

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

v.

SAN GABRIEL VALLEY/ POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2018060532

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on July 24, 2018, in Pomona, California.

Daniela Santana, Fair Hearing Manager, represented the San Gabriel Valley/Pomona Regional Center (SGVPRC or Regional Center). Claimant's mother (Mother) represented Claimant. Claimant appeared at the hearing, as well as Claimant's father (Father) and paternal grandmother (Grandmother).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on July 24, 2018.

ISSUE

Is Claimant eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act,

Welfare and Institutions Code¹ section 4500 et seq. (Lanterman Act)?

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FINDINGS OF FACT

1. Claimant is an eight-year-old boy who lives with Mother and Father (collectively, Parents), as well as Grandmother and older sister, within the Regional Center's catchment area, and is a consumer of the Service Agency.

2. In 2012, the Regional Center determined that Claimant was eligible for services on pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code sections 4500, et seq.,² under the qualifying category of intellectual disability. Specifically, Claimant's diagnosis, as discussed in more detail below, was "[i]ntellectual [d]isability with autistic features," rendered by Liza Carrillo, Ph.D., who, pursuant to the Regional Center's request, performed a psychological assessment of Claimant on September 14, 2012.

DR. LIZA CARRILLO'S ASSESSMENT

3. On September 14, 2012, Dr. Liza Carrillo performed a psychological assessment of Claimant when he was two-years and seven-months old and prepared a written report. Dr. Liza Carrillo did not testify at the hearing, but according to the report, the Regional Center required the assessment in order to help it determine whether Claimant, who had been receiving services in the Early Start program, would be eligible for services under the Lanterman Act in five months, when he was due to turn three-years-old.

4. In the Early Start program, Claimant was deemed a child at risk for

¹ All further statutory references are to the Welfare and Institutions Code.

² All statutory references are to the Welfare and Institutions Code.

developmental delays in relation to his speech and behavior, and received speech and occupational therapy, among other things, through the Regional Center. Additionally, according to Dr. Liza Carrillo's report, Claimant, who had undergone an initial developmental assessment on March 14, 2012 at the Regional Center, received test results indicating a cognitive development equivalence age of 19 months, a gross motor equivalence age of 15 months, a fine motor equivalence age of 17 months, a social development equivalence age of 18 months, an adaptive equivalence age of 20 months, a language development equivalence age of three to six months, and a speech production equivalence age of six to nine months.

5. According to Dr. Liza Carrillo's report, she conducted a clinical interview of Mother, performed a clinical observation of Claimant, reviewed available records, and administered (1) the Differential Ability Scales, 2nd Edition, Lower Level-Early Years (DAS-II), (2) the Vineland Adaptive Behavior Scales-II (Vineland), (3) the Autism Spectrum Rating Scale (ASRS), and (4) the Pervasive Developmental Disorder Screening Test-Stage Three-Autistic Spectrum Disorders Screening.

6. The scores of the DAS-II, which tested Claimant's intellectual functioning, showed that Claimant's intellectual functioning fell in the delayed range.

7. The scores of the Vineland, which assessed Claimant's adaptive behaviors through rating scales distributed to Mother, showed that Claimant functioned overall in the low range. Specifically, Claimant obtained scores in the communication, daily living skills, socialization behaviors, and motor skills domains in the low, moderately low, low, and moderately low ranges, respectively.

8. The scores of the ASRS, which assesses behaviors frequently observed in children with autism spectrum disorder through interview forms, including those distributed to parents, showed that Claimant manifested many behaviors frequently associated with children diagnosed with autism spectrum disorder, based on Mother's

reporting. Specifically, the results of the ASRS showed that Claimant's scores fell in the very elevated range, based, in part, on Mother's reporting of Claimant's sensory sensitivities and issues with attention and self-regulation. Additionally, the ASRS showed very elevated scores in the treatment areas of peer socialization, adult socialization, social-emotional reciprocity, stereotypy, and behavioral rigidity. The results also showed that Claimant scored in the low range in the area of atypical language, reflecting "[Claimant's] current status of being largely non-verbal." (Regional Center Exhibit 3, page 6.)

9. The scores of the ASRS also indicated Claimant manifested qualitative impairment in social interactions and in communication, and showed restricted and stereotyped patterns of behavior, interests, and activities. Specifically, Dr. Liza Carrillo stated the following:

[Claimant] may engage in purposeless, repetitive behaviors, such as being fascinated with parts of objects (e.g., tires), lining up objects, or engaging in some stereotypic behaviors including crossing arms unexpectedly or interlacing his fingers and watching them. He tends to bang objects together and enjoys watching objects that spin. He is reported to bang his head against the wall when upset. [Claimant] frequently insists on sameness of how things are done, and he frequently is upset about changes in routines (even though it is difficult to get him into a routine.) (*Id.*)

10. Dr. Liza Carrillo also noted from the ASRS that Claimant exhibited slightly elevated sensory over-sensitivities, and had difficulties in modulating his attentional resources.

