code, § 4512, subd. (a).) The statute sets out four specific categories of disability: "intellectual disability, cerebral palsy, epilepsy, and autism." (*Ibid.*) The fifth category is less clear cut: "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." (*Ibid.*) The fifth category, however, does not allow unlimited access for all persons with some form of learning or behavioral disability. Many persons have sub-average functioning or impaired adaptive behavior but are not covered by the Lanterman Act. The service agency may not offer services except to those covered by the Lanterman Act.

3. The disability in any of the five categories must be substantial, with "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." (Welf. & Inst. Code, § 4512, subd. (*l*)(1); see also Cal. Code Regs., tit. 17, § 54001.)

4. An equivalent formulation of substantial disability is set out in California Code of Regulations, title 17, section 54001, subdivision (a)(1): "A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential . . . ."

5. The definitive characteristics of intellectual disability include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" to intellectual disability, there must be a manifestation of deficits, cognitive or adaptive or both, which render the claimant's disability like that of a person with intellectual disability. Strict replication of all of the cognitive and adaptive criteria that typically establish eligibility based on intellectual disability is not required, otherwise the fifth category would be redundant. Eligibility under the fifth category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination whether disabling effects on performance render the claimant like a person with intellectual disability.

6. Determining whether a claimant's condition "requires treatment similar to that required" for persons with intellectual disability is not a simple exercise in enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services service agencies offer, such as counseling, vocational training, living skills training, speech therapy, or occupational therapy. Benefit is not the deciding factor, it is whether a claimant's condition requires such treatment.

7. A claimant's substantial disability must not be caused solely by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. A claimant with a "dual diagnosis," a developmental disability coupled either with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. But the claimant whose conditions originate only from excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does not have a developmental disability, would be

ineligible.

EPILEPSY AND CEREBRAL PALSY

8. Among the five categories of developmental disability that qualify a person for services are two medical conditions, epilepsy and cerebral palsy. Dr. DeAntonio found no evidence that claimant suffers from either epilepsy or cerebral palsy. (Finding 14.) Claimant did not offer evidence of his suffering from either medical condition. Claimant does not qualify for services under either of these two categories of the Lanterman Act.

INTELLECTUAL DISABILITY

9. The Lanterman Act and its implementing regulations do not define intellectual disability, a third category of qualifying developmental disability. It is appropriate to analyze qualification under this category as Dr. Levi did, using these criteria in the DSM-5 (Finding 15E):

> 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.

(Exhibit 38, DSM-5, p. 33.)

10. The DSM-5 calls for assessing adaptive functioning, not just such cognitive capacity as may be assessed by an IQ score:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

(Exhibit 38, DSM-5, p. 37.)

11. "To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described

in Criterion A." (Exhibit 38, DSM-5, p. 38.)

12. Dr. Fischer opined that claimant does not suffer from intellectual disability. On the contrary, he functions well intellectually. (Finding 20.) She allowed that in some instances, such as in cognitive testing by Dr. Levi, claimant's overall intellectual abilities and perceptual reasoning abilities were found to be in the average range, as set out in Finding 15E. But Dr. Levi also found that claimant's verbal comprehension abilities are in the high average range. Such verbal ability, as Dr. Fischer explained, is key to good intellectual functioning.

13. Dr. Fischer's opinion on intellectual disability was informed by her review and consideration of each of the professionals who have assessed claimant, including: (i) the wide-ranging assessments by Steve Woda, a School Psychologist at LAUSD, as described in Finding 8; (ii) the cognitive assessment by Hillary Zebberman, LCSW, as described in Finding 13D, and Ms. Zebberman's other assessments as set out in Finding 13; (iii) Dr. Levi's Psychological Assessment as described in Finding 15; and (iv) Dr. Woodall's November 16, 2017 letter and notes. Dr. Fischer noted that these professionals relied upon other records, prepared by or reflecting the observations of claimant's parents, personnel of the District, and various medical providers.

14. Claimant does demonstrate adaptive deficits. It was not established, however, that these deficits are directly related to intellectual impairments, as opposed to claimant's diagnosed psychological condition, whether Oppositional Defiant Disorder as diagnosed by Dr. Levi or, other diagnoses Dr. Fischer considered possibly appropriate: Intermittent Explosive Disorder or Disruptive Mood Dysregulation Disorder. (Finding 20C.) The preponderance of the evidence did not demonstrate that Claimant qualifies for regional center services under the category of intellectual disability.

FIFTH CATEGORY

15. Dr. Fischer opined that claimant does not qualify for services under the

Lanterman Act's fifth category (the Act's fourth category is discussed below). Claimant's adaptive and behavioral deficits are apparently related to his aggressive behaviors and other psychological condition. The evidence did not establish that claimant's deficits affect him as deficits affect a person suffering from a condition similar to intellectual disability.

16. Claimant's behavior appears to have improved over time. His problems have lessened. The evidence did not establish that claimant requires treatment similar to that required for individuals with intellectual disability. In consequence, claimant does not qualify for services under the Lanterman Act's fifth category.

AUTISM

17. As with intellectual disability, the Lanterman Act and its implementing regulations have 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 with the DSM-5 definition of "Autism Spectrum Disorder."

18. The DSM-5, section 299.00, discusses the diagnostic criteria which must be met to provide a specific diagnosis of ASD, 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.

(Exhibit 37, DSM-5, pp. 50-51.)

19. As noted by Dr. Fischer and Dr. Levi, claimant does not meet the criteria under the DSM-5 for a diagnosis of ASD. Dr. Fischer noted that, in this regard, special attention should be paid to Dr. Levi's results in administering the ADOS-2, Module 3, as described in Finding 15D, because the ADOS-2 is the "gold standard" in testing for ASD. The conclusion in Dr. Woodall's November 16, 2017 letter (Finding 19) that services should be provided because of ASD is not supported by proper diagnostic methods and

is not reliable. Claimant presented no other evidence indicating that a qualified professional has diagnosed claimant with ASD.

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20. The preponderance of the evidence did not establish that claimant is eligible to receive services from the service agency under the Lanterman Act.

ORDER

Claimant's appeal is denied. The service agency's determination that claimant is not eligible for services is upheld.

DATED:

THOMAS Y. LUCERO
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.