

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**WESTSIDE REGIONAL CENTER, Service Agency.**

**OAH No. 2020050661**

**DECISION**

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter via telephone/videoconference on November 17, 2020. Candice Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC or service agency). Claimant's mother (Mother) represented Claimant, who was present.<sup>1</sup>

Testimony and documents were received in evidence. The record closed, and the matter was submitted for decision at the conclusion of the hearing.

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<sup>1</sup> To preserve confidentiality, neither Claimant nor Mother is identified by name.

## **ISSUE**

Whether Claimant is eligible for regional center services and supports under the qualifying category of "autism" as provided for in the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500, et seq. The presence of "autism" is determined in accordance with the diagnostic criteria and identifying characteristics of Autism Spectrum Disorder (ASD) in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. By Notice of Proposed Action, effective April 30, 2020, WRC informed Mother its Interdisciplinary Team determined Claimant "is not developmentally disabled and therefore not eligible for Lanterman Act services at WRC following age three." (Exh. 1.)
2. On May 15, 2020, Mother, acting on Claimant's behalf, filed a Fair Hearing Request.
3. All jurisdictional requirements are satisfied.

### **Claimant's Background and Early Start Intervention**

4. Claimant is a three-year, seven-month-old male residing with his parents and sibling.

5. Due to concerns about Claimant's speech, language, and fine motor development, at age 13 months old Claimant was deemed eligible for early intervention services provided by WRC under the California Early Intervention Services Act, Government Code section 95000 et seq. (Early Start) until his third birthday. Claimant received speech therapy, occupational therapy, and Applied Behavioral Analysis therapy.

6. The UCLA High Risk Infant Follow Up (HRIF) Program also monitored Claimant's language, communication, motor, and play skills. HRIF referred Claimant to UCLA Developmental Behavioral Pediatrics for evaluation, which included administration of the Autism Diagnostic Observation Schedule (ADOS), Second Edition, Toddler Module. The ADOS is a semi-structured, standardized assessment of communication, reciprocal social interaction, and imaginative play. The ADOS consists of standard activities which allow an examiner to observe behaviors important to the diagnosis of ASD. The ADOS is so highly regarded it is considered the gold standard for assessment for ASD.

7. Over the course of two clinical sessions occurring at HRIF on August 24, 2018 and September 19, 2018, Melissa Harada, M. D. evaluated Claimant. Claimant was 15 months old at the time. Dr. Harada reported Claimant did not use words or word approximations. He said "mm", "ah", "eh", and "heehee". Claimant did not use any gestures to indicate his wants. Claimant had moments of eye contact and shared enjoyment, but those moments were inconsistent and not always modulated. Claimant's spontaneous engagement was inconsistent, his interactions were not sustained, and his play was independent with little social referencing. Claimant mouthed many different toys. He persisted playing with a chair, which he bit, moved around, rocked back and forth, and climbed.

8. Dr. Harada determined Claimant “met the cut off for an autism spectrum disorder with a comparison score of 15 which indicates a moderate to severe level of concern for autism related symptoms.” (Exh. 3.) Among other things, Dr. Harada recommended Claimant’s continuing receipt of Early Start services through WRC including speech and language therapy to work on his social communication and expressive language skills.

9. On March 28, 2020, when Claimant was approximately 34 months old, Lisa Cerra, OTR/L, on behalf of WRC, conducted a “developmental evaluation” of Claimant in anticipation of his exit from Early Start by telephone. (See Exh 4.) Ms. Cerra employed the Bayley Scales of Infant and Toddler Development, 3rd Edition (Bayley III), an individually administered test of cognitive and motor ability that also includes measures of social-emotional behavior and adaptive behavior, and the Social Emotional and Adaptive Behavior subtests of the Developmental Assessment of Young Children (DAYC-2), an assessment used to identify deficits in children from birth through five years of age.

10. Ms. Cerra reported Claimant’s test scores on the Bayley III fall within the average range for cognition and receptive language skills and within the borderline range for fine motor skills. Ms. Cerra reported Claimant’s test scores on the DAYC-2 fall within the average range on the social emotional behavior subtest and within the below average on the adaptive behavior subtest. She reported Claimant demonstrated developmental skill levels as follows:

Cognitive: 35 months

Receptive Language: 26 months

Expressive Language: 37-39 months

Fine Motor: 23 months

Gross Motor: 21 months

Social-Emotional: 27 months

Adaptive Behavior: 26 months

(Exh. 4.)

