

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT,**

**VS.**

**WESTSIDE REGIONAL CENTER**

**OAH No. 2019110197**

**DECISION**

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 27, 2020, in Culver City, California.

Claimant's<sup>1</sup> grandmother (Grandmother), who also serves as his legal guardian, represented Claimant. Candace Hein, Fair Hearing Specialist, represented the Westside Regional Center (Service Agency or WRC).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 27, 2020.

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<sup>1</sup> Claimant and his family members are identified by title to protect their privacy.

## **ISSUE**

Is Claimant eligible to receive services and supports from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

## **EVIDENCE**

Documents: Service Agency's Exhibits 1-13; and Claimant's Exhibit 14.

Testimony: On behalf of Service Agency, Dr. Kaely Shilakes; on behalf of Claimant, Grandmother and Great Aunt.

## **FACTUAL FINDINGS**

### **Parties and Jurisdiction**

1. Claimant is a 13-year-old boy who was referred to the Service Agency by Grandmother who suspected that Claimant had Autism Spectrum Disorder (ASD) and/or an Intellectual Disability. Grandmother applied Claimant for regional center services in 2014 and again in 2016, but Claimant was deemed ineligible because psychological testing conducted by the Service Agency revealed that Claimant was not substantially impacted by an Intellectual Disability, ASD, Cerebral Palsy, Epilepsy, or other condition similar to Intellectual Disability. Rather, Claimant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Combined Type; Learning Disorder NOS; Language Disorder; and a rule-out of Disruptive Mood Dysregulation Disorder. Grandmother continued to believe that Claimant had ASD and/or an Intellectual

Disability, so in September 2019, Grandmother again applied Claimant for regional center services.

2. On October 16, 2019, the Service Agency sent a letter and a Notice of Proposed Action to Grandmother informing her that Claimant was not eligible to receive regional center services, because he did not meet the criteria set forth in the Lanterman Act, in that he was not substantially impacted by an Intellectual Disability, ASD, Cerebral Palsy, Epilepsy, or other condition similar to Intellectual Disability.

3. On October 21, 2019, Claimant filed a Fair Hearing Request to appeal the Service Agency's decision and to request a hearing. This hearing ensued.

### **Psychological Assessment (2016)**

4. In response to Grandmother's 2016 attempt to obtain regional center services for Claimant, the Service Agency contracted Rebecca R. Dubner, Psy.D. to perform a psychological assessment of Claimant. Dr. Dubner assessed Claimant on February 4, 11, and 26, 2016 to assist with regional center eligibility, and prepared a written a report of the same. Dr. Dubner limited her assessment of developmental disabilities to Intellectual Disability and ASD.

5. Dr. Dubner interviewed Grandmother, and administered the Vineland Adaptive Behavior Scales, 2nd Edition, Parent/Caregiver Rating Form (VABS-II); Wechsler Intelligence Scale for Children, 5th Edition (WISC-V); Autism Diagnostic Observation Schedule, 2nd Edition (ADOS)- Module 3; Childhood Autism Rating Scale, 2nd Edition (CARS-2); Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI); and Wide Range Achievement Test, 4th Edition (WRAT-4).

6. Dr. Dubner noted that during her interactions with Claimant, he displayed appropriate facial expressions, engaged in social smiles, and exhibited varied eye contact, though his eye contact improved when directly interacting with Claimant.

7. Claimant's performance on the WISC-V, which is an intelligence test for children, yielded a Full Scale IQ score of 82, which placed Claimant's intellectual ability in the low average range. His Verbal Comprehension Index score, which addressed verbal reasoning and verbal expression, was 106, which fell within the average range, reflecting well-developed verbal reasoning and verbal expression. His Visual Spatial Index score, which addressed non-verbal problem solving, spatial processing, and visual-motor integration, was 94, which fell within the average range. His Fluid Reasoning Index score, which addressed the ability to manipulate abstractions, follow rules, make generalizations, and identify logical relationships, was 82, which fell within the low average range. His Working Memory scaled score was 4 and his Working Memory Index score, which was highly related to fluid reasoning skills, learning and memory, attention, numerical reasoning, mental manipulation, and other higher order cognitive processes, was 67, which fell within the extremely low range. His Processing Speed scaled score was 4 and his Processing Speed Index score, which related to mental capacity, conservation of cognitive resources, and efficient use of cognitive resources, was 66, which fell within the extremely low range.

