

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2020040209

DECISION

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on June 3, 4, and 10, 2020.

Claimant's biological great aunt who became his adoptive mother (Mother) represented Claimant.¹ 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 June 10, 2020.

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

ISSUE

Is Claimant eligible to receive services and supports from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), pursuant to the eligibility category of Autism Spectrum Disorder (ASD)?

EVIDENCE

Documents: Service Agency (Exhibits 1 through 9); Claimant (Exhibits A and B)

Testimony: On behalf of Service Agency, Kaely Shilakes, Psy.D and Melissa Bailey, Psy.D; on behalf of Claimant, Mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a five-year-old boy who was referred to the Service Agency by Mother who contends Claimant suffers from ASD. Mother applied Claimant for regional center services in 2019, 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.

2. On March 10, 2020, 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 March 25, 2020, Mother executed a Fair Hearing Request on Claimant's behalf to appeal the Service Agency's decision and to request a hearing. This hearing ensued.

Kedren Mental Health Findings

4. Claimant began receiving therapy from Kedren Community Mental Health Center (Kedren Mental Health) in 2018, just before Claimant turned three-years-old, to address negative and persistent behavioral issues. Shaina Lever, a licensed clinical social worker of Kedren Mental Health and who served as Claimant's therapist, prepared a report on June 28, 2019. The report stated that a clinical psychologist from Department of Mental Health Specialized Foster Care Program (DMH SFCP) referred Claimant to Kedren Mental Health's Parent Child Interaction Therapy (PCIT) program. The PCIT is a treatment program addressing behavioral problems in children, including aggression, non-compliance, defiance, and temper tantrums. The clinical psychologist also recommended Claimant undergo an occupational therapy evaluation.

5. Ms. Lever administered the Infancy, Childhood Relationship Enrichment Initial Assessment, the Ages & Stages Questionnaires (ASQ), and the Ages & Stages Questionnaires Social Emotional 2 (ASQ: SE 2), and concluded Claimant met the diagnostic criteria for "Regulation Disorder of Sensory Processing [RDSP] Type B:

Negative/Defiant (412).” (Exhibit 4.) Specifically, Ms. Lever found that Claimant met all three criteria for RDSP Type B: (1) sensory processing difficulties, such as sensitivity to noise, touch, bright lights, smell textures, and movement in space; (2) exhibiting motor patterns involving the seeking of repetitive sensory activities such as swinging, jumping up and down on a bed, or hyperactivity; and (3) engaging in specific behavioral patterns, including negative behaviors, such as negative responses to parental requests, frequent temper tantrums, angry outbursts, aggressive behavior, defiance, controlling behavior, preference for repetition, difficulty adapting to new routines, compulsiveness, perfectionism, avoidance, or slow engagement in new experiences or sensations.

6. Ms. Lever noted an occupational therapist began working with Claimant to provide interventions to address his sensorimotor differences and self-regulation needs.

Initial Psychoeducational Assessment

7. Ayana Angeletti, School Psychologist with the Inglewood Unified School District (District), performed an initial psychoeducational assessment on Claimant when he was four years and one-month old, and prepared a written report dated July 15, 2019. The Los Angeles Department of Children and Family Services recommended that District perform a full assessment due to Claimant’s chronic behavior associated with his diagnosis of RDSP. Ms. Angeletti described Regulation Disorder of Sensory Processing as a disorder in children causing difficulty in regulating one’s behavior due to hypersensitivities to sensory input. Ms. Angeletti assessed all areas of suspected disability. Mother told Ms. Angeletti that her primary concern involved Claimant’s defiant and aggressive behaviors.

8. Ms. Angeletti's assessment consisted of a review of records, observations, and the administration of a Parent Interview Questionnaire (Informal), the Developmental Profile-3 (DP-3) (Parent), the Cognitive Assessment of Young Children (CAYC), the Conner's Early Childhood (EC), and the Gilliam Autism Rating Scale-3 (GARS-3).

9. Ms. Angeletti noted that in addition to RDSP, Claimant had been diagnosed with Fetal Alcohol Syndrome (FAS). She also noted Claimant suffered from asthma, itchy skin, tics and twitches, and allergies.

