BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2020110066

DECISION

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 7, 2021, via videoconference.

Karmell Walker, Attorney at Law and Service Agency's Fair Hearing and Complaint Manager, represented the South Central Los Angeles Regional Center (Service Agency). Claimant was represented by his mother (Mother).[1], A certified court

[1] To protect their privacy, Claimant and Claimant's family members are identified by titles.

interpreter was duly sworn available to provide Spanish-language interpretation services during the hearing.

Oral and documentary evidence was received. The record was closed, and the matter submitted for decision at the conclusion of the fair hearing.

ISSUE

Is Claimant eligible for services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act) under the categories of Intellectual Disability, Fifth Category and Autism?[2]

EVIDENCE

The Service Agency submitted exhibits 1-6 and presented the sworn testimony of Dr. Laurie McKnight-Brown, Ph.D. (Dr. Brown). Claimant did not submit exhibits but presented the sworn testimony of Mother.

SUMMARY

Claimant requested eligibility for Lanterman Act services as an individual with Intellectual Disability or Autism. The Service Agency denied her request after considering eligibility under the categories of Intellectual Disability, Fifth Category, a category closely related to Intellectual Disability or requiring treatment similar to

[2] The parties stipulated to these categories of eligibility during the hearing.

Intellectual Disability and Autism. The Service Agency concluded that Claimant did not meet the criteria under the Lanterman Act for eligibility under these categories or have a substantial disability. Instead, the Service Agency concluded that Claimant had an Unspecified Neurodevelopmental Disorder, meaning he had deficits which did not rise to the level of a specific neurodevelopmental disorder.

Claimant did not provide sufficient evidence to support eligibility on the basis of Intellectual Disability, the Fifth Category or Autism. As such, Claimant's appeal of the Service Agencies denial of his request for eligibility is denied.

FACTUAL FINDINGS

Background and Jurisdiction

1. Claimant is 13 years of age. He lives with his Mother, his maternal grandparents, his three siblings, including two older siblings and one younger sibling, and additional family members including an Aunt and Uncle, 17-years of age, and 13-years of age, respectively. He was referred to the Service Agency to determine whether he was eligible for regional center services under the category of Autism (a term used interchangeably with Autism Spectrum Disorder), and Intellectual Disability. Based upon the parties' stipulation and the Administrative Law Judge's review of the evidence, this decision will address eligibility under the categories of Intellectual Disability, the Fifth Category and Autism.

2. Mother requested regional center services for Claimant from the Service Agency. On August 4, 2020, the Service Agency sent Mother a Notice of Proposed Action (NOPA) notifying her of its interdisciplinary team's decision that Claimant was not eligible for services. In the NOPA, the Service Agency explained that the

interdisciplinary team relied upon the psycho-social assessment completed by Shirley Soto, MSW (Soto) on February 25, 2020 and the psychological assessment administered by clinical and forensic psychologist, Sammie Williams, PsyD, Certified Autism Specialist (CAS) (Dr. Williams) on March 18, 2020 and March 25, 2020. Based upon these assessments, the interdisciplinary team concluded claimant does not have a "'developmental disability'" as the term is defined by California Welfare and Institutions Code (Code) section 4512, subdivisions (a) and (l) and the California Code of Regulations, Title 17, (Regulations) sections 500 through 54002." (Exh. 2.)

> More specifically, [Claimant] is not substantially disabled as a result of having an Intellectual Disability, Autism Spectrum Disorder, Seizures or Cerebral Palsy. The interdisciplinary team also concluded that [Claimant] is not substantially disabled as a result of a condition closely related to Intellectual Disability nor does he require treatment similar to that required by individuals with Intellectual Disability.
>
> [Claimant] was diagnosed with Unspecified Neurological Disorder.

(Exh. 2.)

3. Mother timely filed a fair hearing request on Claimant's behalf to appeal the Service Agency's decision. All jurisdictional requirements have been met for this matter to proceed to fair hearing.

Service Agency's Intake and Assessment

4. On February 25, 2020, Shirley Cardenas (Cardenas), Service Coordinator, conducted an intake meeting with Complainant who was accompanied by Mother and his grandmother who was also his foster parent. Claimant had been exposed to domestic violence between his Mother and the father of his younger siblings and as a result his grandmother was assigned as a foster parent. He was referred to the Service Agency by his social worker. (Exh. 4.)

