BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2019050071

DECISION

Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on February 5, 2020, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by Monique McDavid, Juvenile Resource Attorney.[1]

[1] The names of claimant and his family are omitted to protect their privacy.

San Gabriel/Pomona Regional Center (service agency) was represented by Daniel Ibarra, Fair Hearing Specialist.

ISSUE

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

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon service agency exhibits 1-13 and claimant's exhibits A-D, as well as the testimony of Edward G. Frey, Ph.D., Deborah Langenbacher, Ph.D., claimant's paternal grandmother, and Mandana Moradi, Psy.D.

SUMMARY

Claimant met his burden of establishing by a preponderance of the evidence that he is eligible for services under the Lanterman Act based on his diagnosis of Autism Spectrum Disorder (ASD). Claimant's development has been marked by behaviors consistent with high functioning autism. By the first grade, he was identified by school evaluators as exhibiting autistic-like characteristics. In 2018, claimant was diagnosed with ASD by two different evaluators, including one who consults regularly for a regional center. Although due deference has been paid to the opinions expressed by the service agency and its three evaluators, claimant's expert witnesses' opinions that claimant has ASD sufficiently refuted the service agency's experts' opinions that

claimant does not. Finally, claimant established that his eligible condition causes a substantial disability, in that he is significantly impaired in three of the seven specified areas of major life activity (learning, self-direction, and independent living).

FACTUAL FINDINGS

Parties and Jurisdiction

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

2. Claimant is a 14-year-old male who was referred to the service agency for an eligibility determination in October 2018 on the basis of suspected autism.

3. On April 9, 2019, the service agency issued a Notice of Proposed Action, in which claimant's legal guardians, his paternal grandparents (further reference to any grandparent is only to claimant's paternal grandparents), were advised that service agency staff concluded claimant was not eligible for regional center services because he did not have a qualifying developmental disability, including autism. (Ex. 1.)

4. On April 30, 2019, a Fair Hearing Request (FHR) was submitted to the service agency by claimant's counsel, who had been designated by claimant's grandmother to act as claimant's authorized representative in this matter. The FHR requested a hearing to appeal the service agency's denial of services. (Ex. 2.)

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

5. In connection with prior continuance requests made after the matter was initially scheduled to be heard on June 24, 2019, claimant's authorized representative executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

Claimant's Background and Early Development

6. Claimant lives with his grandparents and uncle. He has limited contact with his biological parents, who separated many years ago. He attends a public middle school, where he receives special education services, which are described in more detail below.

7. There is conflicting evidence concerning claimant's developmental history. During a psychological assessment of claimant in 2018, claimant's father reported that claimant generally reached his developmental milestones within normal limits. On the other hand, claimant's grandmother has consistently reported to evaluators that claimant was delayed by several months in reaching all of his milestones, including talking and socializing. Since claimant has lived with his grandparents for essentially his entire life, and his grandmother has cared for him longer and more intensely than anyone else, her version is credited.

8. Claimant is generally described as a pleasant, cooperative young man who, once rapport is established, can be talkative and engaging. His teachers at school similarly describe him as cooperative in class, but quirky and odd. One teacher describes claimant as "pleasantly weird." (Ex. B, p. 2.)

9. During the hearing, claimant's grandmother testified about claimant's general nature and behaviors. Her description is consistent with what she has told the

various evaluators who have assessed claimant, including school staffers and the professionals who testified in this matter. According to claimant's grandmother, claimant does not like to socialize. He may have friends at school, but he does not socialize with them after school. He prefers to be alone, even during family parties. He is a picky eater, who eats enormous quantities of the few things he likes, but refuses to try new foods. He cannot complete simple tasks at home unless he is constantly directed. He has limited and fixed interests. If a discussion veers of his topic of interest, he will redirect it to his interest. He only wears the same style and color of clothes. He does not have much range in facial expressions. She has seen him cry only once in her life. He has little empathy and generally he does not apologize after he does something wrong.

Claimant's Special Education Services

10. A. Claimant has been consistently described as a child with low-average-to-average cognition. However, in 2012, when claimant was in the first grade, he began struggling academically, and was ultimately deemed eligible for special education services in the category of autistic-like characteristics.