10. Ms. Angeletti performed a formal assessment in a classroom away from other classmates, and Claimant appeared happy and excited to participate in the assessments. Throughout the assessment, Claimant engaged with preferred toys and activities, pausing to answer Ms. Angeletti's questions, "almost as if he was multi-tasking." (Exhibit 5, p. 3.) Ms. Angeletti also stated the following:

He easily completed preferred tasks; more challenging tasks required more prompting and praise to keep him engaged. As the assessment became more challenging, [Claimant] did not seem to become frustrated but appeared simply disinterested. However, when coaxed, he easily completed tasks that are typically more difficult for students his age. [Claimant] worked for about 20-30 minutes during the testing session. [Claimant] appeared to work with adequate effort to his ability level between breaks.

(Ibid.)

11. In the area of cognitive abilities, Claimant's score on the CAYC fell within the Very Superior range, with an age-equivalence of five-years and five-months of age. His cognitive score on the DP-3, which measured perception, concept development, number relations, reasoning, memory, classification, time concept, and related acuity tasks, fell in the Well Above Average, indicating that Claimant's cognitive skills were beyond the expected level of cognitive ability for his age.

12. In the area of adaptive behavior, Claimant's score on the DP-3, which measured competence, skill, maturity for coping with the environment, and measures ability to complete tasks such as eating, dressing, functioning independently, and utilizing modern technology, fell in the Well Above Average range, indicating Claimant's adaptive skills were beyond the expected level of adaptive behavior development for his age.

13. In the area of communication development, Claimant's score on the DP-3, which measured expressive and receptive communication skills, both verbal and nonverbal, as well as assesses the use and understanding of spoken, written, gestural language, communicative devices (e.g., telephone, computer, etc.) effectively, fell in the Average range, indicating his communication skills were at the expected level of communication development for his age.

14. In the area of social-emotional development, Claimant's score on the DP-3, which measured interpersonal relationship abilities, social and emotional understanding, functional performance in social situations, and the manner in which Claimant related to friends, relative, and adults, fell in the Average range, indicating that Claimant's social-emotional abilities were at the expected level of social-emotional development for his age.

15. Ms. Angeletti administered the GARS-3, which is a screening instrument designed to identify individuals who have severe behavioral problems that may be indicative of autism. Mother completed the GARS survey, the results of which indicated Claimant scored in the Very Likely range for an individual with Autism. Mother reported that Claimant displayed ritualistic or compulsive behaviors, did not seem to understand that people had thoughts and feelings that differed from his, and had temper tantrums when frustrated or when he did not get his way.

16. Ms. Angeletti administered the EC test, which is a thorough and focused assessment of Attention Deficit Hyperactivity Disorder (ADHD), and aids in the early identification of behavioral, social, and emotional problems. On the EC Behavioral Scales, Mother noted "Very Elevated" behavior concerns in the areas of inattention, hyperactivity, defiance, aggressive behavior, temper, social functioning, anxiety, mood, affect, and physical symptoms. (Exhibit 5 at p. 5.) Ms. Angeletti noted that these "Very Elevated" behavior concerns were all behaviors associated with Claimant's diagnosis of RDSP.

17. In the area of gross and fine motor development, Claimant's score on the DP-3, which measured physical development by determining Claimant's ability with tasks requiring large and small muscle coordination, strength, stamina, flexibility, and sequential motor skills, fell in the Well Above Average range, indicating his physical skills were well above the expected level of physical development for his age.

18. Ms. Angeletti concluded Claimant did not meet the eligibility criteria for special education. She stated the following regarding ASD:

[Claimant] scored in the Very Likely range of probability for an individual with autism on the GARS-3 when rated by

parent. He also displays many of the listed behaviors associated with Autism as note by Parent. [Claimant] was evaluated by a Mental Health physician and was NOT diagnosed with Autism. However, [Claimant] was diagnosed with Regulation Disorder of Sensory Processing (a Mental Health disorder in children causing it to be difficult to regulate one's own behavior due to hypersensitivities to sensory input). The associated characteristics of Regulation Disorder of Sensory Processing very closely resemble many characteristics of Autism. However, these chronic behaviors, however severe, do not and have not adversely affected his educational performance and do not impede his access to grade level curriculum. He is actually thriving academically and appears to be Well Above Average in all academic areas. Therefore, he does not meet the eligibility criteria as a student with Autism which impedes his social and academic performance in the classroom.