11. By letter dated April 13, 2020, WRC Early Start Coordinator Troy Lane informed Claimant's parents "as of April 30, 2020 [Claimant] will no longer be eligible to receive services from Westside Regional Center Early Start Program." (Exh. 5) Mr. Lane additionally informed Claimant's parents Claimant "has been assessed and her [sic] chart reviewed by the Regional Center Interdisciplinary Team, which found him to be ineligible to receive services provided by the Regional Center under the Lanterman Act. Your child was not found to have a diagnosis eligible to receive services from the Regional Center in accordance with the Lanterman Act." (*Ibid.*)

12. Claimant has exited the WRC Early Start Program.

## **WRC's Assessment of Claimant for Lanterman Act Services and Supports**

13. Claimant was referred to WRC contract vendor Rebecca R. Dubner, Psy.D., to rule out ASD or Intellectual Disability. On August 24 and 31, 2020, Dr. Dubner conducted, via telehealth, a limited assessment of developmental disabilities employing the DAYC-2, the Vineland Adaptive Behavior Scales, Third Edition (VABS-III), a semi-structured interview to measure adaptive behavior, and the Autism Diagnostic Interview-Revised (ADI-R), a structured interview conducted with Claimant's

parents for evaluation of possible autism spectrum disorders. Claimant was three years and three months old at the time.

14. Due to the remote nature of the assessment, Claimant had difficulty with cognitive testing. Based on the DAYC-2, however, Dr. Dubner reports Claimant's cognition as average. Dr. Dubner observed Claimant perseverated on the spinning wheels of toy vehicles, which he did not use functionally. His use of communication for social purposes was limited. His language was repetitive. He engaged in some echolalia. He did not point or use gestures. He was challenged regulating the high volume of his voice. His eye contact was poor. His facial expressions were limited. Behaviorally, he was energetic. He darted from space to space. He was hyperactive and impulsive. He was challenged regulating his behaviors.

15. Dr. Dubner obtained information about Claimant's reciprocal social interactions, communications, and behaviors from Mother. In terms of his socialization skills, Mother reported to Dr. Dubner Claimant was able to engage in adequate eye contact while interacting with others. Claimant does not engage in reciprocal social smiling. He has a limited range of facial expressions. He does not engage in interactive play with other peers. His use of social overtures is fair. He sometimes recognizes others' emotions.

16. In terms of communication, Mother reported to Dr. Dubner Claimant can speak two-word sentences. He has limited intent to communicate beyond his wants and needs. He nods his head for "yes" and shakes his head for "no". With prompting, Claimant uses gestures. He spontaneously points to express interests. He imitates actions. Sometimes he engages in pretend play. He engages in repetitive language, scripted language, and echolalia.

17. In terms of behaviors, Mother reported to Dr. Dubner Claimant has fixations and compulsions. Claimant is fixated on vehicles and spinning wheels. He has challenges transferring from a preferred to a non-preferred activity. He engages in stereotyped and repetitive motor mannerisms. He spins in circles, runs back and forth, and engages in hand flapping.

18. The VABS-III yield results indicating Claimant's overall adaptive functioning falls within the moderately low range. Dr. Dubner reports the following composite scores: Adaptive Behavior Composite Score=82; Communication Skills Composite Score=93; Socialization Skills Composite Score=79; Daily Living Skills Composite Score=83, and Motor Skills Composite Score=81.

19. Dr. Dubner has determined Claimant "does meet diagnostic criteria for Autism Spectrum Disorder." (Exh. 6, original underline.)

Formal measures utilizing the ADI-R as well as play observations indicated impairments in the area of communication and reciprocal social interactions, and evidence of restricted or stereotyped behaviors or interests according to the DSM-V criteria for 299.00 Autism Spectrum Disorder.

Based on observation, interview and administration of the VABS, adaptive functioning is within moderately low range overall. Strength was noted in his Communication skills and weakness noted in his Socialization skills. His Cognitive functioning was difficult to determine due to his age and remote nature of the assessment. Instead the DAYC-2 was

given, which gives a cognitive developmental score. On the DAYC-2, [Claimant] obtained a score within the average range, which does not reflect cognitive challenges.

*(Id., original underline)*

20. Dr. Dubner renders the following DMS-5 diagnosis for Claimant:

299.00 Autism Spectrum Disorder

Social Communication: Severity level 1: requiring support

Restricted, repetitive behaviors: Severity level 1: requiring support

According to DSM 5 criteria the specifiers utilized herein recognize that the severity of the behaviors described may fluctuate over time and context.

Without accompanying intellectual impairment.