8. Claimant's performance on the WRAT-4, which is a measure of academic abilities, revealed that Claimant performed in the extremely low range on the Word Reading subtest with a Standard Score of 59, on the Spelling subtest with a Standard Score of 62, and on the Math Computation subtest with a Standard Score of 68, with academic skills falling at the kindergarten grade level. Claimant refused to participate in the Sentence Comprehension subtest.

9. Claimant's performance on the VMI revealed a standard score of 87, indicating below average and slightly underdeveloped visual-motor integration skills.

10. Dr. Dubner found that her observations of, and interactions with, Claimant, combined with Grandmother's completed CARS-2 rating form, yielded results that did not support the presence of ASD. Additionally, Dr. Dubner's discussion with Grandmother regarding Claimant's communication, socialization, and behaviors revealed that Claimant did not meet the diagnostic criteria for ASD. Specifically, Claimant did not have deficits in social-emotional reciprocity, as Claimant showed an interest in other children and approached other children, though he did not tend to initiate play with them, and seemed content playing on his own. However, he did have friends and they would go out and play. Claimant also did not have deficits in nonverbal communicative behaviors used for social interaction, as Claimant sometimes engaged in adequate eye contact, used gestures spontaneously, and had a full range of facial expressions. Claimant also had no deficits in developing, maintaining, and understanding relationships, as Claimant was able to develop friendships to an appropriate level.

11. Dr. Dubner also found that Claimant did not engage in stereotyped or repetitive motor movements. While Grandmother reported that Claimant, while seated, rocked back and forth, typically at home, Dr. Dubner observed no stereotyped or repetitive behaviors during her three days of assessing Claimant, and theorized Claimant's rocking at home was due to ADHD. Claimant also did not insist on sameness, have an inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, although he tended to be a very picky eater. Additionally, Claimant did not engage in highly restricted, fixated interests that were abnormal in intensity or focus, as Dr. Dubner reported that Claimant had no unusual interests,

although he was interested in video games, but not to an abnormal degree, according to Dr. Dubner. Dr. Dubner also noted Claimant did not have hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment, as lights or things that spin did not overly fascinate Claimant.

12. On the ADOS, Claimant needed to score 9 or greater in order to show the possible presence of ASD. Claimant scored 5 in the category of social affect, and a 0 in the category of restricted and repetitive behavior, for a total score of 5, significantly below the cut-off score of 9.

13. Grandmother completed a VABS-II Survey Interview Form in order to measure Claimant's adaptive functioning. The results of the VABS-II indicated that Claimant's overall adaptive functioning, with an Adaptive Behavior Composite score of 76, fell within the moderately low range. Claimant's Communication Skills Composite Score was 72, his Socialization Skills Composite score was 80, and his Daily Living Skills Composite Score was 81, and individually within the moderately low range too.

14. Dr. Dubner diagnosed Claimant with "Attention Deficit/Hyperactivity Disorder—Combined (By History)" and "Disruptive Mood Dysregulation Disorder (Rule Out)." (Ex. 10, p. 11.)

### **Claimant's IEPs**

15. Claimant attends Culver City Middle School and has received special education services from his school district since February 26, 2013. His recent Individual Education Programs (IEPs), specifically his January 23, 2019 and January 24,

2020 IEPs, cited Specific Learning Disability and Other Health Impairment<sup>2</sup> as Claimant's special education eligibility categories. The IEPs also stated the following regarding Claimant's Specific Learning Disability:

[Claimant] meets criteria for Special Education services as a student with Specific Learning Disability. He demonstrates a severe discrepancy between his ability and achievement in the areas of basic reading skills, reading comprehension, math calculation, math reasoning, and written language. This discrepancy is due to a disorder in the basic psychological processes of auditory and visual memory, auditory phonological processing, and attention skills, and is not the primary result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disability.