11. Dr. Liza Carrillo also stated that she reviewed and considered available

reports, and noted the following:

Sensory issues are verified in occupational therapy assessment of 8/14/12, including: use of excessive force on persons and objects; difficulty with eye contact; difficulty with certain tactile stimuli. Psychosocial skills, communication, and attention were noted as deficient. The language assessment of the same date indicated communication abilities in the profoundly delayed range, and concerns regarding reduced joint attention, limited eye contact, and a tendency to rock and spin were cited. Some social interaction was recognized when [Claimant] showed objects to [Parents], but overall, he was described as "limited in the variety of interactive schemes and reciprocal activities." (*Id.* at page 7.)

12. Dr. Liza Carrillo stated that the results of this assessment indicated the following:

[Claimant] is currently functioning at a significantly delayed range of cognitive ability. Scores obtained in this evaluation should be treated with caution due to indeterminate "floor" arising from raw scores of zero or near zero. Even so, [Claimant's] performance is far below expectations for his age.

[¶] ... [¶]

[Claimant is suspected of currently manifesting symptomatology of autism spectrum disorder, as described in the text of this report. Although past records did not report many behaviors that might have predicted a diagnosis of autism, present information and observation identify related behaviors or clarify ones reported previously. Now that [Claimant] will be transitioning to the public school, his behaviors should be monitored further for diagnostic clarification.

13. Dr. Liza Carrillo concluded Claimant manifested "substantially handicapping deficits" in the "areas of communication skills, learning, socialization, and self-care." (*Id.* at page 8.) Dr. Liza Carrillo also stated that Claimant had poor gross motor skills, and low fine motor adaptive behaviors.

14. Dr. Liza Carrillo diagnosed Claimant with "Mild to Moderate Mental Retardation (Intellectual Disability) with autistic features" and with "Significant developmental delays in speech and language." (*Id.* at page 8.)

15. Dr. Liza Carrillo made the following pertinent recommendations: (1) for the interdisciplinary team to decide on eligibility for Regional Center services; (2) the monitoring of Claimant's behaviors during the school year "to clarify whether a separate diagnosis of autism is warranted, separate from that of Intellectual Disability," as "such monitoring would provide additional continuous data, over time, from a separate observer in addition to parent;" (3) for Claimant to continue receiving occupational therapy to teach organization of behaviors, modulation of sensory stimuli and attention, and fine motor skills; (4) for Claimant to continue receiving intensive speech/language therapy; and (5) for Parents to learn some strategies to manage Claimant's behaviors, and to coordinate efforts between home and school. (*Id.*)

REPORTS OF AUTISM BY CLAIMANT'S PHYSICIANS

16. On December 2, 2013, Claimant underwent genomic testing which was submitted to Quest Diagnostics (Quest). On December 13, 2013, Quest prepared a report that stated the following:

Inherited and de novo duplications involving 16p13.11 have been implicated in variable phenotypes ranging from normalcy to cognitive impairment, autism and/or intellectual disability. A thorough clinical assessment of this patient is recommended. (Claimant's Exhibit 6.)

17. Mother, on Claimant's behalf, submitted a three-sentence letter from Claimant's primary physician, Dr. Nithya R. Kona, dated June 4, 2018, addressed to "To whom it may concern." Dr. Kona did not testify at the hearing, but her letter stated that Claimant had been diagnosed with Autism since 2013, and that he also had a component of ADHD. Also on June 4, 2018, Claimant received authorization from his insurance carrier that he was eligible to receive ABA therapy services.

REASSESSMENT BY DR. THOMAS CARRILLO³

18. On July 28, 2017, when Claimant was seven-years and five-months old, Dr. Thomas Carrillo performed a psychological assessment of Claimant and prepared a written report. Dr. Thomas Carrillo did not testify at the hearing, but according to his report, he performed the psychological assessment pursuant to a request of the Regional Center, and limited his assessment to "developmental disabilities, specifically Intellectual Disability

³ According to the representation of Ms. Santana, Dr. Thomas Carrillo and Dr. Liza Carrillo are not related.

and/or Autism Spectrum Disorder.” (Regional Center Exhibit 5, page 1.)

