

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2020011016

DECISION

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on telephonically on May 19, 2020.

Claimant's mother (Mother) represented Claimant.¹ Jacob Romero, Fair Hearing Representative, represented the Eastern Los Angeles Regional Center (Service Agency or ELARC).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 19, 2020.

¹ Titles are used to protect the privacy of Claimant and her family.

ISSUE

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

EVIDENCE

Documents: Exhibits 1 through 12

Testimony: On behalf of Service Agency, Randi E. Bienstock, Psy.D; on behalf of Claimant, Mother and Saqib Iqbal, LCSW.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a nine-year-old girl who was referred to the Service Agency by Mother who contends Claimant suffers from Autism Spectrum Disorder (ASD). Mother applied Claimant for regional center services in 2013, 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. Mother continued to believe that Claimant had ASD, so in July 2019, Mother again applied Claimant for regional center services.

2. On December 19, 2019, the Service Agency sent a letter to Mother, deeming Claimant ineligible for regional center services. The Service Agency asserted Claimant did not present with a developmental disability, as defined by Welfare and

Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000, subdivisions (a) and (c). Specifically, the Service Agency concluded that the results of assessments performed on Claimant demonstrated Claimant did not have ASD, an Intellectual Disability, Epilepsy, or Cerebral Palsy, and did not have a condition which requires treatment similar to that required by individuals with Intellectual Disability.

3. On December 29, 2019, Mother executed a Fair Hearing Request on Claimant's behalf to appeal the Service Agency's decision and to request a hearing, and submitted it to ELARC on January 21, 2020. This hearing ensued.

Psychological Assessment (2013)

4. In response to Mother's 2013 attempt to obtain regional center services for Claimant, the Service Agency requested its consulting psychologist, Randi E. Bienstock, Psy.D., to perform a psychological assessment of Claimant. Dr. Bienstock testified at hearing. Dr. Bienstock earned her bachelor's degree in Human Development and Family Studies from Cornell University in 1991, and her master's and doctorate degrees from the California School of Professional Psychology in 1994 and 1996, respectively. She earned her board certified behavior analyst certification from Florida Institute of Technology in 2013. Dr. Bienstock has been in private practice since 1998, providing psychotherapy as well as psychological testing, treatment, and supervision. Since 2006, Dr. Bienstock has served as a consulting psychologist for the Service Agency, reviewing individual cases in order to help determine if an individual is eligible for regional center services. Her duties also include providing recommendations related to the appropriate treatment and intervention plans for consumers of the regional center, as well as providing expert testimony at fair hearings. Approximately 99 percent of her work for the last 20 years has involved

individuals with neurodevelopmental disabilities. Since 2003, Dr. Bienstock has served as an expert witness for the County of Los Angeles, providing psychological evaluations of children ranging in age from birth to 18 years.

5. Dr. Bienstock assessed Claimant on May 15, 2013, when Claimant was two years and nine months old. Claimant had been receiving early intervention services from the Service Agency through Nikki Palmer, LMFT, addressing concerns regarding Claimant's speech and language development and behaviors. Dr. Bienstock evaluated Claimant for the purpose of assessing her current level of intellectual, emotional, social, behavioral, and adaptive functioning, in order to help determine whether Claimant was eligible to receive ongoing services from the Service Agency under the Lanterman Act.

6. Dr. Bienstock reviewed Claimant's records and noted Ms. Palmer observed that Claimant "demonstrated some facial gazing with facilitation from the therapist . . . switched activities frequently and included stereotypic play . . . did not respond to shared attention . . . engaged in avoidance behaviors and appeared in her own world." (Ex. 3, p. 2.) Mother reported that Claimant walked on her toes, flapped her hands, engaged in self-stimulatory behaviors, and aggressive behaviors, such as kicking, tantrums, and self-injurious behaviors. Ms. Palmer also noted Claimant's "speech was very limited." (*Ibid.*) Ms. Palmer reported that Claimant "engaged in many behaviors associated with Autism Spectrum Disorder" and recommended an assessment to "confirm an Autism Spectrum Disorder diagnosis" through the Service Agency. (*Ibid.*)