(Ex. 9, p. 1; Ex. 14, p. 1.)

## **Psychosocial Report**

16. On August 12, 2019 and August 15, 2019, Rebecca Choice of the Service Agency conducted a psychosocial assessment of Claimant, and prepared a written report. Grandmother expressed to Ms. Choice that Claimant had been passed from

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<sup>2</sup> Dr. Kaely Shilakes, Staff Psychologist, explained at hearing that Other Health Impairment typically references students who suffer from Attention Deficit Hyperactivity Disorder.

grade to grade, but was not functioning at grade level. She also expressed that Claimant read at a kindergarten level, demonstrated non-age-appropriate social skills and emotional interaction, and had poor comprehension. Grandmother also told Ms. Choice that Claimant attended private weekly group therapy and social skills training, and previously attended school-based speech and language therapy.

17. Ms. Choice reported that Claimant responded to her greeting with a smile, eye contact, and a handshake. Ms. Choice also stated that Claimant remained cooperative, well-mannered, pleasant, responsive, and demonstrated moderate eye contact throughout the session. She noted that Claimant demonstrated the ability to engage in reciprocal communication as he shared about his school-based friends. Ms. Choice also reported that Claimant displayed no significant expressive or receptive deficits, no motor skills impairments, and no significant behavior patterns.

18. Grandmother told Ms. Choice that Claimant depended on her to assist him navigating throughout the daily affairs of his life, including performing each of his hygiene tasks through constant reminders and instruction. Grandmother also reported that Claimant was unable to select his daily clothing, comb his hair, or tie his shoes.

19. Ms. Choice reported that Claimant had potential cognitive deficits relative to math, vocabulary, and writing. Specifically, Ms. Choice gave Claimant 11 basic math calculations to complete, including addition, subtraction, and multiplication, but Claimant answered all of them incorrectly. Additionally, in response to Ms. Choice's request that Claimant write two complete and different sentences on any subject, Claimant printed two sentences that contained poor grammar, poor penmanship, and poor punctuation. Ms. Choice also gave Claimant a spelling quiz consisting of 10 words ranging from seven to twelve letters, and Claimant spelled all



the words incorrectly. Ms. Choice stated that standardized psychological testing was necessary to appropriately assess whether Claimant had cognitive deficits.

## **Psychological Report**

20. The Service Agency contracted licensed psychologist Jeffrey Nishii, Psy.D. to perform a psychological assessment of Claimant to rule out or substantiate a diagnosis of ASD and to clarify Claimant's current level of functioning. Dr. Nishii performed the assessment on September 26, 2019 and October 1, 2019, and prepared a written report on October 1, 2019.

21. Dr. Nishii conducted a clinical interview, reviewed Claimant's records, and administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), the Wide Range Achievement Test, Fourth Edition (WRAT-4), the Vineland Adaptive Behavior Scales, Third Edition (VABS-III), and the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2).

22. At the clinical interview, Claimant presented as a "polite, responsive, and easy going young man." (Ex. 7, p. 5.) Grandmother reported to Dr. Nishii that Claimant experienced challenges following through with activities of daily living and needed constant prompting.

23. Claimant displayed low average cognitive functioning as measured by his Full Scale IQ on the WISC-V. Specifically, Claimant's yielded a Full Scale IQ score of 84, which placed Claimant's intellectual ability in the low average range. His Verbal Comprehension Index score was 100, which fell within the average range. His Visual Spatial Index score was 92, which fell within the average range. His Fluid Reasoning Index score was 82, which fell within the low average range. His Working Memory

scaled score was 6, which fell within the extremely low range. His Processing Speed scaled score was 4, which fell within the extremely low range.

24. His academic achievement scores on the WRAT-4 fell into the low range for Word Reading, Spelling, and Math Computation, with Standard Scores of 59, 61, and 62, respectively. His overall adaptive functioning, as measured by the VABS-III, fell within the low range. Claimant received low scores in the areas of Communication and Daily Living Skills, and a moderately low Socialization score. Dr. Nishii found that Claimant's performance on both cognitive and adaptive functioning measures did not indicate the presence of Intellectual Disability, but rather evidenced concerns for a Learning Disorder.