5. Claimant was a healthy, full-term baby, and there was no evidence Mother had exposed him to alcohol or drugs during her pregnancy. His early development was considered typical: he walked at 13 months, said his first words at 1.5 years of age and he was toilet-trained at three years of age. He has no history of medical interventions; however, he displays some anxiety according to his Mother and Grandmother by overeating and biting his nails. At Claimant's intake interview he was receiving mental health services from Shields for Families. (Exh. 4.)

6. At the time of Cardenas's assessment Claimant was in the sixth grade and was made eligible for special education in December 2019 as a student with a Specific Learning Disability (SLD) as it is defined by the California Education Code. Claimant was placed in a general education class and provided resource support. (Exh. 3.) The Individual Education Program (IEP) was not provided as an exhibit at the fair hearing; however, it was provided to Dr. Williams and referenced in his report. (Exh. 4.)

7. Claimant's grandmother reported Claimant's functioning to be adequate. In the area of fine and gross motor skills Claimant evidenced no impairments. (Exh. 4.)

8. Claimant is adequate in many areas of self-care according to his grandmother. His grandmother reported Claimant uses utensils appropriately, toilets

appropriately with complete bladder and bowel control, but needs wipes to improve his hygiene, and needs reminders to complete all his personal hygiene tasks and needs assistance to scrub his underarms and neck. Claimant can make a sandwich if he is guided, wash dishes, although he leaves food on his plate, fix his bed imperfectly, and he seek aid for minor injuries. (Exh. 4.)

9. Claimant's deficits in the area of self-care are mainly in the area of acceptable dressing and money exchange based upon his grandmother's observations. Claimant will choose shorts in the winter instead of pants, shirts that are too small and may know that four quarters is a dollar but does not know how to determine whether he is given correct change from a store clerk. (Exh. 4.)

10. Claimant performs adequately in most areas Cardenas referred to as social/behavioral/emotional. According to his grandmother, claimant does not need encouragement to participate in social activities or group projects, initiates interactions with familiar friends and has about nine friends at school, but does not establish new friendships, plays better with younger children because they do not "bully" him. Claimant is well-behaved, is not hyperactive, and does not tantrum or have repetitive behaviors. (Exh. 4.)

11. Claimant's deficits in the area of social/behavioral/emotional from Grandmother's report include a lack of focus on his assignments. (Exh. 4.)

12. Claimant did not have any significant deficits in communication according to Cardenas. He can use gestures and facial expressions, carry on basic conversation and his speech is understandable to others. (Exh. 4.)

13. In the area of cognitive ability, Claimant can read simple books and sentences. He self-reported deficits in division and multiplication and had a difficult

time writing and spelling a simple sentence requested by Cardenas. Claimant can focus on a single activity between one and five minutes but must have instructions repeated three or more times to remember them. (Exh. 4.)

14. Cardenas referred Claimant for a psychological evaluation with a focus on Autism and Intellectual Disability. Her report was signed electronically on June 8, 2020. (Exh. 4.)

15. Dr. Williams administered the psychological evaluation on behalf of the Service Agency on March 18 and March 25, 2020, and prepared a report dated April 22, 2020. (Exh. 3.) Dr. Williams used a variety of assessment tools. He reviewed relevant documentation from Claimant's school, interviewed Mother and observed Claimant during testing. He administered a standardized assessment to measure Claimant's cognitive ability, the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V). He administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3), which relied on Mother's report, to measure Claimant's behavior and functioning. (Exh. 3.) He administered the Clinical Assessment of Behavior (CAB), a parent-report which measures social-emotional adjustment for children and adolescents and was used to evaluate his behaviors and potential treatment plan.

16. Dr. Williams did not testify. His assessment report and the conclusion of the interdisciplinary team were reviewed during the hearing by Dr, Brown, who provided sworn testimony. Dr. Brown is the lead psychological consultant for the Service Agency and a member of its interdisciplinary team. She obtained her Bachelor of Arts, Master of Arts and Ph.D. in psychology, and is licensed as clinical psychologist by State of California. Dr. Brown and also possesses a clear multi-subject teaching credential issued by the Board of Education. Based upon Dr. Brown's experience in the educational system, she is familiar with school services provided for special education

pupils through the IEP. Dr. Brown provided thorough, concise and insightful testimony with one exception in the area of the Fifth Category, discussed below, and her testimony was given great weight.