7. Dr. Bienstock administered the Achenbach Child Behavior Checklist (CBCL); the Autism Diagnostic Interview-Revised (ADI-R); Temperament and Atypical Behavior Scales (TABS); Gilliam Autism Rating Scale-2nd Edition (GARS-2); Mullen

Scales of Early Learning; select items from the Autism Diagnostic Observation Scale-I (ADOS-1), Module One; and the Vineland Adaptive Behavior Scales, 2nd Edition (VABS-II). Dr. Bienstock also conducted clinical observations of Claimant and a clinical interview of Claimant's parents.

8. To assess emotional and behavioral skills, Dr. Bienstock administered the TABS, which is 55-item questionnaire to measure dysfunctional behavior of infants and young children by assessing temperament, attention, attachment, social behavior, play, vocal and oral behavior, senses and movement, self-stimulation, self-injury and neurobehavioral style. Dr. Bienstock also administered the CBCL, which is a standardized form for assessing children's behavioral and emotional problems. The results from both measures showed that Mother continued to report significant concerns regarding tantrums, aggressive behaviors toward others and self-injurious behaviors, and repetitive and idiosyncratic type behaviors.

9. Dr. Bienstock administered the GARS-2 and the ADI-R to Claimant's parents and noted Mother reported Claimant's symptoms and behaviors as elevated on all scales to a rather significant degree, while Claimant's father (Father) did not report Claimant's symptoms and behaviors as elevated, with the exception of some communication deficits reported by Father.

10. Dr. Bienstock provided Claimant with some select items from ADOS-1, which is a diagnostic tool used to measure her social communication and social behavior, and to help rule out or confirm the existence of ASD. Dr. Bienstock noted that Claimant smiled, provided sustained eye contact, attempted to use words and nonverbal gestures to communicate, exhibited a range of facial expressions, initiated play and social interactions with others, engaged in reciprocal games with the examiner, responded well to praise, and did not display any stereotyped or

idiosyncratic behaviors. Dr. Bienstock concluded that her findings did not support a diagnosis related to ASD.

11. To assess Claimant's cognitive functioning, Dr. Bienstock administered the Mullen Scales of Early Learning, which measured Claimant's visual receptive, fine motor, and receptive and expressive language skills. Claimant's overall learning composite placed her skills within the average range in most areas of development, with the exception of her expressive language skills.

12. To assess Claimant's adaptive skills, Dr. Bienstock administered the VABS-II, which estimates a person's current functioning in the areas of communication, daily living/self-help skills, socialization, and motor skills. Claimant's parents individually completed the rating scales. Claimant demonstrated no significant motor deficits. Mother and Father disagreed in their responses concerning Claimant's self-help and social development skills, with Mother reporting significant deficits in these areas, and Father reporting no significant social, emotional, or behavioral concerns. Claimant's overall expressive language and articulation skills showed significant deficits.

13. Dr. Bienstock's impressions were that Claimant continued to present with significant language delays, which could impact her social relationships, and, as such, deferred a diagnosis to a speech therapist. Dr. Bienstock stated the following:

It is important to note that children who present with clear and definitive characteristics that are indicative of a diagnosis of Autism, exhibit these symptoms across all environments and settings. While symptoms may differ in intensity in certain settings, the core deficits and symptoms of Autism are still clearly evident across all settings.

[Claimant] does not present with core deficits and symptoms related to an Autistic Spectrum Disorder across all settings and it is believed that a conservative diagnostic approach is warranted at this time.

(Ex. 3, p. 13.)

Psychoeducational Assessment

14. On January 24, 2013, Claimant's school district deemed her qualified for special education services, under the eligibility category of Speech and/or Language Impairment. Later testing showed that Claimant was also eligible for special education services under the category Other Health Impairment. Claimant received speech and language therapy services one time per week, for 30 minutes, and specialized academic instruction for a total of 360 minutes weekly.