B. School staff noted that claimant's "autistic-like behaviors adversely affect his ability to remain on-task during large group lessons and independent seatwork activities. His disability also may adversely affect his social interactions with both children and adults and impairs his communication skills at times." (Ex. C, p. 2.) It was also noted that claimant's academic performance was considerably lower than his overall cognitive skills, suggesting that his autistic-like characteristics were the cause of the discrepancy. (*Id.*, p. 14.) School staff concluded that the various test results and

observations suggested claimant's autistic-like behaviors were similar to those who were diagnosed with Asperger's Disorder, i.e., high-functioning autism. (Ex. C, p. 14.)

11. Claimant was again assessed in 2015 and again qualified for special education services with a primary eligibility of autistic-like characteristics; however, a secondary category of eligibility was added, i.e., other health impairment (OHI) for ADHD [attention deficit hyperactivity disorder]-like characteristics.[3] (Exs. C, D & 6.)

12. A. Claimant was reevaluated for special education services in September 2018. He was given a battery of tests, including those aimed at detecting autistic-like behaviors. Claimant's grandmother and teachers were also interviewed. Claimant's primary impediments to learning were listed as his inability to focus, stay on task, and not be distracted.

B. In their reports (exs. 6 & 7), school staff noted that while one of claimant's teachers and his grandmother described claimant's behavior as autistic-like, other teachers did not see the same, suggesting claimant did not present as an autistic-like person in all settings. School staff also noted the results of some tests revealed "the probability of Asperger's Disorder was Low/Not Probable range," and that claimant's autistic-like behaviors did not consistently affect his performance at school. (Ex. 6, p. 17.) Therefore, school staff concluded claimant no longer qualified for

[3] OHI is defined in claimant's special education documents as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment," related to various listed medical ailments, such as asthma and diabetes, as well as ADHD. (Ex. 6, p. 16.)

special education services in the category of autistic-like characteristics. (*Ibid.*) Instead, the sole basis of his eligibility for special education services is OHI "for symptoms that impede academic functioning that are similar to . . . ADHD."[4] (*Id.*, p. 16.)

Non-School Evaluations of Claimant in 2018

13. A. In March 2018, claimant was referred to the Center for Integrated Family & Health Services (CIFHS) for a psychological assessment to determine whether claimant's symptoms are "more impulse/conduct related or Asperger's/developmental delay?" (Ex. 5, p. 1.)

B. Claimant was seen twice in March 2018 by Zyra Alandy-dy, MA, for interviews, a battery of tests, and observation. Claimant's father provided claimant's developmental history and participated in the testing. Ms. Alandy-dy noted in her report that claimant exhibited atypical behaviors, used a monotone voice, and demonstrated idiosyncratic speech. (Ex. 5, p. 3.)

C. Claimant was administered the Gillian Autism Rating Score, Third Edition (GARS–3), which is a widely used test to assess whether a subject exhibits symptoms present in individuals diagnosed with ASD. Claimant's father's answers to the test questions indicated to Ms. Alandy-dy that claimant had a high likelihood of ASD, particularly in the area of social interaction deficits. (Ex. 5, p. 5.) Claimant's father also was interviewed for the Autism Diagnostic Interview-Revised (ADI-R), a

[4] This development perplexing. While the record in this case copiously describes claimant as having attention deficits, it is interesting to note that no exhibit admitted or witness who testified indicates claimant has been diagnosed with ADHD.

standardized interview and response coding assessment used for diagnosing autism. Ms. Alandy-dy found that claimant demonstrated specific deficits in reciprocal social interaction and restrictive/repetitive behaviors. She concluded the results of the ADI-R were consistent with the results of the GARS-3 and showed claimant had a developmental history similar to children diagnosed with ASD. (*Ibid.*)