17. Dr. Williams relied on Mother's observations of Claimant's behaviors, not his grandmother's, and Mother noted more deficits. Mother noted more difficulties as far back to Claimant's entry into preschool, including his preference for being alone, his insistence on lining up cars in a certain manner, his tantrums and limited eye contact. During preschool he continued to struggle with communicating and playing with other children. Today, Mother observed he typically interacts and plays with younger children. (Exh. 3.)

18. Mother's testimony at hearing was consistent with her disclosures to Dr. Williams during her interview. Mother provided direct and unbiased testimony of her observations and concerns about Claimant's functioning and her testimony was given careful consideration and great weight in determining Claimant's eligibility under the Lanterman Act. Claimant prefers to play and communicate with younger children, four to five years of age, and a younger sibling, seven years of age, but he does not get along with his older siblings, Claimant is not functioning well at school now that classes are conducted remotely via videoconference. Mother or another family member sits next to him during class and Claimant is physically present, but "not there." His teachers have also reported to Mother that Claimant is not paying attention. He has not been provided with specialized services because of the remote education, and he is still in general education classes where he cannot perform. Someone always has to be with him to keep him safe; he cannot walk cross the street by himself. He does not shower properly without prompting. Claimant speaks to himself during the day when no one is around him, and this behavior "scares" Mother.

Claimant's social worker has been trying to get him mental health services, but he is not receiving any therapeutic services at this time.

19. Dr. Williams confirmed from his review of records Claimant's poor performance in school, his historically below grade performance in reading, writing and math and his difficulty sustaining attention and completing assignments without prompting. In the school district's assessment Claimant's cognitive abilities were in the "low average range." (Exh. 3.) However, Claimant's cognitive abilities were not uniform: he had better abilities in special tasks requiring visual processing and visual-motor integration. He demonstrated deficits in auditory processing and attention processing. He could not manipulate individual sounds and phenomes (phonological processing), to work with information recently obtained (auditory memory), and to comprehend and make sense of information heard (listening comprehension). He demonstrated significant difficulty in sustaining attention and focus by selecting particular visual stimuli and ignoring others (attention), and planning and completing tasks, especially those that require his organization and attention to information obtained in the short-term (planning). (Exh. 3.)

20. Dr. Williams reached the following conclusions about Claimant's cognitive abilities from his administration of the WISC-5. Claimant's full-scale intelligent quotient (FSIQ) was 73, the "very low range," which is less than or equal to only four percent of his peers.

21. Claimant's full-scale IQ is derived from the composite scores of five cognitive domains: the Fluid Reasoning Index (FRI) which measures reasoning and problem solving with unfamiliar information; the Verbal Comprehension Index (VCI), which measures the ability to define words, find similarities between concepts and words using verbal clues; the Visual Spatial Index (VSI) which measures the ability to

organize visual information into meaningful patters and to understand how they change as they rotate and move through space; the Working Memory Index (WMI) which measures the ability to actively hold information while problem-solving and to selectively attend to certain information while ignoring other information, and to perform mental tasks using a step-by-step approach; and the Processing Speed Index (PSI) which measures the speed with which a person learns material presented visually and processes social cues, gestures, body language and decision-making based on the information received. (Exh. 3.)

22. There was a wide disparity between Claimant's composite index scores which is referred to as a "scatter." Claimant's strongest scores were on tests within the FRI where the cognitive processes tested were related to learning and integrating information by using acquired knowledge to make deductions, answer questions, interpret graphs or charts or answer critical thinking questions. Claimant scored in the average range on the FRI, which placed him greater than or equal to 27% of his peer group. Claimant's score on the VCI was in the "low average" range or greater or equal to 23% of his same-aged peers. Claimant's score on the VSI was also in the low average range, or less than 10% of his same-aged peers. Claimant's score on the WMI was in the extremely low, or less than 99% of his peers. Claimant's lowest score was on the PSI, where he also scored in the extremely low range or less than 99% of his peers. Claimant's scores were determined to be scattered due to his 34-point difference between VCI and the lowest score, the PSI.