25. Claimant's results on the ADOS-2 revealed little to no evidence of autism spectrum-related symptoms. His overall total on the ADOS-2 fell within the non-spectrum range of classification.

26. Dr. Nishii noted Claimant did not meet the diagnostic criteria for ASD, in that Claimant did not demonstrate deficits in social-emotional reciprocity, as Claimant engaged in back and forth conversation. However, he did note that Claimant demonstrated some evidence of deficits in nonverbal communicative behaviors used for social interaction, in that Claimant displayed reduced eye contact and difficulty reading social cues. He also noted that Claimant demonstrated some evidence of deficits in developing, maintaining, and understanding relationships, in that Claimant was able to develop friendships, but encountered difficulty maintaining relationships. Additionally, Dr. Nishii found that Claimant did not demonstrate stereotyped or repetitive motor movements or highly restricted, fixated interests that are abnormal in intensity or focus. He noted, however, that Claimant showed evidence of insisting on

sameness in that he was a picky eater, and showed evidence of hyper-or-hypo-reactivity to sensory input, in that Claimant was reactive or sensitive to loud sounds.

27. Dr. Nishii diagnosed Claimant with "Other Specified Neurodevelopmental Disorder associated with prenatal alcohol exposure" and "Rule Out Specific Learning Disorder with Impairment in Reading, Written Expression, and Mathematics." (*Id.* at p. 7.)

28. Dr. Nishii recommended that Claimant receive Applied Behavioral Analysis (ABA) therapy to address Claimant's angry outbursts, and that he be subjected to a strengths-based approach, instead of focusing on his limitations. Dr. Nishii also recommended that Grandmother consider seeing a mental health professional to process difficult emotions associated with the challenges of caring for Claimant.

## **Multidisciplinary Evaluation**

29. On November 13, 2019, the Service Agency's multidisciplinary team consisting of Autism Specialist Soryl Markowitz, LCSW, Staff Psychologist Kaely Shilakes, Psy.D., Candace Hein, J.D., and Wilhelmina Hernandez, M.D., observed Claimant, and Dr. Hernandez prepared a written report of the same. Dr. Shilakes testified at hearing regarding the multidisciplinary team's conclusions based on its observation of Claimant, as well as its review of Claimant's IEPs, psychosocial report, and psychological report referenced above. The team also reviewed a collection of reports stemming from Claimant's 2014 and 2016 requests for regional center services.

30. Grandmother and Claimant's great aunt (Great Aunt) reported to the team that Claimant was oppositional and defiant and experienced daily struggles at school. Grandmother and Great Aunt joined the multidisciplinary team behind the

two-way mirror during the observation while Dr. Hernandez interacted directly with Claimant in the assessment room.

31. Dr. Hernandez noted that Claimant demonstrated awareness of his visit and the need for supports while at school. He turned to face Dr. Hernandez to share his interests, such as his friends at school, spoke in full sentences and used multiple facial expressions, including a smile and three-point gaze shifts. He also made eye contact and frowned when Dr. Hernandez asked him questions that made him uncomfortable. He openly offered information about his own experiences and related many of the stories to himself, though Grandmother told the team that most of the scenarios Claimant described were not true. Dr. Hernandez noted that Claimant was able to hold a conversation well and he paused and joined in appropriate moments, and easily engaged in reciprocal social interaction, varied and extensive functional social communication, and imaginative play. However, Claimant demonstrated difficulty with displaying insight into relationships.

32. Dr. Hernandez reported that the multidisciplinary team did not observe characteristics of ASD, but given the ability to determine Claimant's interaction with peers, the team determined that the next step of the evaluation would be to partake in a school observation.<sup>3</sup>

33. Based on the observations that Dr. Hernandez and the multidisciplinary team observed on November 13, 2019, Dr. Hernandez reported her impressions.

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<sup>3</sup> The Service Agency conducted an observation of Claimant at his school on January 13, 2020, but proffered no witnesses or reports describing the substance of the school observation.