Without accompanying language impairment.

*(Id.)*

21. Dr. Dubner's August 31, 2020 Telehealth Psychological Assessment report memorializing her assessment of Claimant is comprehensive and detailed in its narration of Claimant's observed behaviors and clinical analysis of data. Dr. Dubner did not testify at the administrative hearing.

22. Less than one month after Dr. Dubner's assessment of Claimant, on September 18, 2020, via the Zoom online video platform, a multidisciplinary team



comprised of Kaely Shilakes, Psy.D., Ari Zeldrin, M.D., Jessica Haro, BCBA, Rita Eagle, Ph.D., and Mayra Mendez Ph.D., LMFT conducted an observation of Claimant.

23. Dr. Mendez prepared a Multidisciplinary Observation report describing how Claimant approached and looked directly at the computer screen, responded to her greetings, and maintained a visual regard with the screen as he engaged her in a back and forth conversation about the features of several toy vehicles he retrieved and brought to the screen. Dr. Mendez reports Claimant presented with joyful affect and demonstrated an expansive vocabulary and meaningful understanding of language and the words he used to describe the functions of his toys. He correctly recited the alphabet, counted from one to 10, counted items in the room, and appropriately named animals. Dr. Mendez additionally reports Claimant maintained age-appropriate self-regulation and tolerated redirection in accordance with team members' instructions. Dr. Mendez did not observe Claimant display aggression, oppositionality, or inattentiveness consistent with Mother's report. She reports Claimant's motor movements as typical. Mother expressed no concerns about Claimant self-care to Dr. Mendez.

24. Dr. Mendez's Multidisciplinary Observation report concludes, "The consensus of all participants of the consultation is that [Claimant] could benefit from typical education and developmental stimulation to continue age appropriate developmental trajectory. [Claimant] presents with age appropriate intellectual functioning and global developmental skills." (Exh. 7.) Dr. Mendez did not testify at the administrative hearing.

25. On behalf of the multidisciplinary team, Dr. Shilakes, who serves as Intake Manager at WRC, informed Mother about the team's observations and ineligibility determination by letter dated September 24, 2020:

While we do not deny the concerns you have regarding [Claimant's] behaviors and recent intensity of these behaviors during the pandemic, we do not feel that he meets all of the DSM-5 Autism Spectrum Disorder criteria at this time. During the observation, we were able to see behaviors of typical children. For example, [Claimant] was engaging, responsive, and showed his interests. He used joint attention and sought out the observer. [Claimant] was observed to display capacity for appropriate interactions and was able to transition between activities. These strengths are not typically observed in children with ASD.

Although Dr. Rebecca Dubner did render a diagnosis of ASD in [Claimant's] August 2020 psychological evaluation, due to these strengths and capabilities mentioned above, it is the opinion of the multidisciplinary team that [Claimant] does not meet the full criteria for ASD described in the DSM-5 at this time and that he is not substantially disabled by a developmental disability. The clinical team determined that the ineligibility decision remains unchanged.

(Exh. 2(c).)

26. At the administrative hearing, Dr. Shilakes explained in this case the multidisciplinary team determined to conduct an observation because it "had difficulty determining eligibility." She acknowledged "it is more challenging to determine eligibility" during the COVID-19 pandemic emergency. The service agency's professionals and consultants were precluded from firsthand, in-person observation

and assessment of Claimant in his home and educational environments. The ADOS, for example, was “not used because of the pandemic. It is not possible to be administered via telehealth.” Dr. Shilakes testified, “We are doing the best with what we have.”

27. Dr. Shilakes expressed doubts about UCLA’s Dr. Harada’s ASD diagnosis for Claimant. Dr. Shilakes stated Claimant was “pretty young” at the time of the initial diagnosis, an ASD diagnosis is best at age three years old “when more skills appear,” and an ASD diagnosis “makes more sense when presentation is more clear, severe, and obvious.” Dr. Shilakes testified, without elaboration, “it did not seem very clear” to the multidisciplinary team that at the time of UCLA’s Dr. Harada’s diagnosis Claimant presented with severe restricted, repetitive patterns of behavior, interests, or activities. Dr. Shilakes further explained the multidisciplinary team considered Drs. Harada and Dubner’s ASD diagnosis for Claimant but “didn’t think he presented with ASD.”