23. Based upon his cognitive scores and the manner in which he processes and recalls information, Dr. Williams opined that Claimant would benefit from the use of prompts to store and recall previously learned information. (Exh. 3, p. 5.) There is

not evidence that he has been provided with any such interventions by the school district.

24. Dr. Williams assessed Claimant's adaptive functioning and behavioral challenges. The ABAS-3 used rating forms completed by Mother. It addressed Claimant's functioning in the area of social, practical and conceptual skills. Scores were compartmentalized in composite areas: the Practical Composite (skills for self-care and community, school, home and safety); Social Composite (skills necessary for interaction with others in a variety of settings); and the Conceptual Composite (skills necessary to communicate and to perform functional academics and self-direction).

25. From Mother's ratings Dr. Williams reviewed Claimant's skill levels in various areas and determined Claimant's functional communication skills, his academic skills and his ability to function in the community and outside the home was below average. He determined Claimant's ability to socially interact and initiate and maintain friendships and express or recognize emotion was in the average range. Dr. Williams determined that the Practical Composite offered a more reliable measure of Claimant's abilities to function at home and in the community and his expression of interest in activities outside his home. Whereas Claimant's functioning in the home, including helping with chores and taking care of possessions was average, his ability to function in the community was below average. Similarly, Claimant's overall health and safety skills were rated as below average but were different for home and the community; i.e., Claimant's stills were average in self-care in the home such as eating, dressing and personal hygiene, but below average in the area of safety outside the home.

26. Claimant demonstrated deficits in social-emotional areas on the rating system also completed by Mother which comprised the CAB assessment. Mother's ratings on the CAB were consistent with her testimony at hearing. She expressed

concerns with behaviors that are associated with anxiety, mood dysregulation, poor self-regulation, attention and focus, and learning challenges. Despite Mother's concerns, Dr. Williams noted that Claimant did not report to him similar concerns, and as such, Mother's ratings should be reviewed with caution. However, based upon the rest of his report and interviews, and Mother's testimony, her observations are reliable and are given great weight.

27. The DSM-5 discusses the diagnostic criteria for Intellectual Disability in pertinent part as follows:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication,

social participation, and independent living, across multiple environments, such as home, school, work, and community.

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

[¶] . . . [¶]

The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual

disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

Factors that may affect test scores include practice effects and the "Flynn effect" (i.e., overly high scores due to out-of-date test norms). Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid. . . . Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single

IQ score. . . .

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

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

[¶] . . . [¶]

Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the

> person to perform adequately in one or more life settings at school, at work, at home, or in the community. **To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A**.

(DSM-V, pp. 37-38, italics in original; bold added.)[3]

28. Dr. Williams did not provide a specific analysis of the DSM-5 in his report. However, in his summary he addressed the two aspects of Intellectual Disability, Claimant's cognitive ability based upon his performance on the WISC-5 and his adaptive abilities.

> [Claimant] is a 12-year-old male who at present is experiencing various symptoms associated with likely learning challenges, which also include difficulties with information processing and recall. Thus, given [Claimant's] performance on the WISC-5, his presentation is also consistent with a possible intellectual disability, yet adaptive scores suggest average to below average scores. Additionally, based on [Mother's] reports, given his (adaptive) abilities, he does not present with significant functional challenges that warrant a diagnosis of an intellectual disability *at this time*. [Italics added.]

[3] Official Notice is taken of the DSM-5 pursuant to Government Code section 11515. [Exhs. 5 (Intellectual Disability) and 6 (Autism Spectrum Disorder).]

> Based on collateral reports, [Claimant's] academic abilities are at, or well below his expected grade level; therefore, [Claimant] currently meet[s] educational criteria for a *specific learning disability*. [Emphasis included in text.] it further appears that [Claimant] struggles to integrate information that may be applied to day-to-day social situations, specifically interacting with others. Thus, the central theme for [Claimant] (and his family) is his current profile, which suggest he has recurring challenges with learning, aspects of social awareness, and occasional difficulties with self-regulation.

(Exh. 3, p. 7.)

29. Dr. Williams did not expressly provide guidance to the interdisciplinary team for a determination of eligibility under the Fifth Category, a condition similar to Intellectual Disability or requiring the treatment provided to someone with an Intellectual Disability. Dr. Brown testified about the Fifth Category at the hearing. According to Dr. Brown, the interdisciplinary team determined that neither Intellectual Disability nor the Fifth Category applied because Claimant did not have a condition similar to an Intellectual disability, based upon the scatter in his cognitive ability scores, and his adaptive functioning. Although his FSIQ score of 73 was close to that of a person with Intellectual Disability, who would have an FSIQ score of 70 or below, he did not have uniform global intellectual delays, which is a hallmark of Intellectual Disability.