15. In September 2018, Claimant's school district conducted a triennial psychoeducational assessment, when Claimant was eight-years-old. The school psychologist who performed the psychoeducational assessment reviewed Claimant's school records, including her cumulative file, special education file, previous test results, and health file; interviewed Claimant, Mother, and Claimant's teacher; and administered the following measures: (1) Kaufman Assessment Battery for Children-Second Edition (KABC-II); (2) Kaufman Assessment Battery for Children-Second Edition Nonverbal Index (KABC-II-Nonverbal); (3) Test of Auditory Processing Skills, Third Edition (TAPS-3); (4) Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2); (5) Beery-Buktenica Development Test of Visual-Motor Integration, Sixth Edition (Berry VMI); (6) Kaufman Test of Educational Achievement, Third Edition (KTEA-3); (7) Behavior Assessment System for Children, Third Edition (Parent) (BASC-3-

Parent); (8) Behavior Assessment System for Children, Third Edition (Teacher) (BASC-3-Teacher); (9) Conners Third Edition (Parent) (Conners-3-Parent); (10) Conners Third Edition (Teacher) (Conners-3-Teacher); (11) Childhood Autism Rating Scale, Second Edition (High-Functioning Version) (CARS2-HF); (12) Adaptive Behavior Assessment System, 3rd Edition (Parent) (ABAS-3-Parent); and (13) the Adaptive Behavior Assessment System, 3rd Edition (Teacher) (ABAS-3-Teacher).

16. The results of the KABC-II and the KABC-II-Nonverbal, which assessed Claimant's intellectual development, showed Claimant's nonverbal cognitive ability and general intellectual ability fell within the average range. The results of the Beery VMI, which assessed Claimant's visual-motor skills, showed the coordination of Claimant's visual perceptual and fine motor control systems fell within the average range. The results of the TAPS-3, which assessed Claimant's auditory processing ability, showed Claimant's auditory processing index fell within the average range.

17. The results of the CTOPP-2, which assessed Claimant's phonological processing skills, showed Claimant had a normative deficit in phonological awareness and phonological memory, and in the normal range in the area of rapid symbolic naming. The results of the BASC-3-Parent, BASC-3-Teacher, Conners-3-Parent, and Conners-3-Teacher indicated Claimant exhibited significant attention difficulties. The results of the KTEA-3, which assessed Claimant's academic achievement, showed Claimant's reading composite score fell within the low range, her math composite score fell within the below average range, and her written language composite score fell within the low range.

18. The results of the BASC-3-Parent, which assessed behavioral and personality characteristics, showed Claimant's adaptability, social skills, and activities of daily living fell within the at-risk classification range. The results of the BASC-3-Teacher

showed Claimant displayed characteristics that fell within the at-risk range, such as depression, withdrawal, social skills, and leadership. The results of the Conners-3-Parent and Conners-3-Teacher, which was a tool designed to assess Attention Deficit Hyperactivity Disorder (ADHD) and its most comorbid problems, showed elevated levels of inattention, hyperactivity, impulsivity, learning problems, executive functioning, defiance, aggression, and peer relations.

19. The results of the ABAS-3-Parent and ABAS-3-Teacher, which assessed Claimant's general adaptive behaviors and skills important to everyday life, showed Claimant's overall adaptive scores fell within the low range and extremely low range, respectively.

20. The results of the CARS-HF, which is a behavioral rating scale designed to help identify children with autism and to distinguish them from developmentally disabled children who are not autistic, showed Claimant exhibited minimal-to-no symptoms of ASD.

21. The school psychologist concluded Claimant "only exhibit[ed] a couple of autistic-like behaviors in the home and school, which [were] displayed at a mild degree . . . [and did] not appear to currently affect her educational performance in an adverse manor (*sic*).\" (Ex. 6, p. 18.) The school psychologist found Claimant met the special education eligibility criteria for Other Health Impairment resulting from her diagnosis of ADHD and Specific Learning Disability.