19. According to Dr. Thomas Carrillo’s report, he interviewed Claimant, Mother, and Claimant’s Applied Behavior Analysis (ABA) therapist, Ashley Rue, conducted clinical observations, and administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Wide Range Achievement Test-Fourth Edition (WRAT-IV), the Vineland, the Gilliam Autism Rating Scale-Second Edition (GARS-II), the Childhood Autism Rating Scale-Second Edition (CARS-II), and the Autism Diagnostic and Observation Schedule-Second Edition (ADOS-2) (Module 3). Dr. Thomas Carrillo also reviewed the assessment report prepared by Dr. Liza Carrillo, an occupational therapy triennial report dated September 17, 2015, a speech and language assessment and a psychoeducational assessment prepared by the Pomona Unified School District (School District) on November 12, 2015 and November 18, 2015, respectively, and Claimant’s Individualized Education Program (IEP) dated November 16, 2016.

20. Dr. Thomas Carrillo’s noted from his clinical observations that Claimant presented himself as a playful, engaging, and intelligent young man with good and meaningful eye contact. He noted that Claimant smiled and laughed appropriately, but had difficulty sustaining his attention and required frequent redirection.

21. Dr. Thomas Carrillo, in an effort to obtain information concerning Claimant’s cognitive potential, administered the WISC-V, and noted that Claimant consistently scored in the normal range. Specifically, Claimant’s overall results “yielded a Verbal Comprehension IQ Composite Score of 86, Visual Spatial IQ Composite Score of 97, Fluid Reasoning IQ Composite Score of 91, Working Memory IQ Composite Score of 100, Processing Speed IQ Score of 100 and a Full-Scale IQ Score of 89.” (*Id.* at page 4.) Dr. Thomas Carrillo stated that the scores suggested that Claimant’s cognitive abilities were within the normal range.

22. To further assess Claimant’s cognitive ability based on academic

achievement, Dr. Thomas Carrillo administered the WRAT-IV. In the area of word reading, Claimant, who was in second grade, received a standard score of 129, with a grade equivalent of 4.9. In the area of spelling, Claimant received a standard score of 105, with a grade equivalent of 2.3, and in the area of mathematics computation, Claimant received a standard score of 95, with a grade equivalent of 1.7. Dr. Thomas Carrillo noted that based on the results of the WRAT-IV, Claimant had academic skills beyond what would be expected at his current grade level.

23. In an effort to obtain information concerning Claimant's adaptive functioning, Dr. Thomas Carrillo administered the Vineland, and noted that in the area of communication, Claimant received a standard score of 79, which was in the borderline range of delay. Claimant received a receptive language age equivalent of 2.6 years, an expressive language age equivalent of 3.11 years, and a written language age equivalent of 7.1 years. Dr. Thomas Carrillo noted that based on the results of the Vineland, Claimant had written communications skills within the normal range, while his receptive and expressive language skills fell within the delayed range. Based on these findings, Dr. Thomas Carrillo noted that Claimant would qualify for a diagnosis of a language disorder.

24. On the motor portion of the Vineland, Claimant received a standard score of 85, which was in the low-normal range. Claimant received a gross motor age equivalent of 7.5 years and a fine motor age equivalent of 5.2 years. Based on these findings, Dr. Thomas Carrillo noted that Claimant's gross and fine motor skills were in the normal range.

25. In the area of daily living skills, Claimant received a standard score of 103, which was within the normal range, and in the area of socialization, Claimant received a standard score of 85, which was in the low-normal range. Dr. Thomas Carrillo noted that when comparing the four areas of adaptive functioning (i.e., communication, daily living skills, socialization skills, and motor skills), Claimant's overall adaptive abilities were within the normal range with an adaptive behavior composite score of 87.

26. Dr. Thomas Carrillo noted that due to concerns regarding the existence of autism, he screened Claimant for autism spectrum disorder with the GARS-II. Claimant received an autism index score of 57, which was within the unlikely probability range of autism spectrum disorder. Dr. Thomas Carrillo also screened Claimant with the CARS-II, in which Claimant received a total score of 23.5, which was within the minimum/no symptoms range for autism spectrum disorder.

