

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of CLAIMANT against:

NORTH LOS ANGELES REGIONAL CENTER, Service Agency

OAH No. 2019010992

DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on June 11, 2019, in Lancaster, California.

Monica Munguia, Fair Hearing Representative, represented North Los Angeles County Regional Center (NLACRC or Service Agency). Lourdes Alcala, Hanna Interpreting, provided Spanish translation services.

Claimant's foster mother represented claimant<sup>1</sup>, who was initially present, and left soon after the beginning of the hearing.

Oral and documentary evidence was received and the matter was submitted for decision at the conclusion of the hearing.

ISSUE

Whether claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.).<sup>2</sup>

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<sup>1</sup> Titles are used to protect the family's privacy.

<sup>2</sup> All statutory references are to the Welfare and Institutions Code, unless otherwise designated.

## EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 20; claimant's exhibits A through

I.

Testimony: Sandi Fischer, Ph.D., NLACRC Clinical Services Supervisor; foster mother; Aida Bensimon, Foster Family Agency Social Worker; foster aunt.

## JURISDICTIONAL MATTERS

1. Claimant is a nine-year-old boy who resides with his foster mother and foster father, and their two daughters, 18 and 25 years old, and their 24 year old son.<sup>3</sup> Claimant is very creative and enjoys playing with his toys in the back yard, playing video games, and watching you-tube videos. Based on claimant's challenges with speech and controlling his behavior, his asthma and obesity, and suspected developmental delays, claimant seeks a finding that he has a developmental disability as defined in the Lanterman Act under the eligibility categories of Autism Spectrum Disorder (ASD), Intellectual Disability (ID), or a disabling condition closely related to an intellectual disability or requiring treatment similar to that required for an intellectual disability (fifth category). (§ 4512, subd. (a).)

2. The Service Agency determined that claimant is not eligible under the Lanterman Act based on the results of visual and written assessments, and the lack of

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<sup>3</sup> Claimant was removed from his mother's custody in 2017 due to her general neglect of claimant and her use of methamphetamine. After his removal, claimant lived in approximately four foster homes prior to being placed with foster mother in August 2017. Claimant does not have visits with his mother, but has twice monthly visits with his siblings.

any qualifying conditions set forth in claimant's educational, medical, and psychological records, as described below.

3. On November 20, 2018, the Service Agency issued a Notice of Proposed Action and accompanying letter which informed claimant that he was not eligible for services under the Lanterman Act. On January 25, 2019, claimant filed a Fair Hearing Request.

4. On March 21, 2019, the Service Agency sent foster mother a post-informal meeting letter, agreeing to defer its informal decision to obtain a copy of the Children's Bureau's March 20, 2019, assessment of claimant. After reviewing the assessment, on June 5, 2019, the Service Agency again determined claimant did not meet eligibility criteria under the Lanterman Act.

#### CLAIMANT ASSESSMENTS AND RECORDS

5. To determine claimant's eligibility for services, the Service Agency considered the following assessments, which consistently identify the behaviors and diagnostic results described in the remaining Factual Findings.

##### Medical Assessments

6. Claimant has a history of rhinitis, respiratory distress, asthma, and obesity. Claimant is fully ambulatory, and can walk, hop, run, and jump independently. On August 30, 2018, Carlo De Antonio, M.D., reviewed claimant's available medication information and concluded there was no indication of substantially handicapping condition of cerebral palsy or epilepsy.

##### Educational Assessments

7. A. During the 2017 – 2018 school year, claimant attended Valley View Elementary School as a second grader. In November 2017, claimant's Child Study Team

(CST) met to discuss claimant's behavior and academic performance.<sup>4</sup> The CST noted claimant's struggles with impulsivity, appropriate peer interactions, and respecting others' personal space. These struggles were identified by claimant's failure to complete his homework, inability to consistently follow directions, and, though he initiated play with others, his inability to maintain safe behaviors and physical boundaries with his peers. The CST referred claimant for a psychoeducational evaluation to determine if claimant had educational needs which were not being met.

