

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

**In the Matter of the Fair Hearing Request of:**

**CLAIMANT**

**vs.**

**NORTH LOS ANGELES COUNTY REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2020030275**

**DECISION**

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

Claimant, who was not present, was represented by his foster mother.<sup>1</sup>

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<sup>1</sup> The names of claimant and his family are omitted to protect their privacy.

North Los Angeles County Regional Center (service agency) was represented by Jimmy Alamillo, Contract Officer.

## **ISSUE**

Is claimant eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

## **EVIDENCE RELIED UPON**

In reaching this Decision, the ALJ relied upon service agency exhibits 1 through 28, as well as the testimony of Sandi Fischer, Ph.D., and claimant's foster mother.

## **SUMMARY**

Claimant has not been diagnosed with intellectual disability, autism, epilepsy, or cerebral palsy. He has intellectual deficits and borderline functioning in some areas suggestive of a fifth category condition. But claimant also has a history of academic, intellectual, and adaptive functioning in the low-average-to-average range. He also has experienced other challenges that may be impeding his intellectual ability, including an abusive and turbulent early childhood, attention deficits, and mental health issues. The weight of the evidence, at this early and evolving time in claimant's life, is insufficient for him to meet his burden of establishing by a preponderance of the evidence that he has a fifth category condition. His appeal therefore is denied.

## 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.)<sup>2</sup>

2. Claimant is a seven-year-old boy who was referred to the service agency for an eligibility determination in August 2019. (Ex. 14.) The service agency thereafter conducted an intake and psychological evaluation of claimant.

3. On February 11, 2020, the service agency issued a Notice of Proposed Action, in which claimant's foster mother was advised that service agency staff concluded claimant was not eligible for regional center services because he did not have a qualifying developmental disability. (Ex. 12.)

4. On February 26, 2020, a Fair Hearing Request was submitted to the service agency by claimant's foster mother, which contained a request for a hearing to appeal the service agency's denial of services. (Ex. 1.)

5. This matter initially was set to be heard on April 23, 2020. However, the hearing was continued to the instant date due to the COVID-19 pandemic. (Ex. 1.)

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<sup>2</sup> Undesignated statutory references are to the Welfare and Institutions Code.

## **Claimant's Background and Early Development**

6. Claimant is a ward of the court and currently lives in foster care with his sister in the home of his foster mother and her sister. Claimant's foster mother's adopted son and other foster children also live in the home. The parental rights of claimant's biological parents have been terminated. Claimant's foster mother is in the process of adopting claimant. (Ex. 9.)

7. Claimant's early developmental history is unknown. Claimant's biological parents were neglectful and/or abusive and are not a viable source of information. His early childhood also was turbulent, in that claimant was placed in a few different foster homes, and monitored by several different social workers, before he was placed with his current foster mother in January 2015.

8. Claimant's foster mother describes his primary problems as follows. Claimant is sometimes aggressive with the other children in the home, i.e., he hits, bites, pushes, kicks, scratches, yells, and spits. Claimant hides and steals food, which has led to him over-eating to the point of having pain and discomfort. He also "poops on himself" and "puts poop on walls and covers." Claimant also lacks safety awareness, in that he wanders and escapes from secure settings, including the car. He also has a history of exiting his room window to sit on the roof. (Exs. 3 & 9.)

## **Claimant's Prior Developmental Evaluations and Services**

9. In 2014, claimant's prior foster parents took him for developmental evaluations by two different children's service providers, Square One Diagnostic and Enriched Learning Services. (Exs. 20 & 21.) At that time claimant was less than two years old. Both entities found claimant's cognitive skills to be average-to-low average,

but that he had significant delays in motor functioning, communication, adaptive functioning, and social-emotional ability. (*Ibid.*) Enriched Learning Services staff believed claimant may have been suffering from post-traumatic stress disorder (PTSD) and recommended treatment. (Ex. 21.) As a result of these evaluations, claimant was deemed eligible for services under the Early Start program.

10. As part of his Early Start programming in 2015, claimant was seen by a speech and language pathologist (ex. 22) and a physical therapist (ex. 23). By this time, claimant had been placed with his current foster mother. The speech and language pathologist noted claimant did not demonstrate symptoms associated with autism, but found his primary problem was a receptive language delay. (Ex. 22.) The physical therapist noted claimant showed significant signs of stress, and that his gross motor skills were significantly delayed. (Ex. 23.)