27. Dr. Thomas Carrillo also administered the ADOS-2 (Module 3), which is a semi-structured assessment of communication, social interaction, and play (or imaginative use of materials) for individuals suspected of having autism or other pervasive developmental disorders. In the area of social affect, Claimant received a total score of 4, which Dr. Thomas Carrillo stated was "well below the cutoff score of Autism Spectrum Disorder." (*Id.* at page 5.) In the area of restricted and repetitive behavior, Claimant received a score of 1, which was also "well below the cutoff score of Autism Spectrum Disorder." (*Ibid.*) Dr. Thomas Carrillo stated the following:

When combining the two scores of [s]ocial affect and [r]estricted and [r]epetitive [b]ehavior, [Claimant] received a total score of 5, which is well below the cutoff score for a diagnosis of [a]utism. A total score of 5 provided him a comparison score of 3, which is within the low probability of [a]utism. (*Ibid.*)

28. Dr. Thomas Carrillo further stated the following:

[Claimant] "indeed, displayed some [a]utistic-like behaviors, in the form of jumping in his seat while sitting and slapping himself with an open hand when angry. These are behaviors

that are seen in children who fall within the [a]utism [s]pectrum [d]isorder range. (*Ibid.*)

29. Dr. Thomas Carrillo applied the diagnostic criteria for autism spectrum disorder from the Diagnostic and Statistical Manual of Mental Disorders (5th Edition) (DSM-5), which was published on May 18, 2013. Dr. Thomas Carrillo noted that in order to meet the criteria for autism spectrum disorder under DSM-5, Claimant had to demonstrate symptomatology in two specific domains: (1) social communication and social interaction; and (2) restricted, repetitive, patterns of behavior, interests or activities.

30. Dr. Thomas Carrillo stated that in the area of social communication and social interaction, Claimant would have to meet all of the three following subcategories: (1) deficits in social-emotional reciprocity; (2) deficits in nonverbal communicative behaviors used for social interaction; and (3) deficits in developing, maintaining and understanding relationships. Dr. Thomas Carrillo noted that Claimant failed to meet any of those three subcategories, as Claimant "was easily able to engage in back-and-forth conversation," "was able to maintain good and meaningful eye contact through the evaluation and he had a wide range of facial expressions to demonstrate his mood," and "would engage in play activity with others, as indicated by the report from his mother and from school representatives." (*Id.* at page 6.)

31. Dr. Thomas Carrillo stated that in the area of restricted, repetitive patterns of behavior, interest or activities, Claimant would have to meet two of the four following subcategories: (1) stereotyped or repetitive motor movements, use of objects or speech; (2) insistence on sameness, inflexible adherence to routines or ritualized patterns of verbal or nonverbal behavior; (3) highly restricted, fixated interests that are abnormal in intensity or focus; and (4) hyper or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. Dr. Thomas Carrillo noted that Claimant met two of those four subcategories, specifically demonstrating stereotyped or repetitive motors

movements and hyperactivity, in that Claimant displayed repetitive motor mannerisms “in the form of jumping in his seat while sitting” and Claimant “was an active child.” (*Id.* at pages 6-7.)

32. Dr. Thomas Carrillo noted that Claimant met two of the seven subcategories for a diagnosis within the autism spectrum disorder range, therefore, Claimant did not meet the criteria for autism spectrum disorder under DSM-5. Dr. Thomas Carrillo stated that when comparing Claimant’s behavior to the DSM-5, he seemed to meet many of the criteria for attention deficit hyperactivity disorder. Specifically, Dr. Thomas Carrillo noted that Claimant “had difficulty paying close attention to details . . . often had difficulty sustaining his attention . . . [and] from time to time, appeared as though he was not listening when spoken to directly.” (*Id.* at page 7.) Additionally, he noted that Claimant “had difficulty following through with instructions” and “clearly avoided tasks that required his sustained mental effort.” (*Ibid.*) Dr. Thomas Carrillo also stated that Claimant “was easily distracted by extraneous stimuli” and “was somewhat impulsive.” (*Ibid.*)

33. Dr. Thomas Carrillo stated that his DSM-5 diagnostic impression of Claimant was as follows:

314.01 (F90.2) Attention-Deficit/Hyperactivity Disorder,
Combined Presentation, Mild

315.39 (F80.9) Language Disorder
Cognitive abilities within the normal range
Adaptive abilities within the normal range

34. Dr. Thomas Carrillo recommended that Claimant “continue to receive special education services through the school district in an effort to maintain programming consistent with individuals with speech and language delays and difficulties with attention and concentration.” (*Id.* at pages 7-8.)

SCHOOL DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT REPORT AND IEP

35. On May 23, 2018, the School District conducted a psychoeducational assessment of Claimant and prepared a report. No one from the School District testified at the hearing, but according to the report, Claimant was referred for assessment, because he demonstrated an increase in aggressive behaviors at school, noncompliance, oppositional and argumentative behavior, and toileting accidents.

36. At the time of the assessment, Claimant was eligible for special education due to autism, orthopedic impairment due to his club feet, and speech and language impairment. He received specialized academic instruction, speech and language services, occupational therapy, counseling, inclusion services, health and nursing services, adapted physical education, and behavior intervention services.