B. On January 23 and 30, 2018, Alicia Ceroni, M.S., conducted a Psychoeducational Evaluation of claimant on behalf of the Westside Union School District (District). During the evaluation, claimant was cooperative, curious, and restless. Ms. Ceroni administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), and claimant's Full Scale Intellectual Quotient (FISQ) score was 92. Claimant demonstrated sufficient independence with his ability to change his clothes, get his own food, and use the restroom. Though claimant presented with articulation challenges, Ms. Ceroni found no adaptive concerns.

C. Ms. Ceroni concluded that claimant's phonological memory was weak, but he did not demonstrate with a specific learning disability. Ms. Ceroni noted that despite not attending preschool and missing an entire semester of kindergarten, claimant demonstrated the ability to perform in the average range in all academic areas of the Woodcock Johnson Tests of Achievement – Fourth Edition. However, Ms. Ceroni concluded that claimant qualified for special education under Other Health Impairment due to his Attention Deficit Hyperactivity Disorder (ADHD)-like symptoms. These

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<sup>4</sup> During this school year, claimant's grade point average spanned from 1.5 to 1.75, the District determined he was best served by instructional materials at kindergarten level, and the District considered retaining claimant in the second grade.

symptoms included claimant not being able to stay focused to complete daily tasks, talking in class which interfered with learning and instruction, and further failing to consistently maintain attention to task even during one-on-one testing.

D. In his February 6, 2019, Individualized Education Plan (IEP), claimant continued to be eligible for special education services under Other Health Impairment due to his ADHD symptoms, including his inability to sustain attention in multiple environments which significantly impacts his ability to access his education. Claimant's 2019 IEP provides that his educational placement is in the general education classroom for a majority of the school day, with academic support in areas of language arts and self-management. The District also provides occupational therapy to address claimant's fine motor skill development. Claimant's articulation skills tested in the low average range, but the distortions were due to functional issues (e.g., missing teeth). Claimant was completing grade level work with accommodations.

#### NLACRC Assessments

8. When claimant was six years old, his mother requested that the Service Agency determine claimant's eligibility for services due to claimant's disobedience. On January 4, 2016, Sylvia Mejia, LCSW, social intake vendor for the Service Agency, conducted a Social Assessment. Ms. Mejia observed claimant mumbled when he spoke, causing his speech to be unclear. During the assessment, claimant made eye contact with Ms. Mejia, played with toys, and interacted appropriately with mother. Testing was not completed and on February 17, 2016, the Service Agency determined claimant was not eligible for services. On July 23, 2018, Beatriz Osegueda, M.B.A., Service Agency Intake Coordinator, conducted a second Social Assessment due to the foster mother's referral, which resulted in similar findings. (See also Factual Finding 9.) The Service Agency referred claimant to Amalia Sirolli, Ph.D., for a psychological evaluation to rule out ASD, Intellectual Disability, and fifth category eligibility.

## Diagnostic Assessments and Diagnoses

9. A. On October 29, 2018, Dr. Sirolli conducted a psychological evaluation of claimant. At that time, claimant was eight years and nine months old, attending Valley View Elementary, and in the third grade. Throughout the assessment, claimant made good eye contact with Dr. Sirolli, participated in reciprocal interactions, asked questions, and read social cues. Dr. Sirolli administered the WISC-V. All of claimant's cognitive scores ranged from low average to average, with a FSIQ score of 88. Dr. Sirolli also administered the Autism Diagnostic Observation Schedule (ADOS-2 Module 3) to assess possible characteristics of ASD, and the Vineland Scales of Adaptive Functioning-III (Rater Foster Mother).

B. 1) Dr. Sirolli considered the results of claimant's assessments and reports from foster mother and foster aunt, and others involved in claimant's life, and found the following.