30. Dr. Brown did not consider Claimants very low scattered scores to be sufficient to qualify him under the Fifth Category because his adaptive functioning,

although not uniformly average, was not similar to that of a person with Intellectual Disability. Based upon Dr. Williams's assessment Claimant did not have a deficit in three of the seven areas applicable to his age group. He had a deficit in learning, but there was insufficient evidence that he had a significant deficit in self-care which was rated as average, self-direction, which included social interactions, which were average, and communication. Dr. Brown's testimony was supported by Dr. Williams' report where he distinguished Claimant's average functioning at home from his deficits in the community. As such, claimant's adaptive functioning was not similarly deficient in all settings as it is required to be under the DSM-V definition of Intellectual Disability. Claimant's motor skills were not an issue and economic self-sufficiency and independent living skills were inapplicable to his age group.

31. Dr. Brown did not provide complete testimony about whether Claimant qualified under the Fifth Category on the basis that he required treatment similar to that of an individual with Intellectual Disability. Dr. Brown considered the Service Agency's role for adults with Intellectual Disability, but not its provision of services for children under 18. Dr. Brown did not provide any insight as to what treatment in the form of services a child with Intellectual Disability would be provided, which was unexpected given her multi-subject teaching credential and her past participation in IEP meetings. For adults, the Service Agency assists with independent living and economic self-sufficiency.

32. The record is not clear as to what treatment Claimant requires which would be similar to the treatment given by the Service Agency to clients under the age of 18 with an Intellectual Disability. Given the current absence of meaningful school district services to Claimant, it has not been established from the record, what

treatment in the form of services, would be akin to the services offered to those with Intellectual Disability.

33. Dr. Brown acknowledged that neither Dr. Williams nor the interdisciplinary team considered Claimant as being excluded for eligibility on the basis of his learning disability. Although the school district determined Claimant had a specific learning disability, it made this determination under the Education Code which, Dr. Brown confirmed, is not applicable to eligibility determinations under the Lanterman Act.

34. Dr. Williams also assessed Claimant for Autism. He administered the Autism Diagnostic Observation System, Second Edition, Module 3, (ADOS-2) which is a standardized assessment of social interactions, communication, play and imaginative use of materials.

35. Claimant did not meet the criteria for Autism which has been defined under the DSM-5, as follows:

> A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history examples are illustrative, not exhaustive, see text):
>
> 1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

Specify current severity:

Severity is based on social communication impairments and restricted repetitive patterns of behavior . . . . [Italics and bolding in original.]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).

4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

Specify current severity:

Severity is based on social communication impairments and restricted, repetitive patterns of behavior . . . . [Italics and bolding in original.]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities or may be masked by learned strategies in later life).

> D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
>
> E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and Autism spectrum disorder frequently co-occur; to make comorbid diagnoses of Autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5, pp. 50-51.)

36. Claimant did not meet the threshold criteria for a diagnosis of Autism based upon Dr. Williams administration of the ADOS-2 and his observations during testing. He engaged in sporadic eye contact, used odd and inconsistent facial expressions when he spoke, he was not flexible with changes in routine, but did initiate communication and "consistently" was able to express "very simple and superficial emotional feelings." (Exh. 3, p. 7.) His language was "fluent and complex throughout the evaluation as the majority of his speech was articulate and easy to follow." (*Ibid.*) Claimant did have challenges with providing insight, his conversation was restricted and went off topic, and he did have problems understanding feelings and emotions. (*Id.*) Respondent had an "extremely restricted interest for science." (*Id.*) Overall, Claimant demonstrated he was deficient in social communication and displayed some restricted interests and odd mannerisms, but his total score did not meet the threshold diagnostic criteria set forth in the DSM-5. (*Id.*)

37. Dr. Williams concluded that Claimant did not currently fit the pattern of an individual with Intellectual Disability and that he did not meet the criteria for Autism. As such, he diagnosed him with an Unspecified Neurodevelopmental Disorder, which means that Claimant has some of developmental disorder that does not meet the threshold criteria of either Intellectual Disability or Autism.