Specifically, Dr. Hernandez reported that Claimant had struggled academically and was found eligible for special education services from his school district under the categories of Specific Learning Disability and Other Health Impairment, and noted that Claimant's academic performance was commensurate with past cognitive scores. Additionally, Dr. Hernandez reported that Claimant had a long-standing complex psychosocial history involving his biological parents with mental health issues, and suffered possible exposure to intrauterine substances.

34. With respect to ASD, Dr. Hernandez acknowledged that Claimant evidenced some weaknesses in his social functioning and a high number of difficulties in understanding nonverbal social cues and displaying oppositional behaviors towards others. Specifically, Claimant was noted to have difficulty relating to peers, initiating interactions, and engaging in conversations with them. He was also noted to exhibit a rigid pattern of behavior when under stress. Dr. Hernandez reported Claimant had no history in early childhood of isolated behaviors, repetitive or stereotyped behaviors, or issues in nonverbal communication.

35. Dr. Hernandez reported that Claimant did not meet the diagnostic criteria for ASD. Specifically, she found that Claimant demonstrated no persistent deficits in social communication and social interaction across multiple contexts, as manifested by deficits in social-emotional reciprocity, in nonverbal communication behaviors used for social interaction, or in developing, maintaining, or understanding relationships. Dr. Hernandez also found that Claimant demonstrated no restricted, repetitive patterns of behavior, interests, or activities, such as stereotyped or repetitive motor movements, use of objects, or speech; insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; highly

restricted, fixated interests that were abnormal in intensity or focus; or hyper-or-hypo reactivity to sensory input or unusual interest in sensory aspects of the environment.

36. Dr. Hernandez diagnosed Claimant with "Unspecified, Neurodevelopmental Disorder" and "Possible Oppositional Defiant Disorder." (Ex. 5, p. 3.) Dr. Hernandez recommended that Claimant's family seek guidance and assistance with Claimant's special education program, and seek other opportunities for counseling either through Claimant's school district or through his managed care medical plan.

37. Dr. Shilakes reiterated that nothing the team observed or reviewed demonstrated that Claimant had ASD or an Intellectual Disability. With respect to ASD, Dr. Shilakes emphasized that the team saw Claimant make eye contact and not engage in any stereotyped or repetitive behaviors. With respect to Intellectual Disability, Dr. Shilakes explained that Claimant's overall cognitive functioning evidenced from his psychological assessment performed by Dr. Dubner and Claimant's results of the WISC-V and WRAT-4, was very similar to the results of the WISC-V and WRAT-4 in the psychological assessment performed by Dr. Nishii, neither of whom diagnosed Claimant with Intellectual Disability. Rather, Dr. Shilakes agreed with Dr. Nishii that Claimant's scores were indicative of the presence of a Learning Disability.

### **Grandmother's and Great Aunt's Testimony**

38. Grandmother testified at hearing and explained that she has had custody of Claimant since birth, and she has been seeking regional center services for Claimant since he was seven-years-old. Grandmother believes Claimant has ASD, given his behaviors, and an Intellectual Disability, given his poor academic performance and his failure to master concepts. With respect to ASD, Grandmother testified that she has

experience with ASD, as Grandmother's sister (Claimant's Great Aunt), who also testified at hearing, has two sons with ASD, and thus both Grandmother and Great Aunt contend they know how to identify symptoms of ASD, and have identified the same in Claimant. Additionally, Grandmother testified that she has two brothers who have high-functioning autism.

39. Grandmother reported that Claimant "wanders off all of the time" with no regard for danger, and constantly runs up and down the hallway. She also explained that if she does not tell him what to do every morning regarding his hygiene, such as brushing his teeth, combing his hair, and putting on his clothes, Claimant will not complete those tasks. Grandmother reports that she "has to repeat everything to him." When Claimant becomes frustrated, he "shuts down" and gets very verbally abusive and angry. Claimant is also attracted to violent video games and television shows. When he is immersed in violent video games or television shows, he has full-blown conversations, even though he is alone in the room. Grandmother testified that Claimant misreads his peers' cues and body language, therefore he becomes aggressive toward them. Claimant demonstrates no sympathy and feels sorry for no one. Grandmother also testified that Claimant "has gotten good at lying." In addition to private social training classes, Grandmother takes Claimant to the psychologist once every two or three months to help address Claimant's behaviors. Claimant takes Adderall "to keep him calm and focused at school."