22. Claimant's Individualized Education Program (IEP) team developed Claimant's IEP on September 25, 2018, and deemed Claimant eligible for special education services under the category of Other Health Impairment. Claimant's IEP

team determined Claimant would receive specialized academic instruction and 30 minutes per week of language and speech services in a group setting.

Psychosocial Assessment

23. On August 8, 2019, Maria E. Garcia, Assessment Coordinator, performed a psychosocial assessment on Claimant. Ms. Garcia assessed and/or reviewed Claimant's current functioning and programming in the areas of motor skills, communication skills, social skills, emotional domain behaviors, cognitive skills, and independent living skills. Ms. Garcia noted Claimant demonstrated good gross and fine motor skills, good communication skills, poor socialization skills, and poor cognitive skills. Ms. Garcia also noted Claimant often engaged in aggressive behaviors, hyperactive-type behaviors, and self-injurious behaviors.

Eye Cue Mental Health Letter

24. Claimant began individual psychotherapy sessions at Eye Cue Mental Health under the care of Sabib Iqbal, Licensed Clinical Social Worker,² on July 17, 2019, to address Claimant's rigidity and behavioral issues, such as tantrumming. He held, and continues to hold, sessions with Claimant one time per week, for 60 minutes. Mr. Iqbal testified at hearing.

25. On August 20, 2019, Mr. Iqbal wrote a letter to the Service Agency, stating that he had diagnosed Claimant with ASD, as she had met the ASD criteria set

² Official notice is taken of the California Board of Behavioral Sciences' website that lists August 9, 2017 as the date of issuance of Mr. Iqbal's clinical social worker license.

forth in the Diagnostic Statistical Manual of Mental Health Disorders, Fifth Edition (DSM-5).

26. Mr. Iqbal explained at hearing that he conducted no independent testing, but rather reviewed and applied each criterion of ASD as set forth in the DSM-5, and determined, through reports primarily from Mother, that Claimant suffered from ASD. Specifically, with respect to the DSM-5 ASD criterion requiring persistent deficits in social communication and social interaction across multiple contexts, Mr. Iqbal found that Claimant presented with deficits in social-emotional reciprocity, deficits in nonverbal communicative behaviors used for social interaction, and deficits in developing, maintaining, and understanding relationships. In support of his conclusion, Mr. Iqbal noted, based on Mother's report, children did not want to be near Claimant at a birthday party, Claimant had limited expression, and Claimant had no friends.

27. With respect to the DSM-5 ASD criterion requiring restricted, repetitive patterns of behavior, interests, or activities, Mr. Iqbal found that Claimant engaged in stereotyped or repetitive motor movements, insisted on sameness, maintained highly restricted, fixated interests that were abnormal in intensity, and demonstrated hyper- or hyporeactivity to sensory input. In support of his conclusion, Mr. Iqbal noted, based on Mother's report, that Claimant spun uncontrollably, insisted on eating the same food every day, harbored a fascination with horror films, and was attracted to soft textures.

28. With respect to the DSM-5 ASD criterion requiring that symptoms be present in the early developmental period, Mr. Iqbal noted, based on Mother's reporting, that Claimant as a toddler demonstrated similar behaviors as her older sister, who was diagnosed with ASD. With respect to the DSM-5 ASD criterion

requiring that the symptoms not be better explained by Intellectual Disability, Mr. Iqbal noted no observed Intellectual Disability.

29. Because Mr. Iqbal determined Claimant met the DSM-5 ASD criteria, he concluded Claimant suffered from ASD, but testified he considered Claimant “mild” on the autism spectrum, as she had good eye contact, was able to express herself, was friendly, played with people even though she had no friends, and demonstrated some flexibility. Mr. Iqbal testified he had ruled out mood disorder, in that he had not observed any manic or depressive episodes. Mr. Iqbal did, however, observe signs of ADHD.

30. At hearing, Mr. Iqbal explained that Claimant required additional specialized supports, such as Applied Behavioral Analysis (ABA), so she can learn how to express her emotions and frustrations, particularly when suffering a disturbance in her routine, or when she is engaged in tantrumming behavior.