(Exhibit 5, p. 7.)

Psychosocial Report

19. On November 5, 2019, Tatiana Sosa, Early Start Intake Coordinator, performed a psychosocial assessment on Claimant after Mother brought Claimant to the Service Agency because of concerns related to his behavior. Ms. Sosa assessed and/or reviewed Claimant's family history, birth and early development, medical history, and current functioning and programming in the areas of motor skills, communication skills, social skills, and emotional domain behaviors. Ms. Sosa

recommended Claimant undergo a psychological assessment to determine whether he meets eligibility criteria.

Psychological Evaluation

20. In response to Mother's attempt to obtain regional center services for Claimant, the Service Agency requested licensed psychologist, Melissa Bailey, Psy.D., to perform a psychological assessment of Claimant. Dr. Bailey, who testified at hearing, is licensed in four states, and has been practicing psychology for more than 25 years, particularly in the areas of clinical and developmental psychology. Dr. Bailey is the mother of two children with ASD, and has been performing psychological evaluations assessing developmental disabilities for more than 18 years.

21. Dr. Bailey assessed Claimant on December 17, 2019, December 20, 2019, and February 18, 2020, when Claimant was four-years and seven-months-old. Dr. Bailey evaluated Claimant to determine Claimant's current levels of cognitive and adaptive functioning, and whether Claimant suffered any developmental disabilities, particularly "high-functioning autism," and prepared a written report. (Exhibit 7, p. 1.)

22. Dr. Bailey conducted clinical interviews, reviewed Claimant's records, including Claimant's psychoeducational report, and administered the Wechsler Preschool and Primary Scale of Intelligence-4th Edition (WPPSI-4), the Vineland Adaptive Behavior Scales-3rd Edition (VABS-III), and the Autism Diagnostic Observation Schedule-2nd Edition (ADOS-II).

23. After a review of records and after interviewing Mother, Dr. Bailey noted Claimant was removed from his biological mother's care when he was four-months-old due to neglect. She noted Claimant was possibly exposed to drugs in-utero, and had a

previous diagnosis of FAS, but did not have to spend any time in the neonatal intensive care unit. Claimant reached all milestones within normal limits.

24. Dr. Bailey noted from her interview with Mother that Claimant liked to play with other children, but only on his own terms, and recently pushed a little girl at school because she did not play like he wanted her to, resulting in the little girl suffering a broken arm. Mother reported that Claimant had frequent meltdowns, seemed oblivious to consequences, was very impulsive, and would put himself in danger if left alone. She also reported that Claimant liked to line up his shoes, had a difficult time with a change in routine, did not like certain textures, and when frustrated, he would yell, hit, or bite himself.

25. Dr. Bailey noted that during her initial session with Claimant, Claimant was very loud, extremely active, very impulsive, easily distracted, and had a hard time sitting still, but was able to answer her questions. She noted that Claimant frequently picked at his skin, scratched, and constantly touched his face. Claimant was extremely hyperactive throughout the evaluation, and Dr. Bailey had a difficult time assessing him because of his hyperactivity. In fact, Dr. Bailey was unable to complete cognitive testing because Claimant gave up easily and then refused to participate.

26. During her second session with Claimant, Dr. Bailey administered the ADOS-II, which is a structured communication tool that provides a number of opportunities for the child to interact with the examiner. The ADOS-II has an autism classification that includes autism, autism spectrum, and non-spectrum, and, based on Dr. Bailey's observations, Claimant fell in the non-spectrum classification. Dr. Bailey noted that Claimant was extremely hyperactive, again picked his skin, and made eye contact and looked up when he completed a task. Claimant was very impulsive and grabbed items off of Dr. Bailey's desk.

27. Mother invited two of Claimant's therapists to attend the second session, Sana Lever, LCSW, and Dr. Heidi Tinpas, who is a mental health occupational therapist. When his therapists appeared, Claimant immediately greeted them and then became "somewhat of a show off," became defiant, and required a lot of redirection to stay in his seat. (Exhibit 7 at p. 4.) Claimant made good eye contact and displayed a wide range of affect.