40. With respect to Claimant's academic achievement, Grandmother believes the lack thereof demonstrates that Claimant has an Intellectual Disability. She is especially convinced of Claimant's Intellectual Disability because he continues to fail at mastering concepts, despite extensive interventions in his special education program.

41. Grandmother did not proffer any independent expert testimony or assessment reports with conclusions that Claimant suffers from ASD or an Intellectual Disability.

## **LEGAL CONCLUSIONS**

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. (Welf. & Inst. Code, §§ 4700-4716.) Claimant requested a hearing to contest 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 1-3.)

2. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him to prove by a preponderance of the evidence that she meets the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; Evid. Code, §§ 115, 500.) "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.)

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:



[A] disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. . . . [T]his 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 an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a qualifying developmental disability within the meaning of Welfare and Institutions Code section 4512, Claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (1)(1):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

5. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(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.

6. California Code of Regulations, title 17, section 54001, subdivision (b), provides, in pertinent part, that the "assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines," and the "group shall include as a minimum a program coordinator, a physician, and a psychologist."

7. In addition to proving that he suffers from a "substantial disability," Claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: intellectual disability, epilepsy, autism, and cerebral palsy. The fifth and last category of eligibility is listed as "[d]isabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability." (Welf. & Inst. Code, § 4512.)

8. The determination of eligibility under the category of Intellectual Disability is guided by the DSM-5, which states in pertinent part as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period

[11] . . . [11]

...[11] Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 ( $70 \pm 5$ ). Clinical training and judgment are required to interpret test results and assess intellectual performance.

...[11] IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For

example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and socio-cultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior and school and work tasks organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural

experience, and coexisting general medical conditions or mental disorders influence adaptive functioning. . . .

[¶] . . . [¶]

Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired 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. To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.

(DSM-5, pp. 37-38).

9. Here, the evidence established that Claimant has significant functional limitations in at least three areas of major life activity, as described in Legal Conclusion 5. Specifically, Claimant has limitations in his receptive and expressive language, as evidenced by the results of the VABS-III, in that Claimant scored in the low range in the area of communication, including receptive and expressive communication. Additionally, Claimant has limitations in learning, evidenced by Claimant's Specific Learning Disability found by Claimant's school district and the conclusion reached by Dr. Nishii. Moreover, Claimant is challenged by self-direction, evidenced by the credible testimony of Grandmother, who must instruct Claimant in many areas of his daily life, including daily hygiene tasks.

10. Despite Claimant's functional limitations, the preponderance of the evidence does not support a finding that Claimant is eligible to receive regional center

services. Specifically, Claimant failed to demonstrate that he has a “substantial disability” (as defined in the Lanterman Act and Title 17 of the regulations) resulting from one of the five qualifying conditions specified in Welfare and Institutions Code section 4512, specifically, Autism, Intellectual Disability, Cerebral Palsy, Epilepsy, or a condition closely related to Intellectual Disability or requiring treatment similar to that required for individuals with Intellectual Disability. No evidence was presented demonstrating that Claimant has diagnoses of Cerebral Palsy or Epilepsy.

11. Despite his claims to the contrary, Claimant proffered no credible evidence demonstrating that he has ASD. While Grandmother and Great Aunt proffered testimony that they believe Claimant suffers symptoms of ASD, based on their personal experience with family members who possess the disorder, Claimant proffered no evidence from any medical or mental health professionals stating the same. The Service Agency, on the other hand, proffered evidence from multiple professionals, including licensed psychologists, demonstrating that Claimant did not meet the criteria for ASD, given the results of Claimant’s performance on tests administered during psychological assessments, including the ADOS, the WISC-V, the WRAT-4, and VABS-III. (Factual Findings 1 through 37.)