37. According to the report, the assessor conducted a classroom observation, reviewed records, conducted an interview of Claimant, Mother, and Claimant's teacher, distributed rating scales to Mother and Claimant's teacher, performed a norm-referenced assessment and a criterion-referenced assessment, and considered outside agency reports. The assessor interpreted the assessment data and found that Claimant continues to demonstrate behaviors associated with autism at home and at school, as well as behaviors clinically significant in the areas of interpersonal problems, inappropriate behaviors and feelings, and depression. As such, the assessor concluded that Claimant met the criteria for eligibility for special education and related services in the areas of autism, emotional disturbance, other health impairments (attention deficit hyperactivity disorder), and severe orthopedic impairment (club feet). The assessor did not find that Claimant met the criteria for intellectual disability.

38. Claimant's IEP dated May 23, 2018 listed autism as Claimant's primary disability, and emotional disturbance as Claimant's secondary disability. The IEP stated that "[Claimant's] autistic behaviors, emotional disturbance, ADHD, speech and language

delays, and orthopedic impairment affect his progress in the general education setting. (Regional Center's Exhibit 12.)

REGIONAL CENTER'S AUTISM CLINIC ASSESSMENT

39. On May 3, 2018, the Regional Center's Autism Clinic conducted an assessment of Claimant. Specifically, Deborah Langenbacher, Ph.D., Judith Aguilera, MA, CCC-SLP, and Larry Yin, MD, collectively conducted an assessment of Claimant, which included a parent interview, play observation, a review of records, and administration of the ADOS-2, the CARS, and the Adaptive Behavior Assessment System (Third Edition) (ABAS-III). Dr. Langenbacher and Dr. Yin collectively prepared a written report, and Ms. Aguilera prepared a separate written report. Neither Dr. Langenbacher, Dr. Yin, nor Ms. Aguilera testified at the hearing.

40. According to the report prepared by Dr. Langenbacher and Dr. Yin, from their observations of Claimant during their administration of the ADOS-2, as well as the information gathered from the completed CARS rating scales, and the interviews and records review, Dr. Langenbacher and Dr. Yin concluded that in the area of communication, Claimant demonstrated an overall comfortable quality of rapport and used complete sentences, and did not demonstrate repetitive behaviors, although he referred frequently to cars. They also noted that Claimant demonstrated a high level of distractibility and fidgety behavior.

41. In the area of social interaction and social communication, Dr. Langenbacher and Dr. Yin concluded that Claimant demonstrated an ability to initiate with others and engage in conversation with others. They noted that Claimant made fleeting eye contact and demonstrated difficulties with verbal comprehension that made it difficult for him to respond to others. Additionally, Claimant behaved aggressively toward other children at times, and for that reason experienced difficulty with social relationships.

42. In the area of stereotypic motor behaviors or language usage, Dr.

Langenbacher and Dr. Yin concluded that Claimant did not demonstrate such behaviors or language usage, and demonstrated no difficulties with transitions. They also stated the following:

[Claimant] has previously been diagnosed with Attention Deficit Hyperactivity Disorder. And he is prescribed medication for this condition. He presents with traits of inattention, including difficulty sustaining attention for tasks or in play sometimes does not seem to listen when he is spoken to, resists tasks he perceives as being difficult, and he is easily distracted by extraneous stimuli. He presents with traits of hyperactivity, including fidgeting, leaves his seat when remaining seated is required, impulsive behaviors, difficulty waiting, and intrudes on others (e.g., personal space.) (Regional Center's Exhibit 8, page 5.)

43. In the area of adaptive skills, Dr. Langenbacher and Dr. Yin administered the ABAS-III with Mother serving as informant. The results showed that the age equivalent scores in the areas of conceptual, communication, leisure, social, community use, home living, health and safety, and self-care skills fell in the younger than five years range, and his functional academics fell in the 5.4 to 5.7 years range.

44. Dr. Langenbacher and Dr. Yin concluded that overall results of the ABAS-III were an underestimate, because the scores were significantly higher when Claimant underwent testing in 2017. Notwithstanding the suspected underestimation, Dr. Langerbacher and Dr. Yin concluded that in the area of conceptual skills, including communication, functional academics, and self-direction, Claimant could answer the phone, speak clearly, tell friends about his favorite activities, and sometimes give verbal

instructions to others, listen to others for five minutes, and follow directions; Claimant could read and write his name, read and obey community signs, and sometimes keep score in games; and Claimant could sometimes work on a task for 15 minutes.