D. Based on the above, Ms. Alandy-dy diagnosed claimant with ASD, Level 1 (requiring support, without accompanying language and intellectual impairment). (Ex. 5, p. 9.) Ms. Alandy-dy opined that claimant did not meet the full diagnostic criteria for ADHD, although she noted claimant presented with symptoms in that area and that future testing for ADHD was recommended. (*Ibid.*) For that reason, Ms. Alandy-dy concluded that claimant's behavior "is accounted for by his ASD diagnosis and the social immaturity related to that diagnosis." (*Ibid.*)[5]

E. Based on her diagnosis, Ms. Alandy-dy recommended that claimant be referred to a regional center for services, including social skills and community-based programs; in-home applied behavior analysis (ABA) to address his social skills and executive functioning deficits; individual therapy focusing on social skills goals; a peer relationship program in a group setting; therapeutic interventions focusing on understanding verbal concepts; and monitored social events to practice appropriate social skills. (Ex. 5, pp. 10-11.)

14. A. On November 6, 2018, claimant was evaluated by clinical psychologist Mandana Moradi. Dr. Moradi is known to the ALJ as a psychologist with significant experience in evaluating children and adults for autism and other developmental

[5] Ms. Alandy-dy's report was approved and signed by David Zableckis, Psy.D.

disorders, who consults for at least one regional center.[6] Dr. Moradi therefore is well versed on the eligibility requirements of the Lanterman Act.

B. Dr. Moradi interviewed claimant and his grandmother, reviewed claimant's records, and administered three tests. She noted in her report that during her interview of claimant he had intermittent eye contact, he could not engage in symbolic or pretend activities with her, and that his spontaneous language was concrete and his speech pedantic. He could only name one friend (who has since moved away), he could not describe his emotions, and although he said he enjoyed using puns he could not provide an example of one. (Ex. 9, pp. 2-3.) During the hearing, Dr. Moradi described these characteristics as hallmarks of autism.

C. Claimant's grandmother completed answers to the Adaptive Behavior Assessment System Third Edition (ABAS-3), which assesses a subject's adaptive skills. Dr. Moradi rated claimant as exhibiting severe deficits in social areas, in that he cannot make or keep friends and has trouble empathizing with others. He also showed lack of appropriate safety awareness, deficits in functional academics, problems with reciprocal communication, lack of independence in his home life, and an inability to work independently. (Ex. 9, pp. 8-9.)

[6] The hearing officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence. (Gov. Code, § 11425.50, subd. (c).)

D. Claimant was administered the Autism Diagnostic Observation Schedule-2 (ADOS-2), a semi-structured standardized assessment used for individuals suspected of ASD. Claimant displayed idiosyncratic speech, monotone voice, interest in limited areas, and very little reciprocal interest during conversation. His eye contact was poorly modulated. Though he appeared polite, his conversation was one-sided. He showed no creativity in answers and was very concrete in storytelling. Dr. Moradi scored claimant with a total of 22, well above the cut-off of 9 indicative of autism. (Ex. 9, p. 10.) Dr. Moradi also had claimant's grandmother complete the ADI-R. Claimant was described as a child with a life-long history of poor social skills and eye contact, whose communication is hampered by his limited interest in topics. Dr. Moradi scored claimant as exceeding the cut-off for autism in all areas, consistent with a diagnosis of ASD. (*Id.*, pp. 10-11.)

E. After evaluating the diagnostic criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), Dr. Moradi diagnosed claimant with ASD. (Ex. 9, pp. 12-13.) She pointed out that despite average or low-average cognitive and academic skills, claimant was unable to function independently at school and had significant social and emotional delays. Dr. Moradi did not diagnose claimant with ADHD.

F. Dr. Moradi believes claimant will likely need lifelong supervision and care to address his deficits. She recommended claimant be referred to a regional center for services, such as adaptive skills training and a social skills training program for teenagers. (Ex. 9, p. 15.)

Service Agency's Evaluation of Claimant

15. Claimant was referred to the service agency for an eligibility assessment in October 2018. On November 5, 2018, claimant and his grandmother met with service agency Intake Service Coordinator Efraim Wong for a social assessment. Mr. Wong wrote a report from that assessment. (Ex. 8.) Intake Coordinator Wong recommended that claimant be referred for a psychological evaluation. (*Id.*, p. 7.) Deborah Langenbacher, Ph.D., a long-time service agency staff psychologist, had previously reviewed claimant's file when his grandmother first contacted the service agency in October, and also determined that claimant should be referred for an evaluation of ASD and his adaptive skills, though she concluded that cognitive tests were not necessary. (Ex. 4.)