11. In 2016, claimant was nearing the end of his Early Start programming. He was receiving early childhood developmental services from Community Therapies. The provider noted that by the age of 32 months, claimant's cognitive ability was appropriate for his age, but that he was suffering from social delays. (Ex. 24.) By age 34 months, the provider noted claimant did not display symptoms associated with autism. (Ex. 25.) It was also noted that in the prior year claimant significantly improved in his cognitive, motor, and adaptive skills. (Ex. 25.) However, a speech and language therapist working with him noted that claimant was engaging in maladaptive behaviors, which was interfering with his services. (Ex. 26.)

### **Claimant's 2017 Service Agency Intake and Evaluation**

12. In April 2017, when claimant was four years old, he was referred to the service agency for an eligibility intake and evaluation under the Lanterman Act. The

primary reason for the referral was to rule out whether claimant had autism or was intellectually disabled. (Exs. 2 & 3, p. 1.)

13. In August 2017, claimant was given a social assessment by a service agency intake specialist. (Ex. 3.) Claimant's foster mother advised that claimant's primary problems were behavioral and emotional. Claimant also appeared somewhat delayed in some areas of cognition. It also was noted that claimant found stressful monitored visits with his biological father. (Ex. 3.)

14. A. On September 15, 2017, claimant was referred for a psychological evaluation by Amalia Sirolli, Ph.D. The primary problem noted by claimant's foster mother was claimant's self-injurious behaviors, mostly related to visits with his biological mother.

B. Cognitive testing administered by Dr. Sirolli resulted in variable scores, some in the average range, some low average, and some showing mild intellectual disability. Adaptive functioning test scores were in the low or low average range. Dr. Sirolli linked those lower test scores to the fact that claimant "has a history of multiple placements and reported difficulties with visits [with his biological parents]." (Ex. 4, p. 7.) The results of standard autism tests, along with her observations of claimant during the evaluation, led Dr. Sirolli to conclude there was minimal evidence of claimant having autism.

C. Dr. Sirolli diagnosed claimant with Speech Sound Disorder, and recommended that he also be evaluated by a mental health professional. (Ex. 4, p. 7.) Because claimant had significant deficits in his verbal functioning and had trouble focusing, Dr. Sirolli believed his lower cognitive scores likely did not indicate that claimant had borderline intellectual functioning. (*Ibid.*) Nonetheless, Dr. Sirolli

recommended that claimant “be reassessed in the future should it be necessary, based on his cognitive functioning as he is exposed to further schooling.” (*Ibid.*)

15. Based on the above intake and evaluation, the service agency found claimant ineligible for services.

### **Claimant’s 2018 Mental Health Evaluation**

16. In July 2018, claimant was referred to the Children’s Center of Antelope Valley (CCAV) for mental health services. (Ex. 5.) After an intake and assessment, claimant was diagnosed with Conduct Disorder and Anxiety Disorder. (*Id.*, p. 16.) Dr. Sandi Fischer, a member of the service agency’s standing interdisciplinary eligibility determination team, testified that the diagnosis of Anxiety Disorder is usually used for adults and was “shocking” to see given to a five-year-old. CCAV recommended that claimant receive comprehensive wraparound services and a therapist to address his mental health and emotional problems. (*Ibid.*) Dr. Fischer considers this a high level of treatment.

### **Claimant’s 2019 Special Education Services**

17. In early 2019, claimant was assessed for special education services. (Ex. 7.) Claimant’s various academic skills were scored in the low average, low, and very low ranges. (Exs. 7 & 6, p. 3.) His cognitive non-verbal ability score was within the average range. (*Ibid.*)

18. In April 2019, claimant was deemed eligible for special education services under the category of specific learning disability. (Ex. 6.) An individualized education program (IEP) was developed for him. (*Ibid.*) Claimant was assigned to a general

education classroom and scheduled to receive 60 minutes of special academic instruction per month. (Ex. 6.) Dr. Fischer testified that level of services was insufficient to adequately address claimant's deficits.

19. Claimant's school district later determined that although claimant would remain in a general classroom, his services would be increased to 90 minutes per day provided on a "pull out" basis outside of the classroom. (Ex. 27.) The reason for the increase in services was recognition that claimant had auditory processing and attention deficits that impeded his progress in the curriculum. (*Ibid.*) Dr. Fischer believes that claimant would be better served in a special day class (SDC) given his deficits.

### **Claimant's Current Service Agency Intake and Evaluation**

20. On August 19, 2019, the service agency received a referral concerning claimant from the agency involved in his foster care. (Ex. 14, p. 1.) Service agency staff noted claimant had been denied services in 2017, but decided to "redetermine" his eligibility. (Ex 9, p. 1.)

21. On October 4, 2019, claimant and his foster mother met with service agency Intake Coordinator Beatriz Oseguenda for a social assessment. (Ex. 9.) Ms. Oseguenda noted claimant had been diagnosed with attention deficit hyperactivity disorder (ADHD). (*Id.*, p. 1.) At the end of the intake process, Ms. Oseguenda recommended claimant's referral for medical and psychological evaluation. (*Id.*, p. 5.)