28. Dr. Bailey interviewed Ms. Lever, who reported that she had been Claimant's therapist since he was two years and 11 months old. Ms. Lever shared that Claimant had poor self-regulation skills, was easily distracted, required a lot of movement to attend to any activities, and had a difficult time with transitions. She also reported that Claimant could be demanding with his peers and needed to be in charge. Ms. Lever explained that Claimant has poor frustration tolerance, will lie for no reason, will often sneak and hoard various items.

29. Dr. Bailey interviewed Dr. Tinpas, who reported that she had been seeing Claimant since he was two-years-old. Dr. Tinpas explained that Claimant was a very social child, but had a difficult time managing his emotions, and was defiant. He also engaged in a lot of name-calling and pushing, and tended to be very rigid about what he wanted and how he wanted to do something.

30. In order to assess Claimant's cognitive skills, Dr. Bailey administered the WPPSI-4, which assesses verbal comprehension, visual and spatial skills, fluid reasoning, working memory, processing speed, and a full-scale IQ. Dr. Bailey found that Claimant had a difficult time paying attention and needed maximum help to stay on task, and thus concluded that Claimant's scores were an underestimation of his true abilities. He showed a relative strength in terms of his visual and spatial skills, and a relative weakness in terms of his abilities on similarities and picture concepts.

31. In order to assess Claimant's adaptive skills, Dr. Bailey administered the VABS-III, and Mother served as the informant. The VABS-III assessed Claimant's communication, daily living skills, socialization, and motor skills. Dr. Bailey found Claimant's adaptive functioning to be in the borderline range, with a relative strength in terms of motor skills and communication skills. He showed difficulties with daily living skills and socialization.

32. Dr. Bailey observed Claimant in his classroom at school, and testified she "just tried to be a fly on the wall and not interact with" Claimant. She noted that Claimant was able to follow his teacher's instructions. At no time did Claimant engage in any stereotypical or repetitive behavior, and he was responsive to social smiles. Dr. Bailey also noted Claimant displayed much less hyperactive behavior while she observed him in that structured setting. While he needed redirection from time to time, he did not run around the classroom like he had done in her office.

33. Dr. Bailey determined Claimant did not meet the criteria for ASD as set forth in the Diagnostic Statistical Manual, Fifth Edition (DSM-V). Instead, Dr. Bailey opined that Claimant's symptoms were better explained due to FAS, possible sensory processing issue, and most likely Reactive Attachment Disorder (RAD) due to his neglect at birth. Dr. Bailey noted that most children who have RAD have been neglected or abused in the first five years of life, and demonstrate hoarding behaviors, poor attachments, tend to be extremely hyperactive, and will lie for no reason.

34. Dr. Bailey officially diagnosed Claimant with ADHD and RAD, and noted Claimant's previous diagnosis of FAS. At hearing, Dr. Bailey explained that she attributed Claimant's sensory issues to his ADHD, because children with severe ADHD tended to suffer sensory issues. She also testified that with respect to RAD, she did not make that diagnosis lightly, and noted the disorder featured lying, hoarding, temper

tantrums, anger issues, hyperactivity, and an attachment to strangers or caregivers. Additionally, individuals with RAD have an overall obliviousness to boundaries and consequences, primarily because they did not have an opportunity to bond during their first several months of life. Dr. Bailey concluded Claimant needed “additional assistance in many different areas of life” and recommended that Claimant be referred back to the Department of Mental Health for wraparound services. (Exhibit 7 at p. 10.)

Multidisciplinary Team

35. On February 26, 2020, the Service Agency’s multidisciplinary team met to discuss Claimant’s eligibility. Dr. Kaely Shilakes, Chief Psychologist and Manager of Intake Services, testified at hearing regarding the eligibility process. Specifically, Dr. Shilakes testified regarding the multidisciplinary team’s conclusions based on the information available to it at the time: (1) the report from Kedren Mental Health; (2) Claimant’s psychoeducational assessment; (3) the psychosocial report; and (4) the psychological evaluation report completed by Dr. Bailey. Dr. Shilakes explained that the multidisciplinary team concluded Claimant was not eligible for regional center services because Claimant was not substantially handicapped by an Intellectual Disability, Cerebral Palsy, Epilepsy, ASD, or other conditions similar to Intellectual Disability.