16. A. The service agency referred claimant for a psychological evaluation by Thomas L. Carrillo, Ph.D., a clinical psychologist. Dr. Carrillo saw claimant on January 15, 2019, at which time he administered a series of tests, observed claimant's behavior, and interviewed claimant, his grandparents, and his great grandmother. He also reviewed pertinent records. Dr. Carrillo wrote a report of his findings. (Ex. 10.)

B. Dr. Carrillo found claimant to be talkative, friendly, and engaging. He maintained good eye contact. He understood simple humor. At times, however, Dr. Carrillo found claimant's conversation was tangential and fragmented, and that claimant sometimes had difficulty following the conversational theme. (Ex. 10, p. 4.)

C. Claimant was administered the Vineland Adaptive Behavior Scales – Third Edition (Vineland-3), a test designed to determine a subject's adaptive functioning in various areas. Dr. Carrillo scored claimant's receptive, expressive, and written language abilities as within normal range; his social skills within normal range;

but that claimant displayed concerning behaviors, mainly finger-flicking and finger-tapping sometimes seen in children diagnosed with ASD.

D. Claimant also was given the ADI-R. Claimant received a score of 7 in reciprocal social interaction (the cut-off is 10); a score of 4 in communication (the cut-off is 8); and a score of 3 in repetitive or restrictive behaviors (the cut-off is 3). While Dr. Carrillo concluded claimant was below the cut-off in these major areas, it is still noted that claimant was close to the cut-off in one area and actually met the cut-off in another area. Claimant also was given the ADOS-2. Claimant received a score of 7, which met the cut-off for "Autism Spectrum" but was two points below the cut-off of 9 for "Autism." The difference between autism spectrum and autism was not delineated in the report. Nonetheless, Dr. Carrillo described that score as showing claimant had a "low probability for Autism." (Ex. 10, p. 5.)

E. Dr. Carrillo reviewed the criteria for a diagnosis of ASD pursuant to the DSM-5 and concluded claimant only met one of the seven subcategories (restricted, repetitive patterns of behavior), and therefore he could not diagnose claimant with ASD. (Ex. 10, p. 6.) Dr. Carrillo also concluded claimant "is not seen as meeting the criteria for a diagnosis of ADHD based on his behaviors." (*Ibid.*) Dr. Carrillo finally noted that claimant had "Slight Autistic-like and ADHD-like behaviors that are not substantial enough to qualify for a diagnosis." (*Ibid.*)

17. A. Dr. Langenbacher decided to conduct an observation of claimant at school because the psychological evaluations described above had "discrepant results," and none of the involved psychologists observed claimant at school, except for the school psychologist involved in claimant's special education determination. (Ex. 11, p. 1.) Dr. Langenbacher conducted her school observation of claimant on

March 27, 2019. She watched claimant in class and while on recess. She also interviewed a vice principal, playground aide, and claimant's science teacher.

B. In class, claimant participated cooperatively and socialized with other children. He used good eye contact. Dr. Langenbacher attributed claimant's finger-tapping to nervousness. During recess, claimant behaved normally and socialized with a group of other children, including a former girlfriend. The school personnel described claimant as "quirky" but that he did not otherwise stand out. (Ex. 11, p. 4.)

C. Dr. Langenbacher had a special education specialist familiar with claimant, Betty Zuletta, complete the ABAS-3. All adaptive areas were reportedly in the normal range. However, Dr. Langenbacher felt Ms. Zuletta "over-reported" in a few areas. (Ex. 11, p. 4.) The most glaring example was in self-direction, an area where all prior school evaluators noticed claimant had major deficits. However, Ms. Zuletta described claimant as able to work on assignments without becoming frustrated and completing large projects on time. (*Ibid.*) That description of claimant is nearly opposite of how other school personnel have described claimant's self-direction skills.