2) Claimant has difficulty focusing, is often hyper, does not listen to directions, and needs frequent prompting to stay on task. Claimant enjoys playing with a variety of toys, riding his scooter, swimming, and watching television. Claimant is affectionate with family, and is able to engage with peers and initiates play, though he lacks age appropriate social skills. Reports varied from good eye contact, to sporadic eye contact, to difficulty maintaining eye contact. Claimant has speech delays and is difficult to understand. Claimant lacks safety awareness, is not aware of his immediate surroundings due to distractibility, and he lacks age appropriate boundaries with strangers.

3) Claimant can wash his hands, bathe, and brush his teeth. He can dress and undress himself, though he needs assistance with buttons, zippers, snaps and tying shoe laces. He is toilet trained but needs to be woken every night to prevent him from wetting his bed. Claimant eats independently and does not spill food but is messy

during meals and hides food in his room. Claimant does not have aversions to food or textures and can handle changes to his routine. Claimant tends to rock back and forth, is sensitive to sounds (claimant will cover his ears to block sounds), and has tantrums, demonstrated by crying, screaming, or flopping down to the floor.

#### Autism Spectrum Disorder Criteria

C. 1) Based on the foregoing information and considerations, Dr. Sorelli assessed claimant for ASD criteria as follows:

##### Social Communication and Social Interaction Across Contexts

2) Deficits in social emotional reciprocity: claimant engaged in back and forth conversation at the level slightly below what would be expected for his age due to his speech difficulties. Claimant showed empathy and initiated and engaged in play with others.

3) Deficits in nonverbal communicative behaviors used for social interaction: claimant displayed good eye contact and a nice range of gestures and facial expressions.

4) Deficits in developing, maintaining, and understanding relationships: claimant was able to adjust behaviors to different contexts, sometimes plays imaginatively, and has several friends.

##### Restricted, Repetitive Patterns of Behavior, Interests, or Activities

5) Stereotyped or repetitive motor movements: claimant did not engage in object lining during the evaluation, though foster mother reports that claimant lines up his toys sometimes.

6) Insistence of sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior: claimant was able to make transitions and did

not display rigidity in thinking; foster mother reports transitions are not difficult, though claimant is distractible and sometimes requires several prompts.

7) Highly restricted, fixated interests that are abnormal in intensity or focus: these behaviors were neither reported nor observed.

8) Hyper-hypo reactive to sensory input or unusual interest in sensory aspects of the environment: Dr. Sirolli did not observe any sensory or repetitive behaviors; foster mother reported claimant was bothered by certain sounds and does not like to be touched.

D. Based on Dr. Sirolli's assessments and review of the foregoing information, she determined claimant did not meet the criteria for ASD. Claimant's intellectual quotient scores were mainly in the average and low average range of functioning, and his adaptive skills in the moderately low range. Dr. Sirolli diagnosed claimant under the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) with Speech Sound Disorder, ADHD, and mental health diagnoses deferred to a professional.

E. Dr. Sirolli referred the matter to the Service Agency multidisciplinary eligibility staffing committee, and she recommended that foster mother continue to provide claimant with a stimulating environment, consistency, and support and discipline; that claimant receive mental health services and educational services; and that claimant receive a psychiatric evaluation to assess if he would benefit from medication. Dr. Sirolli also noted that she observed claimant had facial and behavioral characteristics that might be indicative of Fetal Alcohol Symptoms.

#### Mental Health

10. Claimant submitted an April 9, 2019, letter from Natalie Montenegro, MBA, LMFT. Ms. Montenegro has been providing a combination of individual, family, and collateral therapy sessions to claimant and his foster family since January 17, 2018, with the goal of decreasing claimant's ADHD related symptoms. Claimant has made minimal

progress toward this goal. On May 22, 2019, Ms. Montenegro conducted a Child/Adolescent Full Assessment of claimant on behalf of the Children's Bureau, and identified the behaviors and symptoms identified in the preceding Factual Findings and concluded claimant has ADHD.