36. Dr. Shilakes noted that the Kedren Mental Health report included no diagnosis of a developmental disability. Additionally, Claimant’s psychoeducational assessment noted that although Mother’s report on the GARS showed a high probability of autism, the assessor’s independent testing did not confirm Mother’s report. Rather, the psychoeducational assessment report noted that Claimant’s cognitive abilities fell in the very superior range, his adaptive skills were well above average, his communication skills fell in the average range, and his social-emotional

development fell in the average range. Dr. Shilakes explained that while the psychoeducational report showed Claimant had elevated scores regarding the presence of ADHD, such a disorder does not constitute a developmental disability.

37. With respect to Dr. Bailey's report, Dr. Shilakes explained that Dr. Bailey was an experienced psychologist who had performed a number of evaluations for the regional center, and agreed with the findings of her report, given the outcome of the assessment tests administered. Dr. Shilakes found the results of the ADOS-II of particular import, as it showed Claimant fell in the non-autism range, and she found that respective results of all of the assessment tests supported Dr. Bailey's finding that Claimant did not meet the DSM-V criteria for ASD.

38. Dr. Shilakes explained that it is clear that Claimant requires assistance to manage his ADHD and negative behaviors, but he does not qualify for regional center services as Claimant does not have a developmental disability, despite his disorders and behaviors.

Claimant's Evidence

ST. JOHN'S PSYCHOLOGICAL EVALUATION

39. On January 30, 2020, Agnesa Papazyan, Psy.D., of the St. John's Well Child & Family Center, Autism Assessment Clinic, conducted a psychological examination of Claimant, when he was four-years and eight months old, to rule-in or rule-out ASD, based on a referral from his treating clinician. Dr. Papazyan prepared a written report dated February 6, 2020.

40. Dr. Papazyan conducted a parent and patient diagnostic review, performed a record review, and administered the ADOS-II, the Autism Spectrum Rating

Scale (ASRS) which Dr. Papazyan distributed to Mother and Claimant's teacher, a Beery Visual-Motor Integration Test (Beery VMI), the Behavior Assessment System for Children, Third Edition (BASC-3) (Parent Report), the VABS-III, and attempted to administer the WPPSI-IV.

41. Dr. Papazyan noted Claimant, per Mother, demonstrated behavioral difficulties, such as physical aggression, struggling with transitions and with following simple, single-step instructions at home and in the community. He also exhibited poor safety awareness, such as grabbing sharp objects without knowledge of the consequences. Additionally, Dr. Papazyan noted Claimant struggled socially, in that he preferred to play alone, struggled to engage in parallel play, did not like to share or take turns, and did not initiate or sustain appropriate social interactions.

42. Dr. Papazyan noted Claimant had notable exposure to substances in-utero, and had been diagnosed with FAS and RDSP. She stated that he engaged in grunting and making random noises, communicated by grabbing objects or grabbing and taking Mother to a desired object, and did not engage in pointing or making eye contact. Dr. Papazyan also stated Claimant was not toilet trained and wore diapers throughout the day. Dr. Papazyan noted Claimant was a very picky eater, as he only ate finger foods, and refused to try new foods, and he experienced sleeping difficulties.

43. Dr. Papazyan noted from a clinical interview with Mother that Claimant met ASD symptom diagnostic criteria, as outlined in the DSM-V. Specifically, in the area of social-emotional reciprocity, Dr. Papazyan noted Claimant struggled with maintaining reciprocal social interactions, did not always understand how to regulate his social and emotional responses with peers, could become aggressive when things failed to go his way, often withdrew, and preferred to play alone. In the area of

nonverbal communicative behaviors used for social interactions, Dr. Papazyan noted Claimant demonstrated inappropriate eye contact during social interactions, failed to respond when his name was called, and had an exaggerated range of expressions. In the area of deficits in developing, maintaining, and understanding relationships, Dr. Papazyan noted claimant struggled significantly with initiating and maintaining social interactions with peers and adults, struggled with sharing or taking turns, demonstrated no desire to initiate or sustain peer interactions, often played alone, and became aggressive when other people were around him.