12. Similarly, despite Grandmother’s belief that Claimant has an Intellectual Disability due his poor academic performance and his failure to master concepts, Claimant proffered no expert reports or expert testimony concluding that Claimant has an Intellectual Disability. Rather, the evidence showed that Claimant’s Full Scale IQ score was 84 in 2019 and 82 in 2016, according to his performance on the WISC-V, which exceeds the 65-75 IQ score cited in the DSM-V as evidence of an Intellectual Disability, as outlined in Legal Conclusion 8. Additionally, Dr. Nishii found that Claimant’s performance on both cognitive and adaptive functioning measures did not

indicate the presence of Intellectual Disability, but rather evidenced concerns for a Learning Disorder. Additionally, Claimant's IEPs stated that Claimant demonstrates a severe discrepancy between his ability and achievement in the areas of basic reading skills, reading comprehension, math calculation, math reasoning, and written language, and that the discrepancy was not the primary result of an Intellectual Disability.

13. The assessment of whether Claimant suffers from a fifth category condition requires consideration of both prongs of potential fifth category eligibility, i.e., whether Claimant suffers from a disabling condition found to be closely related to Intellectual Disability or whether Claimant requires treatment similar to that required for individuals with Intellectual Disability. (Welf. & Inst. Code § 4512, subd. (a).)

14. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that "the fifth category condition must be very similar to [Intellectual Disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.*, at p. 1129.) It is therefore important to track factors required for a diagnosis of Intellectual Disability when considering fifth category eligibility.

15. The presence of adaptive deficits alone is not sufficient to establish Intellectual Disability or fifth category eligibility. (*Samantha C. v. Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1486 [Intellectual Disability "includes both a cognitive element and an adaptive functioning element" and to "interpret fifth category eligibility as including only an adaptive functioning element" misconstrues section 4512, subdivision (a)].) Claimant has not established with



sufficient evidence that he suffers from the kind of general intellectual impairment found in persons with Intellectual Disabilities, nor is there sufficient evidence to establish that Claimant's adaptive deficits stem from cognitive deficits. Instead, the evidence suggests that Claimant's Specific Learning Disability and ADHD are likely causes of Claimant's adaptive deficits.

16. Determining whether a Claimant's condition "requires treatment similar to that required" for persons with Intellectual Disability is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people, including those who do not suffer from Intellectual Disability, or any developmental disability, could benefit from the types of services offered by regional centers (e.g., counseling, vocational training, living skills training, or supervision). The criterion therefore is not whether someone would benefit from the provision of services, but whether that person's condition requires treatment similar to that required for persons with Intellectual Disability, which has a narrower meaning under the Lanterman Act than services. (*Ronald F. v. Dept. of Developmental Services* (*Ronald F.*), (2017) 8 Cal.App.5th 84, 98.)

That the Legislature intended the term "treatment" to have a different and narrower meaning than "services" is evident in the statutory scheme as a whole. The term "services and supports for persons with developmental disabilities" is broadly defined in subdivision (b) of section 4512 to include those services cited by the court in *Samantha C.*, e.g., cooking, public transportation, money management, and rehabilitative and vocational training, and many others as well. (§ 4512, subd. (b); *Samantha C.*, *supra*, 185 Cal.App.4th

at p. 1493, 112 Cal.Rptr.3d 415.) "Treatment" is listed as one of the services available under section 4512, subdivision (b), indicating that it is narrower in meaning and scope than "services and supports for persons with developmental disabilities."

The term "treatment," as distinct from "services" also appears in section 4502, which accords persons with developmental disabilities "[a] right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports." (§ 4502, subd. (b)(1).) The Lanterman Act thus distinguishes between "treatment" and "services" as two different types of benefits available under the statute.

*(Ibid.)*

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17. Based on the foregoing, Claimant is not eligible for regional center services under the Lanterman Act. As such, Claimant's appeal shall be denied. (Factual Findings 1-41; Legal Conclusions 1-16.)

## **ORDER**

Claimant's appeal is denied. Service Agency's determination that Claimant is not eligible for services under the Lanterman Act is upheld.

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.