D. Overall, Dr. Langenbacher formed the impression that claimant did not present traits of ASD during her observation of him at school and interview of school staff. (Ex. 11, p. 5.) While claimant was described as "different" or "quirky," his limited interests did not seem to be abnormally restricted. (*Id.*, p. 6.) During the hearing, Dr. Langenbacher provided testimony consistent with her report.

18. Based primarily on Dr. Carrillo's psychological evaluation and Dr. Langenbacher's school observation, the service agency concluded claimant did not

have autism or any other eligible condition and closed claimant's file on or about April 9, 2019. (Ex. 12.)

19. For reasons not established, the service agency thereafter referred claimant to Dr. Edward G. Frey for a psychological evaluation, which was conducted on September 17, 2019. Dr. Frey reviewed records, interviewed claimant, observed his behavior, and administered the Vineland-3, ADOS-2, and ADI-R. Dr. Frey made observations and findings about claimant similar to those made by Dr. Carrillo. Dr. Frey conceded that claimant at times "can be an unusual adolescent," but that his difficulties should be viewed as falling within the mental health area. (Ex. 13, p. 7.) Dr. Frey therefore concluded claimant did not have autism. (*Ibid.*) During the hearing, Dr. Frey provided testimony consistent with his report.

Claimant's Evidence

20. A. Dr. Moradi observed claimant at school on January 21, 2020, and later wrote a report with her findings and conclusions. (Ex. B.) Dr. Moradi observed claimant in his English class and during a recess. He did not misbehave and appeared to get along with his classmates. However, as described in more detail in the section below, claimant was not engaged in the instruction. During recess, claimant socialized appropriately with peers.

B. Dr. Moradi interviewed a number of school staff and teachers in depth. Claimant's English teacher described how easily claimant can become fixated on a small or insignificant part of a story and miss the essential meaning of the work. Claimant also makes random comments in class that do not make sense. Claimant's English teacher from the prior year made similar observations. The school counselor opined that claimant does not appear to understand others' feelings and has a hard

time seeing things from another person's point of view. The playground aide found claimant to be odd, fixated on strange things, and that although he socializes with a group of other "misfits" he also frequently isolates himself on the yard. (Ex. B, pp. 204.)

C. Dr. Moradi was most struck with claimant's "significant difficulty functioning independently" in class. (Ex. B, p. 5.) Dr. Moradi believes the description of claimant by school staff and teachers paints a picture of "an individual with high functioning ASD." (*Ibid.*) She again evaluated the criteria of the DSM-5 and renewed her diagnosis of ASD. She also opined that claimant does not present with significant mental health challenges, and that his difficulties are due mainly to attention and concentration deficits, as well as his ASD challenges. (*Id.*, p. 7.) During the hearing, Dr. Moradi testified that if claimant had ADHD, she would expect his behavior in class to be disruptive; the fact that he is not disruptive in class tells her his problems are not related to ADHD, but rather to ASD.

D. Based on the above, Dr. Moradi recommended for claimant adaptive skills training, a social skills training program for teens, and intensive academic tutoring. (Ex. B, p. 8.)

21. Dr. Moradi testified during the hearing and generally discussed her observations, testing, and findings described above. In addition, she offered critiques of the service agency's evaluators, including the following. Dr. Carrillo's reported results of the ADOS are confusing, because he wrote that the "comparison" score meant there is a low probability of claimant having autism, whereas the score actually goes to the severity of the condition and not the probability of having it. Moreover, Dr. Moradi chided Dr. Carrillo for not explaining in greater detail why he did not diagnose claimant with ASD when claimant's scores on some of the testing were so close to the

ASD cut-off and he otherwise acknowledged claimant had "autistic-like" tendencies. Dr. Moradi similarly criticized Dr. Frey for not explaining in his report how he arrived at his ADOS scores for claimant. Contrary to Dr. Frey's testimony, the ADOS instructions do not advise evaluators to exclude this information from a report. Claimant's grandmother testified that both Drs. Carrillo and Frey were with her and claimant for 45 minutes or less. Dr. Moradi testified that one cannot properly complete an ADI-R in so little time, as Drs. Carrillo and Frey apparently did. Dr. Moradi also commented that Dr. Langenbacher did not do in depth interviews with school staff and teachers, which limited her insight in claimant's deficits and allowed her to be fooled by claimant's seemingly typical behavior at face value.