44. In the area of stereotyped or repetitive motor movements, Dr. Papazyan noted that Claimant did not use words, but rather made random sounds to communicate, engaged in body tensing when upset, engaged in jumping up and down and body flexing. In the area of excessive adherence to routines ritualized patterns of verbal and nonverbal behavior or excessive resistance to change, Dr. Papazyan noted Claimant struggled with changes in his routine, and engaged in rigid behaviors that impacted his functioning.

45. In the area of restricted, fixated interests that are abnormal in intensity or focus, Dr. Papazyan noted Claimant perseverated over loud sounds and engaged in non-functional play that created loud sounds. In the area of hypersensitivity or hyposensitivity to sensory input or unusual interests in sensory aspects of the environment, Dr. Papazyan noted Claimant had a sensitivity to foods, was hypersensitive to certain sounds, refused to be touched by others, engaged in visual inspection of random objects throughout the day, and often put random objects against his face and body. Overall, based on Dr. Papazyan's interview with Mother, Claimant presented with "**notable**" symptoms of ASD. (Exhibit A, p. 4.) (Emphasis in the original.)

46. Dr. Papazyan administered the ADOS-II to assess Claimant's social and communicative behaviors, and noted that the results of the semi-structured play observation revealed deficits in Claimant's social, communication, and behavioral skills. Dr. Papazyan noted these deficits were at a level suggestive of ASD. Dr. Papazyan reported that Claimant struggled with both immediate and sustaining eye contact during the evaluation, with transitioning from the waiting room to the assessment room, demonstrated inattentiveness throughout the assessment, and needed multiple verbal and physical reminders to sustain his attention to tasks. She also noted Claimant demonstrated inconsistencies and delays in his social communication and social interaction abilities during most of her observation. Claimant did not attempt to engage Dr. Papazyan in play, demonstrated limited social responsiveness, struggled with imaginative play, and his social overtures were inappropriate.

47. With regard to social communication, Dr. Papazyan noted Claimant used simple phrases to communicate with the examiner, and often grabbed objects and threw them on the floor. Claimant's behaviors consisted of withdrawal, lack of interest, behavioral refusals, and behavioral aggression. Overall, Dr. Papazyan found Claimant presented with social, communication, and behavioral difficulties at the level suggestive of ASD of moderate symptom severity, per ADOS-II administration.

48. To assess Claimant's adaptive functioning, Dr. Papazyan administered the VABS-III. Claimant's composite scores in the communication, daily living skills, socialization, and motor skills domains fell in the moderately low range. Claimant's scores on the Beery VMI, which measured his motor coordination and visual-motor integration, fell in the average range.

49. In the area of behavior and social emotional functioning, Dr. Papazyan administered the BASC-3, which included a rating scale completed by Mother. The

results of the BASC-3 showed Claimant scored in the clinically significant range in the areas of hyperactivity, aggression, externalizing problems, anxiety, depression, somatization, internalizing problems, attention problems, atypicality, withdrawal, behavioral symptoms index, and adaptability.

50. Dr. Papazyan considered aggression one of Claimant's most significant behavioral and emotional problems, and noted that children who exhibit aggressive behaviors may have inadequacies with problem solving and deficiencies in the specific areas of identifying alternatives, considering consequences, and determining causality. They may also engage in means-ends thinking and have difficulty with seeing other perspectives.

51. Dr. Papazyan administered the ASRS, which is an Autism screening measure, and Mother completed the rating scale thereto. The results placed Claimant in the Very Elevated ASD range, particularly in the areas of social/communication, unusual behaviors, peer socialization, adult socialization, social/emotional reciprocity, atypical language, stereotypy, social sensitivity, behavioral rigidity, and attention/self-regulation. Claimant's teacher also completed a rating scale, the results of which placed Claimant in the Very Elevated ASD range.

52. Dr. Papazyan diagnosed Claimant with ASD requiring substantial support for deficits in social communication and interaction, and support for restricted interests and repetitive behaviors. Dr. Papazyan also noted Claimant needed support to address his poor social pragmatic skills.