Criticism of Eye Cue Mental Health Letter

31. Dr. Bienstock reviewed Mr. Iqbal’s letter and disagreed with his diagnosis of ASD, as it was based on unsubstantiated information. Dr. Bienstock explained at hearing that Mr. Iqbal performed no independent testing, but rather accepted Mother’s account of Claimant’s symptoms and behaviors without subjecting Mother’s information to confirmation. Additionally, Dr. Bienstock noted the letter included no evidence of substantiated clinical observations performed by Mr. Iqbal. Dr. Bienstock determined Mr. Iqbal’s ultimate diagnosis of ASD was inconsistent with best practices, as it was based solely on unsubstantiated reports from Mother.

Psychological Assessment of Dr. Larry Gaines

32. In response to Mother's 2019 attempt to obtain regional center services for Claimant, the Service Agency requested licensed psychologist, Larry E. Gaines, Ph.D., to perform a psychological assessment of Claimant. Dr. Gaines assessed Claimant on September 27, 2019, when Claimant was nine-years-old. Dr. Gaines evaluated Claimant to determine Claimant's current levels of cognitive and adaptive functioning, and whether Claimant suffered any developmental disabilities, including Intellectual Disability and/or ASD.

33. Dr. Gaines conducted clinical interviews, reviewed Claimant's records, including Claimant's psychological evaluation reported dated May 15, 2013 and her IEP, and administered the Wechsler Intelligence Scale for Children-V (WISC-V), the ADOS-II, and the VABS-II.

34. With respect to behavioral observations of Claimant, Dr. Gaines noted Claimant maintained good eye contact with him, and exhibited good social language. Dr. Gaines found Claimant cooperative and attentive.

35. In regard to cognitive functioning, Dr. Gaines administered the WISC-V. The results of the WISC-V showed Claimant scores fell within the average range of intellectual ability. Dr. Gaines noted no discrepancy between verbal and nonverbal problem-solving skills.

36. In regard to language functioning, Dr. Gaines administered the VABS-II. The results of the VABS-II showed Claimant's scores fell within the mild range of deficiency, consistent with Claimant's history of language delays or speech problems.

37. With respect to adaptive behavior functioning, Dr. Gaines relied on Claimant's results from the VABS-II, which showed that Claimant's adaptive behavior fell within the low-average range.

38. With respect to social functioning, Dr. Gaines relied on Claimant's results from the VABS-II, which showed that Claimant's social skills fell within the borderline range of performance. While Dr. Gaines observed Claimant to be "quite contented," he noted that Mother reported that Claimant could "flip" and become very aggressive and engage in tantrumming. (Ex. 9, p. 3) Dr. Gaines noted Claimant was described as having friends at school, but could become aggressive, resulting in rejection by her friends. Claimant demonstrated good imaginative play, but could become distracted easily, and was impulsive. Claimant was very hyperactive, and interrupted and disrupted others, symptoms suggestive of attention disorder.

39. Dr. Gaines also administered the ADOS-II, and noted Claimant was able to engage in reciprocal conversation, maintain eye contact, use gestures, describe her emotional experiences, and did not present with verbal and nonverbal communication deficiencies associated with autism.

40. Dr. Gaines stated in his report that ASD requires deficits in social communication, social interaction, and restricted, repetitive patterns of behavior. Dr. Gaines concluded Claimant did not meet the criteria requiring deficits in social-emotional reciprocity, in nonverbal communicative behaviors used in social interaction, and in developing, maintaining, and understanding relationships.

41. Dr. Gaines found that Claimant met the criterion requiring stereotyped or repetitive motor movements, even though he did not observe Claimant show any

restricted and repetitive behaviors associated with autism, because Mother had reported that Claimant often flapped her hands and spun.

42. Dr. Gaines found that Claimant partially met the criterion requiring insistence on sameness, as Mother reported Claimant liked to watch movies repeatedly.