11. Claimant provided the Service Agency with a May 16, 2019, physician's statement completed by Gustave H. Vintas, M.D. Dr. Vintas identified claimant's symptoms of hyperactivity, impulsivity, and defiance; Dr. Vintas also identified that claimant is distracted and disorganized with work, has enuresis, and behaves childishly. Dr. Vintas confirmed claimant's diagnoses of ADHD and concluded that claimant should be assessed to rule out ASD and a learning disability.

12. Claimant submitted a June 3, 2019, letter from Donna Erdmann, MS, MSW, Assistant Chief of Licensing Programs, Inner Circle Foster Care and Adoption Services (claimant's foster family agency since his placement in foster care). Ms. Erdmann had worked with claimant as his social worker through Inner Circle for one year. She observed that claimant was not able to maintain appropriate personal space with others or maintain appropriate eye contact. Ms. Erdmann worked with claimant on these issues, and with reducing his anger and tantrums. Ms. Erdmann reported that claimant reduced these behaviors, but that he continues to be challenged on how to process feelings such as anger, has little to no impulse control, and must be redirected to focus. Ms. Erdmann further reported that it is difficult to understand claimant's speech and that he may benefit from speech therapy.

#### DSM-5 DEFINITIONS OF AUTISM SPECTRUM DISORDER AND INTELLECTUAL DISABILITY

13. Regional Centers determine eligibility for services under the Lanterman Act by applying the DSM-5's definitions of ASD and ID. Relevant portions of the DSM-5 defining these conditions were admitted into evidence.

## Autism Spectrum Disorder

14. The DSM-5 defines ASD as having the following four essential features. First, an individual must have persistent impairment in reciprocal social communication and social interaction (Criterion A), as manifested either currently or historically by all of the following: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. Second, the individual must have restricted, repetitive patterns of behavior, interests or activities (Criterion B), as manifested by at least two of the following: (1) stereotyped or repetitive motor movement, 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. These symptoms must be present in early childhood and limit or impair everyday functioning. (Criteria C and D).

## Intellectual Disability

15. The DSM-5 provides that the following three diagnostic criteria must be met to be diagnosed with intellectual disability:

16. An individual must have 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 (Criterion A). Individuals with ID have FSIQ scores between of 65 to 75, including a five-point margin for measurement error. The DSM-5 cautions that FSIQ tests must be interpreted in conjunction with considerations of adaptive function. The DSM-5 explains that a person with a FSIQ 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." (Ex. 15, at p. 8.)

17. Individuals with an intellectual disability have deficits in adaptive functioning that result in a failure to meet developmental and socio-cultural standards for personal independence and social responsibility, which, without ongoing support, 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 (Criterion B). This criterion is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired such that "ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." (*Id.* at p. 9.) The levels of severity of intellectual disability are defined on the basis of adaptive functioning, and not IQ scores, because the adaptive functioning determines the level of supports required.

18. Individuals with intellectual disability must experience the onset of these symptoms during the developmental period (Criterion C).

#### FIFTH CATEGORY

19. The Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals," under the fifth category of eligibility, but does "not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code § 4512, subd. (a); see *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129 (*Mason*).) The fifth category is not defined in the DSM-5.

20. On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the Guidelines for Determining Fifth

Category Eligibility for the California Regional Centers (Guidelines). These Guidelines list the following factors to be considered when determining eligibility under the fifth category: whether the individual functions in a manner that is similar to that of a person with mental retardation; whether the individual requires treatment similar to that required by an individual who has mental retardation; whether the individual is substantially handicapped; and whether the disability originated before the individual was 18-years-old and is likely to continue indefinitely. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 (*Samantha*), the court cited with approval to the ARCA Guidelines and recommended their application to those individuals whose “general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)” for fifth category eligibility. (*Id.* at p. 1477.)

## LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *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 claimant is eligible for Lanterman Act services. (Evid. Code, § 115.)