45. Dr. Langerbacher and Dr. Yin concluded that in the area of social skills, including social skills and leisure activities, Claimant remembered to say thank you and to laugh at jokes, showed sympathy for others who were sad or upset, tried to please others, and was well-liked by peers. They also noted that Claimant, in his leisure time, participated in organized activities, listened to music, selected television programs of interest, and played with a variety of toys.

46. Dr. Langerbacher and Dr. Yin concluded that in the area of practical skills, which include self-care, health, safety, home living, and community use, Claimant ate and drank independently, sometimes dressed himself, used the restroom, and blew his nose when needed. However, they noted that Claimant did not wash his hands, brush his teeth, fasten fasteners on clothing, or wash his hair. They found that Claimant, in terms of health and safety, would wear his seatbelt, call for help when needed, was sometimes cautious around hot things, and sometimes looked for oncoming cars when crossing the street.

47. Dr. Langerbacher and Dr. Yin noted that Claimant had behavior challenges, including tantrums lasting two hours, that resulted in multiple suspensions from school. "More notable was [Claimant's] challenges with impulsivity, short attention, increased activity and receptive language . . . [but] it was clear that [Claimant] demonstrated social reciprocity, had clear communicative intent and did not engage in restricted or repetitive behaviors." (Regional Center's Exhibit 8, page 8.)

48. Dr. Langerbacher and Dr. Yin set forth their impressions. Specifically, according to the report, they determined that Claimant did not meet the criteria for a diagnosis of intellectual disability and did not meet the criteria for a diagnosis of autism spectrum disorder. They also noted that Claimant had previously been diagnosed with

attention deficit hyperactive disorder, and indeed presented with traits of poor attention and impulsivity. Additionally, Dr. Langerbacher and Dr. Yin had previously been diagnosed with a language disorder, had a history of delayed speech development, and struggled with auditory attention and comprehension, and demonstrated difficulty remaining on topic in conversation.

49. Dr. Langerbacher and Dr. Yin made the following recommendations: (1) continued special education services to address Claimant's behavioral and academic challenges, including a one-to-one aide to promote Claimant's attention and to reduce or eliminate eloping behavior, as well as continued speech and occupational therapies, and adaptive physical education; (2) continued speech therapy to increase Claimant's verbal comprehension and auditory processing; (3) parent education in behavioral techniques for Mother to help Claimant increase his attention and compliance, and to increase safety awareness; and (4) continued intervention for attention deficit hyperactivity disorder.

50. In Ms. Aguilera's written report, which addressed the assessment of Claimant's speech and language skills during the administration of the ADOS-2, she found that Claimant, in the area of receptive language, demonstrated mild-moderately delayed verbal and pictured language comprehension. She also found that Claimant's expressive language was moderately disordered for his age. In the area of pragmatics, Ms. Aguilera found that Claimant's use of social language was moderately affected secondary to reduced attention and comprehension. Ms. Aguilera offered no separate recommendations.

NOTICE OF PROPOSED ACTION (NOPA)

51. On May 31, 2018, the Regional Center sent Claimant a NOPA stating that it was closing Claimant's case because he was not considered eligible for Regional Center services, and that it would be terminating all services it provides Claimant, namely respite and daycare services. The Regional Center explained its reason for its action as follows:

On May 24, 2018, the interdisciplinary team met to decide if [Claimant] continues to be eligible for Regional Center services. The team decided that the original decision that made [Claimant] eligible for Regional Center services is clearly erroneous. After the reassessment conducted by Dr. Thomas Carrillo, Ph.D., on July 28, 2017, and review of the Autism Clinic Assessment Report dated May 3, 2018[,] [i]t was determined that [Claimant] does not have a developmental disability as defined by the law.

[¶] ... [¶]

It appears that the appropriate diagnoses for [Claimant] are most likely Attention Deficit Hyperactivity Disorder. The reasons for this decision are: Current assessments do not diagnose intellectual disability.(Regional Center’s Exhibit 1.)

[¶] ... [¶]

52. In addition to the NOPA, the Regional Center sent Claimant a letter of May 31, 2018 stating that it was terminating Claimant’s eligibility, effective June 28, 2018, as Claimant “[did] not have autism as current defined,” and “[did] not have intellectual disability.” (Id. at pages 1-2.) It further stated that the interdisciplinary team relied on Dr. Thomas Carrillo’s assessment of July 17, 2017, the Regional Center’s autism clinic assessment of May 3, 2018, and the School District’s psychoeducational reports dated November 18, 2015⁴ and May 23, 2018.

⁴ The November 18, 2015 psychoeducational assessment report was neither proffered nor admitted into evidence.