22. On November 17, 2019, Margaret Swaine, M.D., reviewed claimant's file. (Ex. 10.) Dr. Swaine found no evidence suggesting claimant has been diagnosed with cerebral palsy or epilepsy. (*Ibid.*)

23. A. The service agency referred claimant for a psychological evaluation by Brigitte Griffin, Psy.D., a licensed clinical psychologist. Dr. Griffin saw claimant on January 21, 2020, at which time she administered a series of tests, observed claimant's behavior, and interviewed claimant and his foster mother. She also reviewed pertinent records. Dr. Griffin wrote a report of her findings. (Exs. 11 & 28.)

B. Dr. Griffin concluded the results of claimant's cognitive testing did not meet the criteria for intellectual disability. For example, claimant's full-scale IQ score of 79 reflected functioning in the borderline range, but was only one point below low average. There also were various tests that demonstrated a relative strength in some areas measuring average ability. The same was true of claimant's adaptive functioning. (Ex. 11, p. 4.)

C. Generally accepted autism testing showed claimant demonstrated minimal evidence of autistic tendencies. (Ex. 11, p. 5.)

D. While Dr. Griffin noted claimant's borderline cognitive test scores, she also noted a number of other conditions likely to impede claimant's ability, such as that his mother had a history of mental health challenges, he had suffered stress and regression after visiting his biological parents, he had at least three foster placements, he struggled with a range of maladaptive behaviors, and he displayed limited ability to focus during the testing and evaluation. (Ex. 11, p. 7.)

E. Based on the above, Dr. Griffin made a provisional diagnosis of Borderline Intellectual Disorder and a full diagnosis of ADHD;<sup>3</sup> she also recommended that various other mental health maladies be ruled out, including PTSD. (Ex. 11, p. 7.)

24. The service agency's interdisciplinary eligibility determination team (team) met and considered claimant's case on or about February 10, 2020. (Ex. 14, p. 3.) Based on the information discussed above, as well as the other information contained in claimant's file, the team concluded claimant did not have autism, intellectual disability, or any other eligible condition. (Exs. 14, p. 3 & 12.) Dr. Fischer testified that she and her colleagues specifically considered whether claimant had a fifth category condition, given his provisional diagnosis of Borderline Intellectual Disorder discussed above. However, the team concluded claimant did not display the requisite characteristics to warrant finding that he had a fifth category condition.

25. A. Dr. Fischer discussed in her testimony the guidelines developed by the Association of Regional Center Agencies (ARCA) for determining fifth category eligibility, which the team utilized when considering claimant's situation. (Ex. 17.)

B. The ARCA guidelines suggest a person like claimant with a borderline IQ of 79 is more similar to a person of low average intelligence than mild intellectual disability. (Ex. 17, p. 2.)

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<sup>3</sup> A provisional diagnosis is one in which the diagnostician is not certain of the diagnosis because more information is needed; it is viewed as a "temporary" diagnosis until further information is received.

C. The ARCA guidelines also suggest that borderline intellectual functioning needs to show stability over time to warrant a fifth category determination, and, for that reason, young children who display inconsistent cognitive functioning (in claimant's case shown by his variable test scores) "should be viewed with great caution." (Ex. 17, p. 2.)

D. The ARCA guidelines also suggest adaptive deficits that can be explained by psychiatric conditions (in claimant's case ADHD, possible PTSD and/or Anxiety Disorder), socio-cultural deprivation (in claimant's case abusive parents and an initially unstable foster home situation), and poor motivation (in claimant's case focus and attention deficits) also should be viewed with caution. (Ex. 17, p. 3.)

E. The ARCA guidelines also suggest that a person with a fifth category condition requires treatment or services similar to an individual who has an intellectual disability. (Ex. 17, p. 3.) Claimant has been evaluated by countless childhood developmental service providers, special education staff, and other service agencies, and there is no evidence suggesting he requires such treatment or services.

26. Dr. Fischer also relied on her prior experience working with foster children like claimant who have a history of abuse and neglect. In her experience, it is not uncommon for such a child's IQ still to be unstable at the age of seven or eight; once that foster child remains in a stable environment for a long period of time, she has seen IQ scores rise dramatically and stabilize.

27. Based on the above, Dr. Fischer concludes that claimant does not have a fifth category condition.

## **Claimant's Evidence**

28. Claimant's foster mother testified that claimant has "been through a lot" in his short life. He "does not know what is going on at school." She believes the school should provide him with more special education services. She agrees with Dr. Fischer that claimant should be in an SDC, not in a general education classroom.