3. A developmental disability is a disability that originates before an individual turns 18 years old. This disability must be expected to continue indefinitely and must constitute a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, autism, an intellectual disability, or a disabling

condition found to be closely related to intellectual disability or to require treatment similar to that required for an individual with an intellectual disability. Developmental disabilities do not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a), Cal. Code Regs., tit. 17, § 54000.)

4. A substantial disability is the existence of significant functional limitations in three or more of the following areas of major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (§ 4512, subd. (j); Cal. Code Regs., tit. 17, § 54001, subd. (a).)

5. As defined under the Lanterman Act, developmental disability does not include the following: solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder; solely learning disabilities which manifest as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss; and disabilities that are solely physical in nature. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

6. A. Claimant does not have cerebral palsy or epilepsy. (Factual Finding 6.)

B. 1) Claimant is not eligible for Lanterman Act services under the category of ASD. (Factual Findings 7-14.) It was established by a preponderance of the evidence that claimant engages in reciprocal communication with others, that he engages in and initiates play and communication with peers and adults (despite speech articulation delays), that he is receptive to non-verbal social cues, and that despite a deficit in his ability to be safe with strangers and in a public environment and to maintain appropriate social boundaries with others, claimant engages in affectionate

and reciprocal relationships with his family, foster family, and peers. Though claimant demonstrated instances of rocking his body, and of lining up his toys, these behaviors did not occur in a repetitive restrictive pattern.

2) Claimant did not demonstrate by a preponderance of the evidence that he has persistent impairment in reciprocal social communication and social interaction (Criterion A), as manifested either currently or historically by deficits in social-emotional reciprocity, deficits in nonverbal communication behaviors used for social interaction, and deficits in developing, maintaining, and understanding relationships. Claimant did not demonstrate by a preponderance of the evidence that he has restricted repetitive patterns of behavior, interest, or activities, as required by Criterion B.

C. 1) Claimant is not eligible for Lanterman Act services under the category of ID. (Factual Findings 7-13, 15-18.) Claimant has demonstrated average intellectual potential, and his 2018 FSIQ was 88, above that which would identify someone as having an intellectual disability (70), even when accounting for the five-point margin for measurement error.

2) Claimant's lack of full independence in dressing himself and other delays in adaptive functioning, and his enuresis and need for constant prompting to maintain his safety in public places and to complete daily tasks did not demonstrate such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning which might show his actual functioning is comparable to that of an individual with a lower FSIQ score. Claimant did not establish by a preponderance of the evidence that he is sufficiently impaired in either the conceptual, social, or practical domains of adaptive functioning such that he needs ongoing support to perform adequately in one or more life settings at school, at home, or in the community.

3) Claimant did demonstrate by a preponderance of the evidence discrepancies in his cognitive potential and his actual level of academic performance,

and that he has functional limitations in major life activity areas of self-care, learning, and self-direction. However, these discrepancies were due to his learning disability of OHI (ADHD) and did not present as significant functional limitations in three or more areas of major life activities. As such, claimant did not establish he has a substantial disability, and his learning disability is not a developmental disability under the Lanterman Act.

D. Claimant is not eligible for Lanterman Act services under the fifth category. (Factual Findings 7-13, 19-20.) Claimant's cognitive functioning was average and low average, with a 2018 FISQ score of 88, at least 14 points higher than the *Samantha* court recommended applying the Guidelines to assess fifth category eligibility. Claimant demonstrated deficiencies in some adaptive skills, but those deficiencies were attributable to his ADHD symptoms of distractibility and impulsivity, and were not attributable to a disabling condition closely related to intellectual disability or requiring treatment similar to that required for an individual with an intellectual disability. For these reasons and the reasons provided in Legal Conclusion 6.C, claimant is not eligible under the Lanterman Act under fifth category.

## ORDER

Claimant is not eligible for regional center services under the Lanterman Act. Claimant's appeal is denied.

DATE:

CHANTAL M. SAMPOGNA  
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.