53. On June 4, 2018, Mother filed a Fair Hearing Request.

MOTHER'S TESTIMONY

54. Mother, who believes that Claimant suffers from autism spectrum disorder, given Claimant's 2013 diagnosis of the same as well as the results of genomic testing in support of the diagnosis, described behaviors and characteristics of Claimant which she believes is indicative of autism. For example, she explained that Claimant receives services and resources that many individuals with autism receive. Specifically, Mother receives funding to attend conferences and parenting classes that address behaviors of autism and Claimant receives funding for ABA therapy services. Additionally, Mother also stated that Claimant has and continues to suffer from sensory integration problems, which require him to receive physical pressure in the form of tight hugs or squeezing his arm. The absence of such physical pressure results in Claimant tantruming and acting out.

55. Mother also explained that Claimant has no appreciation for traffic danger or dangers in the community, and elopes when given the opportunity, even at school in the presence of his one-on-one aide. He also has repetitive movements, according to Mother, such as acting like a car, making sounds of a car, making wheel movements with his hands, and running into people in his path when he acts like a car. Mother testified that Claimant is and has always been very, very, focused on cars—real and toy cars—plays only with cars, and wants to know everything about cars.

56. Mother shared that Claimant has and continues to demonstrate food texture issues. Consequently, his diet is limited to pizza, bologna, pepperoni, uncooked hot dogs, ham, and corn dogs. Claimant refuses to eat vegetables whatsoever, and also will not eat chicken or red meat. Claimant will refuse to eat all day at school if he is not served any of his preferred foods. Mother explained that because of Claimant's poor diet, he suffers from anemia.

57. Mother explained that Claimant demonstrates many negative behaviors such

as hitting, slapping, kicking, punching, screaming, yelling, destroying property, and engaging in self-injurious behavior. Claimant does not know the difference between certain emotions and specifically does not know the degrees of anger. "Everything is a 10 as far as [Claimant] acting out, no matter how minor" the infraction. Mother stated that when Claimant is engaged in his negative behaviors, he cannot express how he is feeling, as his expressive language skills are limited. Mother shared that Claimant does not receive pain messages in his brain, and, as such, he has no idea what physical pain hurts others. Consequently, he must be taught what hurts people, and has had to learn that a pinch or slap, for example, hurts. Parents are required to constantly explain what is considered painful to people in hope that he will appreciate how he hurts others when he is engaged in his negative, physical behaviors.

58. Mother shared that daily living is difficult. Specifically, bathing is always a challenge and Claimant refuses to wash his hair and does not like for others to wash his hair. Additionally, Claimant will not brush his hair, and he will not sit for a haircut because he "can't stand" the sound of the clippers, as he is very sensitive to noise.

59. Claimant also refuses to brush his teeth without being forced to do so, and when he does, he will only do it without toothpaste because he dislikes the texture of toothpaste. Claimant can dress himself as long as there are no buttons or zippers involved, and he cannot tie his shoes, despite being eight years old.

60. Mother explained that Claimant has always and continues to struggle with learning. Claimant does not understand step by step processes like the kind required in math. In fact, Mother has to assist Claimant make peanut butter and jelly sandwiches, because he still needs instruction on how to make them, as does not remember the steps. Mother also explained that Claimant does not understand the sequence of events in reading, and produces illegible writing due to his inability to hold a pencil correctly. "Everything he does during the day at school is a struggle," according to Mother. While

Claimant has a daily schedule, he must be prompted constantly throughout the day, as he lacks self-direction.

61. Mother asserted that due to Claimant's self-care issues, his food texture sensitivities, his behaviors, and his lack of self-direction, Mother cannot envision Claimant being independent at this point.

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CREDIBILITY FINDINGS⁵

⁵ The manner and demeanor of a witness while testifying are the two most important factors a trier of fact considers when judging credibility. (See Evid. Code, § 780.) The mannerisms, tone of voice, eye contact, facial expressions and body language are all considered, but are difficult to describe in such a way that the reader truly understands what causes the trier of fact to believe or disbelieve a witness.

Evidence Code section 780 relates to credibility of a witness and states, in pertinent part, that a court “may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (b) The character of his testimony; . . . (f) The existence or nonexistence of a bias, interest, or other motive; . . . (h) A statement made by him that is inconsistent with any part of his testimony at the hearing; (i) The existence or nonexistence of any fact testified to by him. . . .”

The trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (Stevens v. Parke Davis & Co. (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (Id., at 67-68, quoting from Neverov v. Caldwell (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 890.) And the testimony of “one credible witness may constitute substantial evidence,” including a single expert witness. (Kearl v. Board of Medical Quality Assurance (1986) 189 Cal.App.3d 1040, 1052.) A fact finder may disbelieve any or all testimony of an impeached

62. Mother, as the historian of Claimant's development and given her hands-on experience concerning Claimant's learning challenges, characteristics, and behaviors, proved to be an exceptional witness. She testified in a clear, concise, straightforward manner, and provided significant detail. As such, her testimony was afforded significant weight.

63. The assessment reports presented by the Regional Center were afforded very little weight, as the Regional Center failed to proffer testimony from any of the authors of the reports. Specifically, the Regional Center failed to proffer testimony from Dr. Thomas Carrillo, Dr. Langerbacher, Dr. Yin, Ms. Aguilera, or any assessors from the School District, despite relying on their collective conclusions and opinions in determining that Claimant was no longer eligible for Regional Center services. The Regional Center's failure to present the assessors as witnesses denied Claimant an opportunity to challenge, through cross-examination, the authentication of the reports, the validity of the assessments, the validity of the scores, and/or the assessors' conclusions that Claimant neither had an intellectual disability nor autism.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, an individual must have a developmental disability, which is specifically defined as "a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with

witness. (Wallace v. Pacific Electric Ry. Co. (1930) 105 Cal.App. 664, 671.)

intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.” (§ 4512, subd. (a).)

2. Section 4643.5, subdivision (b), provides: “An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.”

3. The Regional Center bears the burden of proving that the initial determination that Claimant was and is eligible for services under the Lanterman Act was “clearly erroneous.” (§ 4643.5, subd. (b); Evid. Code, § 500.) However, if the Service Agency carries that burden, the Claimant bears the burden of proving another ground of eligibility, as section 4643.5 does not require a regional center to disprove other grounds of eligibility, other than the initial basis of eligibility. The Claimant’s burden is by a preponderance of the evidence.

4. When reassessing for continuing eligibility a determination of whether or not a consumer is substantially disabled, the criteria that existed at the time of the original determination shall be utilized. (§ 4512, subd. (l).)

ANALYSIS

5. The Regional Center failed to meet its burden of establishing that its initial determination that Claimant was eligible for services under the Lanterman Act was “clearly erroneous.” As set forth in Factual Findings 2 through 15, the Regional Center determined that Claimant was developmentally disabled based on Dr. Liza Carrillo’s conclusion, namely that Claimant had “Mild to Moderate Mental Retardation (Intellectual Disability) with autistic features.” However, the Regional Center later rejected Dr. Liza Carrillo’s diagnosis after Claimant underwent a series of reassessments by Dr. Thomas Carrillo, Dr. Langerbacher, Dr. Yin, and Ms. Aguilera, who determined that Claimant neither had an

intellectual disability nor autism spectrum disorder. But the Regional Center failed to proffer any of those assessors as witnesses at the hearing, foreclosing Claimant an opportunity to challenge the authentication of the reports, the validity of the assessments, the validity of the scores, and/or the assessors' conclusions. As such, and without the presence of those individuals to explain and defend their respective assessment reports, the reports are rendered unpersuasive.

6. Additionally, the assessment reports failed to show specifically how Dr. Liza Carrillo's assessment was clearly erroneous or how the Regional Center was wrong in its initial determination. In other words, none of the assessment reports set forth any errors, flaws, or inconsistencies in Dr. Liza Carrillo's assessment report. Additionally, as set forth in Legal Conclusion 4, when reassessing for continuing eligibility, the assessor must use the criteria that existed at the time of the original determination. Here, Dr. Thomas Carrillo, whose report on which the Regional Center relied heavily, assessed Claimant under the criteria of the DSM-5, which was published on May 18, 2013, approximately eight months following Dr. Liza Carrillo's assessment. At the time of Dr. Liza Carrillo's assessment report, the DSM-IV was in use. Because neither Dr. Thomas Carrillo nor any of the other assessors applied DSM-IV, or otherwise explained with any specificity how Dr. Liza Carrillo's assessment results were somehow erroneous, flawed, invalid, or otherwise problematic, the Regional Center failed to meet its burden of establishing that its initial determination that Claimant was eligible for services under the Lanterman Act was "clearly erroneous."

7. Furthermore, even though it is unnecessary to apply Claimant's evidence in support of his assertion that he indeed suffers from a qualifying developmental disability that renders him eligible for Regional Center services, Mother's testimony concerning Claimant's learning challenges, characteristics, and behaviors was very compelling and legitimately controverted portions of the reassessment reports.

ORDER

Claimant's appeal is granted. Claimant remains eligible for Regional Center services by reason of a developmental disability within the meaning of the Lanterman Act.

Date:

CARLA L. GARRETT

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.