22. A. On balance, it was established by a preponderance of the evidence that the expert witnesses' opinions that claimant has ASD sufficiently refuted the service agency's opinion (and those of Drs. Carrillo, Langenbacher & Frey) that claimant does not have ASD (see Legal Conclusions 1-4 below). This finding is primarily based on the conclusion that Dr. Moradi's opinion is more persuasive and better supported than those offered by Drs. Carrillo, Langenbacher, and Frey, as follows.

B. Pursuant to the case law discussed in the Legal Conclusions below, the service agency's expertise in making eligibility determinations is entitled to deference. In this case, the service agency delegated the diagnostic determinations to Drs. Carrillo and Frey. While Dr. Langenbacher observed claimant at school, she only formed the "impression" that claimant is not autistic; she did not make a clinical evaluation and diagnosis. As noted above, claimant's expert, Dr. Moradi, consults for a service agency, as do Drs. Carrillo and Frey. In that sense, Dr. Moradi's expertise in evaluating autism should be entitled to deference equal to that received by Drs. Carrillo and Frey.

C. Dr. Moradi spent more time administering her various tests than Drs. Carrillo and Frey, and therefore received better quality test data. In addition, Dr. Moradi persuasively questioned the validity of the test results obtained by Drs. Carrillo and Frey, or their interpretations of the results, as explained above in Factual Finding 21.

D. There are parts of Dr. Carrillo's report in which he comes close to describing claimant as a high-functioning autistic person, yet he does not provide much detail in his report explaining why an ASD diagnosis was not warranted.

E. To a lesser extent, Dr. Frey similarly recognized in his report that claimant is "unusual," but he also did not go into much depth explaining why autism is not a valid diagnosis. Dr. Frey's report similarly left out much of the detail he provided in his testimony. Dr. Frey also admitted in his testimony that claimant's functional levels are well below those expected for his age, but he could not pin-point the cause, other than vaguely alluding to a possible mental health issue not otherwise contained in this record.

F. Dr. Moradi's diagnosis better comports with claimant's developmental history. Claimant was suspected of having autism by school staffers evaluating him for special education services from 2012 until 2018. Even when school staff changed claimant's eligibility category in 2018, they simply concluded claimant's problems were attributed to ADHD, a diagnosis that this record does not reflect has ever been made. Claimant was soon thereafter seen by CIFHS, who diagnosed claimant with ASD after a full evaluation. Dr. Langenbacher did not observe claimant acting like an autistic child when she saw him at school. But Dr. Moradi spent more time observing claimant at

school and interviewing school staff, and she opined claimant acts and behaves like an autistic child.

Impairments in Claimant's Major Areas of Life Activity

23. As discussed in the Legal Conclusions below, eligibility for regional center services under the Lanterman Act also requires demonstrating that the eligible condition in question causes a substantial disability. In making that determination, the seven specific areas of major life activity listed below must be analyzed.

24. A. Receptive and Expressive Language. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in receptive and expressive language.

B. There must be impairment in both receptive and expressive language, not one or the other. In claimant's case, there is not a significant impairment in either area. This is borne out by almost every evaluator who has seen claimant. For example, Ms. Alandy-dy of CIFHS diagnosed claimant with ASD without accompanying language and intellectual impairment. (Ex. 5, p. 9.) Claimant was described in special education documents as having average reading skills and advanced conversational proficiency. (Ex. 6, pp. 19-20.) As part of his social assessment during the service agency intake process, Intake Coordinator Wong did not detect any issues with claimant's expressive or receptive language. (Ex. 8, p. 7.) Finally, Drs. Carrillo, Langenbacher, and Frey did not find claimant has a significant expressive or receptive communication impairment. (Exs. 10, 11 & 13.) It is clear from those evaluators' reports (and testimony) that claimant understands what he is told and is understood when he responds.