53. Dr. Papazyan recommended that Claimant participate in Applied Behavioral Analysis (ABA) and social skills services to address his behavioral, social, and emotional deficits. She also recommended that Claimant undergo a school-based

multidisciplinary evaluation to determine his social, emotional, behavioral, motor, and academic needs. Additionally, Dr. Papazyan recommended Claimant be found eligible for special education services due to his Autism, and should be placed in a special day Autism classroom. Dr. Papazyan also recommended that Claimant undergo a Functional Behavioral Assessment (FBA) in school to assist in addressing Claimant's behavioral difficulties at school. Dr. Papazyan recommended Mother participate in psychoeducational classes at the Service Agency, and noted Claimant would benefit from participation in social skills groups to assist with his social pragmatic skills.

54. The Service Agency's multidisciplinary team did not consider St. John's Psychological Evaluation, as it was not available at the time the team met to discuss Claimant's eligibility for regional center services. In fact, the Service Agency did not become aware of St. John's report until the eve of the hearing. Dr. Papazyan did not testify at the hearing.

CRITICISM OF ST. JOHN'S PSYCHOLOGICAL EVALUATION

55. Dr. Bailey reviewed St. John's report at the hearing, and noted several "troubling" aspects of the report. Specifically, Dr. Bailey explained that Dr. Papazyan's conclusions stemmed primarily from test inventories from Mother, as opposed to personal observations, and Dr. Papazyan indicated she was looking only for ASD, and no other potential disorders.

56. Dr. Bailey noted that she and Dr. Papazyan assessed Claimant during the same relative time period. Yet, Dr. Papazyan stated Claimant preferred to play alone, but Dr. Bailey observed Claimant in her office and in the classroom, and experienced Claimant doing the opposite. Additionally, Dr. Papazyan stated that Claimant grunted or used single words to communicate, which was inconsistent with Dr. Bailey's

experience, as Claimant used full and complex sentences. Mother agreed Claimant spoke in full sentences. Dr. Bailey further explained the results of the VABS-III showed Claimant's expressive language score fell in the average range, which supports her and Mother's observation that Claimant spoke in full sentences.

57. Dr. Papazyan stated Claimant was not toilet-trained and wore diapers, which was inconsistent with Dr. Bailey's understanding. Mother acknowledged Dr. Papazyan was in error when she stated that Claimant was not toilet-trained or wore diapers at the time of Dr. Papazyan's assessment.

58. Dr. Bailey believed, overall, that the behaviors and symptoms Dr. Papazyan attributed to ASD could be applied to individuals with RAD or severe ADHD, particularly aggression.

DCFS MEDICAL EXAMINATION FORM

59. On October 8, 2019, Dr. Lyn Laboriel completed the Department of Children and Family Services' (DCFS) medical examination form concerning Claimant, and stated regarding Claimant's diagnosis of FAS:

[Claimant] was previously diagnosed within the Fetal Alcohol Spectrum Disorders based on presence of ALL the classic dysmorphic facial features of FAS as well as a conformed history of serious prenatal exposure to alcohol and drugs. There was no evidence at the last visit of neurodevelopmental issues based on history of high function developmentally. No evidence of growth impact.

(Ex. 5, p. 1)

60. Dr. Laboriel stated the following regarding the possibility of Autism:

Today, [Claimant] presents as highly gifted cognitively and adaptively by preliminary testing, but struggling with serious impairment of his behavior. Using Gilliam Autism Rating Scale (GARS-3) as reported by his mother, a diagnosis of autism is very likely. Clearly, [Claimant] needs to be assessed ASAP by Regional Center for possible so-called "high functioning" autism. It is important that that diagnosis be carefully considered based on upcoming testing results.

(Ex. 5, p. 1)

61. The Service Agency's multidisciplinary team did not consider the DCFS medical examination form concerning Claimant, as it was not available at the time the team met to discuss Claimant's eligibility for regional center services. In fact, the Service Agency did not become aware of DCFS medical examination form report until the eve of the hearing.

62. Dr. Bailey testified that even if she had known that Claimant's FAS diagnosis had been withdrawn, as reflected in the DCFS medical examination form, her overall conclusions regarding Claimant and her diagnosis of RAD and ADHD would remain the same. Similarly, Dr. Shilakes, who reviewed the document at hearing, testified that the contents therein did not change her opinion regarding Claimant's lack of eligibility for regional center services.