43. Dr. Gaines found that Claimant did not meet criteria requiring highly restricted, fixated interests, as he did not observe Claimant engage in any intense interests regarding any toys or other subjects.

44. Dr. Gaines found that Claimant met the criterion requiring hyper- or hyporeactivity to sensory input, as Mother reported Claimant was sensitive to touch or texture.

45. Dr. Gaines stated that Mother had reported to him that Claimant engaged in behaviors she described as autistic in nature, but Mother also described Claimant as having aspects of ADHD and a possible mood condition, which Dr. Gaines concluded could serve as alternative explanations for Claimant's symptoms. Dr. Gaines reiterated that testing did not show significant autistic characteristics. He noted that Claimant was able to demonstrate social and emotional functioning during the testing and where she had difficulties describing emotional experiences, Dr. Gaines concluded such difficulties were secondary to emotional difficulties associated with a mood issue. He also stated the following:

Mother reported that other doctors have identified [Claimant] with Autism, but other than the social work evaluation that used mother's report and DSM-V category list to identify Autism, I could find no actual evaluation or

assessment that confirmed that [Claimant] has been identified with an Autistic Disorder.

(Ex. 9, p. 5.)

46. Dr. Gaines concluded Claimant may require reconsideration of an autistic condition or reinterpretation of her symptoms in the absence of other mental health explanations for her behavior, and recommended that she undergo a mental health evaluation. Dr. Gaines also recommended that Claimant receive behavior management interventions, and that she participate in a regular education program with support services as needed.

47. Dr. Bienstock reviewed Dr. Gaines' psychological report and noted that it was comprehensive, in that it showed that Dr. Gaines reviewed Claimant's previous psychological and psychoeducational records, administered a number of tests, engaged in observations, and interviewed Mother. Dr. Bienstock agreed with Dr. Gaines' findings that Claimant did not have ASD, as they were consistent with the results of the tests he administered, the observations he made, and with the findings of previous comprehensive reports, including Claimant's psychoeducational report and the psychological report Dr. Bienstock completed in 2013.

Pediatric Learning and Development Clinic Report

48. On October 10, 2019, Marvin Tan, MD., of Kaiser Permanente's Pediatric Learning and Development (PLAD) clinic, evaluated Claimant and prepared a report. Dr. Tan noted that Claimant was diagnosed with autism when she was two-years-old by "an outside psychologist . . . (Nikki Palmer)," and that Claimant had an "IEP . . . under Autism" (Ex. 10, p. 2.) Dr. Tan also stated Claimant "was also diagnosed with autism by the regional center at the age three." (*Ibid.*) He also noted that the Social

Security Administration diagnosed Claimant with ASD and Tourette's Syndrome. Dr. Tan received most of the information for the evaluation from Mother.

49. Dr. Tan conducted no independent testing, but rather applied each criterion of ASD as set forth in the DSM-5, and determined, primarily from Mother's reporting, that Claimant suffered from ASD. Specifically, with respect to the DSM-5 ASD criterion requiring persistent deficits in social communication and social interaction across multiple contexts, Dr. Tan found that Claimant presented with deficits in social-emotional reciprocity, deficits in nonverbal communicative behaviors used for social interaction, and deficits in developing, maintaining, and understanding relationships. In support of his conclusion, Dr. Tan noted, based on Mother's report, Claimant was in her "own world," had poor eye contact as a toddler, and she did not have any consistent friends as children would rather not play with Claimant. (Ex. 10, p. 4.)

50. With respect to the DSM-5 ASD criterion requiring restricted, repetitive patterns of behavior, interests, or activities, Dr. Tan found that Claimant engaged in stereotyped or repetitive motor movements, insisted on sameness, maintained highly restricted, fixated interests that were abnormal in intensity, and demonstrated hyper- or hyporeactivity to sensory input. In support of his conclusion, Dr. Tan noted, based on Mother's report, that Claimant engaged in repetitive humming, squealing, screaming, and spinning, lined up objects, demonstrated difficulty changing routines, liked to watch certain shows or videos repeatedly, and exhibited a high pain tolerance.