C. The only evaluator who believes claimant has a significant communication impairment is Dr. Moradi. But in her report and testimony, she described that claimant's impairment is in "social communication," relating to claimant's restricted interest in conversational themes, monotone delivery, and concrete way of perception and expression. That type of impairment does not significantly impede claimant's functional ability to express himself to others or understand their responses.

25. A. Learning. Claimant established by a preponderance of the evidence that he has a significant functional limitation in learning. Nobody involved in this case disputes claimant has low-average-to-average cognitive and academic skills. However, there is also no dispute that claimant needs special education services to bridge the gulf between his academic ability and actual performance. Claimant's special education evaluators have consistently noted this difference in their triannual assessments. Dr. Langenbacher's school observation focused mainly on claimant's communicative and social interactions, not his learning.

B. On the other hand, Dr. Moradi's school observation included attention to claimant's learning abilities. (Ex. B.) For example, Dr. Moradi saw that while in his English class, claimant was disengaged, did not pay attention to this teacher, was slow to activate his computer when prompted, and failed to take the quiz given to the class. (*Id.*, p. 1.) He was easily distracted. (*Id.*, p. 2.) Claimant's English teacher told Dr. Moradi she was "frustrated" because claimant is "capable of much more," but that he is doing very little in her class and will probably fail. (*Ibid.*) Dr. Moradi interviewed claimant's English teacher from the prior year, who reported that although claimant passed her course, it was a struggle for many of the same reasons. (*Id.*, p. 3.) These were the same problems noted by special education staff when claimant was initially deemed eligible

for services in 2012. Inasmuch as no evidence presented indicates claimant has been diagnosed with ADHD, and many of the evaluators have expressly declined to make that diagnosis for claimant, it cannot be concluded that the gulf between claimant's academic ability and his actual performance is related to a learning disorder or ADHD.

26. Self Care. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in self-care. According to California Code of Regulations, title 17, section (Regulation) 56002, subdivision (a)(42), "'Self Care' means providing for, or meeting, a consumer's own physical and personal needs in the areas related to eating, dressing, toileting, bathing and personal hygiene." In this case, claimant is able to generally eat, dress, toilet, bath, and engage in his personal hygiene, with only some assistance and prompting. At worst, it can be said that he is mildly delayed in this area. (See, e.g., ex. 13, p. 4 ["daily living skills are . . . mildly delayed."])

27. Mobility. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in mobility. Claimant can ambulate, walk and otherwise move his body without limitation.

28. Self-Direction. Claimant established by a preponderance of the evidence that he has a significant functional limitation in self-direction. Claimant's special education evaluators in 2012 noted claimant's primary deficits were in remaining on-task, focusing, and independent work, which are all traits related to self-direction. Those deficits were the cause of the significant difference between claimant's cognitive ability and academic performance. (Exs. C & D.) Dr. Moradi gave claimant very low scores on the self-direction part of the ABAS-3, finding that he could not work independently, does not complete chores or tasks, and quits any activity he finds

difficult. (Ex. 9, p. 9.) Dr. Moradi testified she observed those traits when watching claimant essentially refuse to work in his English class. Claimant's grandmother also testified that claimant cannot complete chores around the house without constant direction from her. Interestingly, Drs. Carrillo, Langenbacher, and Frey did not comment on this area of life functioning.

29. A. Capacity for Independent Living. Claimant established by a preponderance of the evidence that he has a significant functional limitation in his capacity for independent living.

B. Section 4512, subdivision (/), provides that the "areas of major life activity" should be applied "as appropriate to the age of the person." This indicates it is appropriate to consider a child's age in relation to this category. Therefore, claimant should be viewed in comparison to the independent living skills of a typically developing 14-year-old.