MOTHER'S TESTIMONY

63. Mother testified at hearing and explained that she was Claimant's biological aunt and had been raising him since he was four-months-old. She recently adopted Claimant. Claimant always experienced problems in the areas of behavior and socialization. Claimant often suffered tantrums and "meltdowns," and experienced sensory issues, particularly in the areas of textures, smells, and sounds. When Mother would take Claimant to his medical appointments at St. John's Well Child & Family Center, Claimant often became very agitated. On one occasion, when Claimant was three-years-old, Claimant became destructive and "destroyed the doctor's office." No one could calm down Claimant. As a result, Claimant's doctor referred Claimant for behavior therapy services.

64. Claimant began behavior therapy shortly following his doctor's referral for such services. Claimant's behavior therapist assessed Claimant and recommended Claimant undergo testing to determine whether Claimant had ASD. Dr. Papazyan performed the psychological assessment around the same period in which Dr. Bailey performed her psychological assessment of Claimant, therefore, Dr. Bailey did not have the benefit of Dr. Papazyan's report, test results, and conclusions.

65. Mother firmly believes Dr. Bailey failed to perform adequate testing of Claimant, as she had not read the file that Mother had previously provided to her, demonstrated frustration and impatience toward Claimant, and appeared rushed. Mother also noted the meeting lasted for only 15 minutes, and because of that reason, Mother felt she needed to have other therapists present at the next session to observe Dr. Bailey's assessment of Claimant.

66. In her defense, Dr. Bailey testified at hearing that it was her custom and practice not to review previous records before seeing the child, because she never wanted to be biased when first assessing a child. She explained she would rather reach her own conclusions instead of trusting what other assessors have said or done in the past. Dr. Bailey also denied feeling rushed, frustrated, or exhibiting impatience toward Claimant.

67. With respect to FAS, Mother explained that Claimant was born with no drugs or alcohol in his system, and was “too smart” and high functioning to have such a diagnosis. Consequently, the retraction of the FAS diagnosis was consistent with her experience of Claimant, and Mother asserted that the FAS diagnosis should not have been used to support any portion of Dr. Bailey’s conclusion that Claimant’s behaviors stemmed from FAS.

68. Mother agrees that Claimant has ADHD, but also believes Claimant has ASD “and potentially other things.” Mother is seeking regional center services for Claimant to obtain services that could help address his behavioral and socialization issues.

Credibility Findings²

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

² 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, and other factors 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 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.)

regarding Claimant's eligibility. Dr. Bailey was equally credible, given her extensive years of practice and her wealth of experience, particularly in the area of ASD and other developmental disabilities.

70. In light of the above, the testimony of Dr. Shilakes, the testimony of Dr. Bailey, and the psychological report prepared by Dr. Bailey, are credited over the report of Dr. Papazyan, and their opinions are afforded great weight.

71. Mother was a credible witness, as she testified in a clear, concise, and straightforward manner regarding her observations and experiences of Claimant's behaviors, and as a valuable historian of Claimant's development. However, the results of inventories prepared by Mother that showed a high probability of Autism were inconsistent with observations and test results described in the psychoeducational report and the report prepared by Dr. Bailey. 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 (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. 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. 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. Shilakes and Dr. Bailey's psychological evaluation report, that Claimant did not have ASD, and neither party presented evidence demonstrating that Claimant suffered from an Intellectual Disability, Cerebral Palsy or Epilepsy.

10. While Mother proffered Dr. Papazyan's report stating that Claimant had ASD, the testimony of Dr. Bailey persuasively discredited that report, as the report contained significant errors regarding Claimant's expressive communication skills and his mastery of toilet-training, was based primarily on reports from Mother, and Dr. Papazyan did not consider disorders other than ASD. The Service Agency, on the other hand, proffered evidence from multiple professionals (i.e., Dr. Shilakes and Dr. Bailey), 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 71.)

11. Claimant proffered no evidence demonstrating he suffers from Cerebral Palsy, Epilepsy, an Intellectual Disability, or from a fifth category condition.

12. Based on the foregoing, Claimant failed to establish by a preponderance of the evidence that he 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 71; Legal Conclusions 1 through 11.)

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.