51. Dr. Tan conducted behavioral observations of Claimant and noted Claimant made good eye contact with him, responded to questions in complete sentences, but noted she was very active. He also noted Claimant made repetitive

noises and squeals. Dr. Tan also diagnosed Claimant with ASD, and stated, in part, the following:

Although [Claimant] did not exhibit consistent ASD features today, that does not rule out a diagnosis since she does have a history of significantly atypical social development as well as a prior diagnosis from an outside provider.

Mom will bring copies of outside assessments that document [Claimant's] early development and diagnosis.

Once reviewed we can confirm her diagnosis.

(Ex. 10, p. 5.)

Criticism of PLAD Clinic Report

52. Dr. Bienstock reviewed Dr. Tan's PLAD report and disagreed with his diagnosis of ASD, as it was based on incorrect and unsubstantiated information. Dr. Bienstock explained at hearing that Dr. Tan's report states that Claimant received an ASD diagnosis from Nikki Palmer, but that information was not consistent with the records. No psychological evaluation report or any other diagnostic document from Nikki Palmer existed in which she diagnosed Claimant with ASD. Additionally, despite Dr. Tan's assertion to the contrary, Claimant had no IEP under the category of autistic-like behaviors. Dr. Bienstock also noted Dr. Tan performed no independent testing, but rather accepted Mother's account of Claimant's symptoms and behaviors without subjecting Mother's information to confirmation. Dr. Bienstock also criticized Dr. Tan for diagnosing Claimant with ASD, even though he admitted in his report that during his observation, Claimant presented no features consistent with ASD, and he did not

mention gathering prior information that showed Claimant exhibited such symptoms in other settings. Dr. Bienstock considered Dr. Tan's diagnosis invalid, as it was rendered inconsistent with the best standards, given Dr. Tan failure to administer measures, review documents and previous testing, and did nothing to corroborate Mother's account.

Interdisciplinary Assessment Team

53. In December 2019, the Service Agency's Interdisciplinary Assessment Team (Team) convened and reviewed, among other things, Dr. Bienstock's May 15, 2013 psychological evaluation report, the August 8, 2019 psychosocial assessment report, the school district's psychoeducational assessment report, Claimant's IEP, the August 8, 2019 letter from Mr. Iqbal of Eye Cue Mental Health, and Dr. Gaines' September 27, 2019 psychological evaluation report. The Team determined Claimant did not have a developmental disability, and that Claimant's psychological testing indicated that Claimant's cognitive functioning was within the average range.

54. Even though the Team determined Claimant did not qualify for regional center services, given her absence of a developmental disability, the Team made several recommendations. Specifically, the Team recommended that Claimant be placed in an appropriate educational setting, that she undergo an evaluation for ADHD or Mood Disorder, that she participate in a social or recreational program, and maintain routine medical and dental care. On December 19, 2019, the Service Agency sent Mother a letter stating the same.

Mother's Testimony

55. At hearing, Mother explained that Claimant had undergone multiple psychiatric assessments, and had been diagnosed with ASD, Asperger's, and Tourette's

Syndrome. Mother stated that Claimant flaps her arms up and down, spins in circles two or three minutes at a time, lines up items, pinches herself, and grunts.

56. Mother testified Claimant was verbal and made good eye contact, but believed Claimant mastered those skills as a result of Mother's relentless work to help Claimant get to that point.

57. Mother testified that the Social Security Administration evaluated Claimant and diagnosed her with ASD and Tourette's Syndrome, and, as a result, Claimant receives social security benefits. Mother explained that Claimant has been receiving such benefits since 2013 or 2014, and is required to be reevaluated annually by psychologists contracted by the Social Security Administration. Mother was unable to secure any social security documents to submit to the Service Agency or to proffer at hearing, due to the termination or delay in services stemming from the COVID-19 pandemic.