### **Mother’s Testimony**

28. Mother’s testimony was brief as she simultaneously attempted managing Claimant and his sibling’s energetic behaviors. Mother is concerned the closure of Claimant’s school due to the COVID-19 pandemic emergency has limited peer-to-peer socialization opportunities for Claimant. Mother specifically requested WRC to provide Claimant with speech and occupational therapies. Currently, Claimant attends school by videoconference between 9:00 a.m. and 11:30 a.m. Mother reported Claimant receives 15 minutes of speech therapy twice weekly. She could not accurately recall the frequency with which Claimant received occupational therapy, but she maintained Claimant “won’t copy” therapeutic instructions or activities delivered by videos or videoconference.

## LEGAL CONCLUSIONS

### Burden and Standard of Proof

1. As Claimant is seeking to establish eligibility for Lanterman Act supports and services, he has the burden of proving by a preponderance of the evidence he has met the Lanterman Act's eligibility criteria. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.)

2. "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 Company* (1990) 226 Cal.App.3d 314, 324-325, original italics.) In meeting the burden of proof by a preponderance of the evidence, Claimant "must produce substantial evidence, contradicted or un-contradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 339.)

### Applicable Law

3. The Lanterman Act defines "developmental disability" to mean the following:

[A] disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also

include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

(Welf. & Inst. Code, §4512, subd. (a).)

4. California Code of Regulations, title 17 (CCR), section 54000 further defines "developmental disability" as follows:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual . . . ;

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a

disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in need for treatment similar to that required for mental retardation.

5. Establishing the existence of a developmental disability within the meaning of the Lanterman Act and promulgated regulations requires Claimant additionally to prove by a preponderance of evidence the developmental disability is a "substantial disability," defined in section 4512, subdivision (1), to mean "the existence of significant 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: (1) Self-

care. [11] (2) Receptive and expressive language. [11] (3) Learning. [11] (4) Mobility. [11] (5) Self-direction. [11] (6) Capacity for independent living. [11] (7) Economic self-sufficiency.”<sup>2</sup>

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<sup>2</sup> CCR section 54001, subdivision (a), similarly defines “substantial disability” as follows:

(1) A condition which results in a 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.

## Discussion

6. Two diagnosticians determined Claimant presents with ASD. When Claimant was a 15-month-old toddler, Dr. Harada reported “a moderate to severe level of concern for autism related symptoms.” (Factual Findings 7 and 8.) Dr. Shilakes asserts Claimant was “pretty young” at the time and she opines an ASD diagnosis is best at age three years old “when presentation is more clear, severe, and obvious.” (Factual Finding 21.) At age three years and three months old, Dr. Dubner confirmed Dr. Harada’s early ASD diagnosis for Claimant reporting he “does meet diagnostic criteria for Autism Spectrum Disorder.” (Factual Finding 18.) Dr. Dubner reported “Severity level 1: requiring support” for Claimant’s social communication and restricted, repetitive behaviors. (Factual Finding 19.)

7. Claimant presents with deficits in reciprocal social communication and interaction. He does not initiate play with other children; nor is he responsive when approached by other children. He engages with limited eye contact. He has a limited range of facial expressions. He does not engage in reciprocal social smiling with others. He does not recognize the facial expressions of others unless they smile or cry. Claimant presents with repetitive patterns of behavior. He engages in hand flapping, spinning, and darting. He engages in repetitive language. He has a fixation on vehicles and their wheels. He has significant challenges with transitions and self-regulation. These deficits present significant limitations for Claimant in learning, notwithstanding

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CCR section 54002 defines “cognitive” as “the ability of an individual to solve problems with insight to adapt to new situations, to think abstractly, and to profit from experience.”



that his cognitive functioning is within average levels, self-direction, present capacity for independent living, and eventual economic self-sufficiency.

8. As Dr. Dubner recognized in her detailed and comprehensive report, the severity of Claimant's behaviors "may fluctuate over time and context" but they are present and substantially limiting. The findings the multidisciplinary team reports from its limited observation of Claimant looking into a computer screen and interacting virtually from his home with team members do not outweigh the substantial evidence Claimant presents with the behaviors and characteristics of ASD, which significantly limit him in major areas of life activity.

9. A preponderance of the evidence offered at the administrative hearing establishes Claimant's eligibility for Lanterman Act services and supports under the qualifying category of "autism" as provided for in section 4512, subdivision (a) of the Welfare and Institutions Code.

## **ORDER**

1. Claimant's appeal is affirmed.
2. Westside Regional Center shall deem Claimant eligible for services and supports pursuant to the Lanterman Developmental Disability Services Act under the qualifying category of "autism."

DATE:

JENNIFER M. RUSSELL  
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.