C. Claimant is not at an age to live independently, but he is at an age where an average functioning teenager of equivalent age could be left home alone for brief periods of time. Claimant's grandparents never leave claimant alone at home because they do not trust that he will be safe. For the same reason, claimant's grandmother does not allow him to go into the community alone, with the exception of letting him go to a nearby liquor store. Dr. Moradi's testing bears out the observations of claimant's grandmother. For example, results from the ABAS-3 led Dr. Moradi to conclude claimant has "significant difficulties" in the areas of community use and home living, including that he is not always careful around hot objects, may use an electrical outlet improperly, and will allow strangers to take advantage of him. (Ex. 9, pp. 8-9.)

30. Economic Self-Sufficiency. It was not established by a preponderance of the evidence that claimant has a significant functional limitation in economic self-sufficiency. Notwithstanding the discussion above concerning capacity for independent living, this major life activity is not applicable in this case, given claimant's age. One would not expect a typically developing 14-year-old to be economically self-sufficient.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (§§ 4700-4716.) Claimant's grandmother requested a hearing to contest the service agency's proposed denial of claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-5.)

2. One is eligible for services under the Lanterman Act if it is established that he is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (§ 4512, subd. (a).) The fifth category condition is specifically defined as "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (§ 4512, subd. (a).) A qualifying condition must originate before one's 18th birthday and continue indefinitely. (§ 4512.)

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

B. Regarding eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS [Department of Developmental Services] and RC [regional center] professionals and their determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.) In *Mason*, the court focused on whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.* at p. 1136-1137.)

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

4. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (Citations.) . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

Does Claimant Have Autism?

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

B. In this case, claimant met his burden of proving by a preponderance of the evidence that he has the qualifying condition of ASD, or for purposes of the Lanterman Act, autism. While growing up, claimant was delayed in most major developmental milestones, including communication and socializing. He was deemed eligible for special education services as an "autistic-like" person by the time he reached the first grade and continues to receive those services currently. In 2018, two different evaluators diagnosed claimant with ASD, CIFHS and Dr. Moradi. During the hearing, claimant's grandmother offered anecdotal observations of claimant's development consistent with someone diagnosed with ASD, namely some communication delays and major social deficits.

C. Most importantly, Dr. Moradi's opinion that claimant has ASD was more persuasive than the service agency's experts that he does not, and the combined opinions expressed by Dr. Moradi and Ms. Alandy-dy of CIFHS effectively refuted the service agency's opinions and evidence to the contrary. Since claimant established his

diagnosis of ASD is valid, he should be considered someone with the qualifying condition of autism for purposes of the Lanterman Act. (Factual Findings 6-22.)

Is Claimant Substantially Disabled?

6. A qualifying condition also must cause a substantial disability. (§ 4512, subd. (a); Reg. 54000, subd. (b)(3).) A "substantial disability" is defined by Regulation 54001, subdivision (a), as:

> (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
>
> (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:
>
> (A) Receptive and expressive language;
> (B) Learning;
> (C) Self-care;
> (D) Mobility;
> (E) Self-direction;
> (F) Capacity for independent living;
> (G) Economic self-sufficiency.

7. A. Claimant established by a preponderance of the evidence that his condition results in major impairment of his social functioning, which requires interdisciplinary planning and coordination of special or generic services. (Reg. 54001, subd. (a)(1).) Ms. Alandy-dy and Dr. Moradi outlined a list of various services recommended for claimant, aimed primarily at his substantial social deficits, but also helping his concrete thinking and expression. The services recommended by those professionals are typically received by a child diagnosed with ASD. Whether those services, if requested by claimant, are appropriate under the Lanterman Act is an issue to be decided at a later time. In any event, it is clear that claimant will require, and benefit from, a coordination of special and generic services. (Factual Findings 6-22.)

B. Claimant also established by a preponderance of the evidence that he has significant functional limitations in three areas of major life activity, i.e., learning, self-direction, and the capacity for independent living. (Reg. 54001, subd. (a)(2).) By doing so, he established that his eligible condition is substantially disabling. (Factual Findings 6-30.)

Is Claimant Eligible for Services?

8. Since claimant established he has the qualifying developmental disability of autism, and that his condition is substantially disabling, it was established by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act. (Factual Findings 1-30; Legal Conclusions 1-7.)

ORDER

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

DATE:

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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