Credibility Findings³

58. Dr. Bienstock was a credible expert witness, as she was thorough, knowledgeable, comprehensive, and had a good command of all the reports reviewed

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

Evidence Code section 780 relates to credibility of a witness and states, in pertinent part, that a court "may consider in determining the credibility of a witness

regarding Claimant's eligibility. Mr. Iqbal was also a credible witness, even though he was just given one hour's notice to prepare and testify at hearing. However, Dr. Bienstock's wealth of experience and training far exceeded that of Mr. Iqbal, in that Dr. Bienstock has been a licensed clinical psychologist for more than 20 years, while Mr. Iqbal has been a licensed clinical social worker for fewer than three. During that time,

any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (b) The character of his testimony; . . . (f) The existence or nonexistence of a bias, interest, or other motive; . . . (h) A statement made by him that is inconsistent with any part of his testimony at the hearing; (i) The existence or nonexistence of any fact testified to by him. . . ."

The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And the testimony of "one credible witness may constitute substantial evidence," including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) A fact finder may disbelieve any or all testimony of an impeached witness. (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671.)

Dr. Bienstock has developed an impressive expertise in the area of ASD and other neurological disorders, evidenced by her specialized training in the area.

59. In light of the above, Dr. Bienstock's testimony is credited over that of Mr. Iqbal, and her opinions are afforded great weight.

60. Mother was a credible witness, as she testified in a clear, concise, and straightforward manner regarding her observations of Claimant's behaviors, and as a valuable historian of Claimant's development. However, Mother's accounts were sometimes inconsistent with the behaviors described in multiple psychological reports and in Claimant's psychoeducational report. As such, Mother's testimony is afforded limited weight.

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 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 her to prove by a preponderance of the evidence that she meets the criteria for eligibility. (*Lindsay v. San Diego County 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 (j)(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 she suffers from a "substantial disability," Claimant must show that her 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. Here, the evidence did not establish that Claimant has significant functional limitations in at least three areas of major life activity, as described in Legal Conclusion 5. While Claimant has limitations in her receptive and expressive language, as evidenced by the results of the Vineland-II, in that Claimant scored in the mild range of deficiency, no credible evidence was proffered demonstrating Claimant suffered significant functional limitations in learning, self-care, mobility, or self-

direction. Additionally, given Claimant's young age, the record contains no evidence concerning Claimant's capacity for independent living or economic self-sufficiency.

9. The evidence also did not establish that Claimant 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. The record firmly established, through the testimony of Dr. Bienstock and Dr. Gaines' psychological evaluation report, that Claimant had no ASD, and neither party presented evidence demonstrating that Claimant suffered from an Intellectual Disability, Cerebral Palsy or Epilepsy.

10. Despite Mother's claims to the contrary, she proffered no credible evidence demonstrating that Claimant has ASD. While both Mother and Mr. Iqbal proffered testimony setting forth their belief that Claimant suffers from ASD, Claimant proffered no credible evidence stating the same. Dr. Bienstock persuasively discredited Mr. Iqbal's and Dr. Tan's respective reports, as they contained no independent testing and were based primarily on Mother's account without any reference to substantiating records, or, in Dr. Tan's case, reference to documents that did not exist. 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. (Factual Findings 4 through 60.)

11. Claimant proffered no evidence demonstrating she suffers from Cerebral Palsy, Epilepsy, or an Intellectual Disability. 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).)

12. 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.

13. The presence of adaptive deficits alone is not sufficient to establish Intellectual Disability or fifth category eligibility. (*Samantha C. v. State Dept. 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 that she 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.

14. 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. State Dept. of Developmental Services (Ronald F.)*, (2017) 8 Cal.App.5th 84, 98.)

15. Claimant presented no evidence establishing she meets the second prong of the fifth category.

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16. Based on the foregoing, Claimant failed to establish by a preponderance of the evidence that she is eligible for regional center services under the Lanterman Act under the qualifying category of ASD, or under any other qualifying category. As such, Claimant's appeal shall be denied. (Factual Findings 4 through 60; Legal Conclusions 1 through 15.)

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.