29. Claimant's foster mother testified that claimant currently takes psychiatric medications. He still receives wraparound services for his behavior and mental health issues. He has been diagnosed with ADHD. Claimant also is in therapy at the Tarzana Treatment Center. He sees a psychologist there weekly and a psychiatrist monthly.

30. Claimant's foster mother conceded in her testimony that no service provider, developmental evaluator, or school staff member has told her claimant is autistic or has an intellectual disability.

## **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 foster mother 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 a fifth category condition. (§ 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.*, pp. 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 an Eligible Condition?**

### **AUTISM**

5. The Lanterman Act and its implementing regulations contain no specific definition of the neurodevelopmental condition of "autism." However, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), which came into effect in May 2013, provides autism spectrum disorder (ASD) as the single diagnostic category for the various disorders previously considered when deciding whether one has autism. (Ex. 15.) Therefore, a person diagnosed with ASD should be considered someone with the qualifying condition of "autism" pursuant to the Lanterman Act.

6. In this case, no qualified service provider or expert has diagnosed claimant with ASD. In fact, the two clinical psychologists to whom claimant was referred by the service agency both concluded there is little evidence suggesting claimant has autism. (Factual Findings 1-30.)

### **INTELLECTUAL DISABILITY AND OTHER DIAGNOSABLE CONDITIONS**

7. The qualifying conditions of intellectual disability (formerly referred to as "mental retardation"), epilepsy, and cerebral palsy require a diagnosis by a competent professional, such as a medical doctor, psychiatrist, or psychologist. Claimant has never been diagnosed with any of these conditions. (Factual Findings 1-30.)

## **A FIFTH CATEGORY CONDITION**

8. The fifth category 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).)

9. A. In this case, there is evidence suggesting claimant may have a fifth category condition. Primarily, when the service agency first considered his eligibility in 2017, Dr. Sirolli found claimant showed borderline intellectual functioning in some areas. For that reason, Dr. Sirolli recommended reassessing claimant’s cognitive functioning in the future. After two years of school, claimant was reassessed by Dr. Griffin in early 2020. Dr. Griffin gave claimant a provisional diagnosis of Borderline Intellectual Disorder, even more suggestive of a mild intellectual disability consistent with a fifth category condition.

B. However, claimant’s average-to-low average performance in various academic, cognitive, and adaptive tests over the years suggest he is probably a person of low average intelligence rather than one with a mild intellectual disability. As the ARCA guidelines suggest, a person with a fifth category condition would likely have borderline cognitive functioning across all domains, not just some.

C. In addition, many of claimant’s evaluators who have seen him in the last several years have noted there are many active processes which probably explain claimant’s poor performance at school and in cognitive/adaptive testing. These include claimant’s receptive language delay and Speech Sound Disorder, behavior and mental health problems (including possible Anxiety Disorder and PTSD), his turbulent early childhood, and his poor focus. As the ARCA guidelines also suggest, and Dr. Fischer

testified, it is not likely that a young child subject to these other problems while still stabilizing has a fifth category condition.

D. Finally, it must be noted that Dr. Griffin's Borderline Intellectual Disorder diagnosis is only provisional. Such a temporary diagnosis signals Dr. Griffin is unsure and needs additional information; Dr. Griffin linked her hesitation to the other processes described above. Moreover, Dr. Fischer, the only expert who testified or provided evidence concerning the fifth category condition in this case, concluded that, for many of the above reasons, claimant does not have a fifth category condition. In a sense, claimant is relying on the service agency's evidence to prove his case, but as summarized above, the service agency's evidence indicates otherwise.

10. Under these circumstances, claimant failed to meet his burden of proving that he has a fifth category condition at this time. (Factual Findings 1-30.)

### **Is Claimant Eligible for Services?**

11. Since claimant failed to establish he has a qualifying developmental disability, he is not eligible for regional center services under the Lanterman Act. (Factual Findings 1-30; Legal Conclusions 1-10.)

12. However, as noted above, claimant is very young and still stabilizing at home and school. While his home situation is likely to remain stable, claimant has only received special education services for a short period, at a level which is arguably inadequate to address his cognitive needs. As Dr. Sirolli recommended three years ago, and Dr. Griffin more recently, claimant's intellectual functioning should continue to be monitored. Should he still display a Borderline Intellectual Disorder, or more

severe intellectual deficits, after more time in school and stabilizing at home, he should again be referred to the service agency for an intake and evaluation.

## **ORDER**

Claimant's appeal is denied. Claimant is not eligible for services under the Lanterman Developmental Disabilities Services Act at this time.

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.