38. Notably, Dr. Williams did not rule out a diagnosis of Intellectual Disability in the future. He recommended Mother return to the IEP and explore with them Claimant's academic setting after considering his findings. Dr. Williams opined that Claimant required a more supportive environment to decrease his confusion and increase his interest and motivation. Based upon Mother's testimony and the use of remote learning during the Pandemic, Claimant has yet to receive comprehensive services from the school district and remains confused by his general education coursework.

39. Dr. Williams encouraged continued monitoring of Claimant to "determine whether further evaluation is necessary in the future." Dr. Williams opinion is consistent with the result of his assessments, Mother's observations, and Claimant's school history.

> For example, should [Claimant] display marked improvement in identified skill areas or lack of progress, a reevaluation of his diagnosis (and functioning) may be warranted. In addition, cognitive and intellectual testing results tend to become more accurate as a child ages, as does a child's diagnostic presentation.

(Exh. 3, p. 8.)

40. Taken together, Dr. Williams report and Dr. Brown's testimony, establish that at this time Claimant does not demonstrate global cognitive deficits or significant adaptive deficits to qualify him for eligibility under the category of Intellectual Disability or the Fifth Category. Claimant's cognitive scores are scattered. Nevertheless, future assessments may establish scores which are consistent Intellectual Disability. Claimant's adaptive functioning may also support at a future time qualification under the category of Intellectual Disability or Fifth Category. In the case of the Fifth Category, a future evaluation by the Service Agency should address the treatment requirements of an individual with Intellectual Disability and assess whether Claimant requires such treatment.

41. The evidence does not support a diagnosis of Autism.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) The Lanterman Act provides services and supports to individuals with developmental disabilities.

2. A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing, and therefore jurisdiction for this case was established. (Factual Findings 1-4.)

3. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on her. (*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].) The standard of proof in this case is preponderance of the evidence. (Evid. Code, § 115.) Thus, Claimant has the burden of

proving her eligibility for services under the Lanterman Act by a preponderance of the evidence.

4. In order to be eligible for regional center services, a person 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.

5. According to California Code of Regulations, title 17, section 54010, subdivision (c), a 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.

6. Welfare and Institutions Code section 4643, subdivision (b), provides: "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources."

7. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, the individual must show that he has a "substantial disability." California Code of Regulations, title 17, section 54001, subdivision (a), defines "substantial disability" as follows: "(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."

8. California Code of Regulations, title 17, section 54002 defines the term "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."

Determination

9. It was not established by a preponderance of the evidence that Claimant has a "developmental disability" as defined under Welfare and Institutions Code section 4512, as a result of Intellectual Disability.

10. There was insufficient evidence that Claimant met the DSM-5 diagnostic criteria for Intellectual Disability. There was insufficient evidence to establish that Claimant fulfilled Criterion A. By assessment, Claimant did not have a global delay in all areas of cognitive ability. There was also insufficient evidence through observations that Criterion A was met. Claimant's cognitive deficits appeared to significantly impact his ability to learn. Claimant did have a full-scale IQ slightly above the typical range of an individual with an Intellectual Disability, but the scatter between domains, were not consistent with the diagnosis of Intellectual Disability.

11. There was insufficient evidence that Claimant met Criterion B of the DSM-5. Individuals may be diagnosed with Intellectual Disability in those instances where the full-scale IQ is higher than that typically associated with individuals with global developmental delays, but where adaptive deficits reduce their functioning to that of individuals with global developmental delays. The adaptive deficits must be directly attributed to Claimant's cognitive deficits. Based upon the record presented, that Claimant's adaptive deficits in three of the seven areas required to establish a

substantial disability. Claimant's adaptive deficits were not uniform in different settings; he functioned better at home than in the community.

12. The evidence did not establish that Claimant is disqualified from eligibility based upon the exclusion of solely learning or psychiatric disabilities. Dr. Brown expressly stated that the interdisciplinary team did not conclude that he had a disability attributed solely to a learning disorder. Dr. Williams did not diagnose Claimant with a learning disability or a psychiatric disorder. The interdisciplinary team did not consider whether Claimant's deficits are solely the result of psychiatric disabilities and there is no evidence that his deficits can be attributed solely to a psychiatric disorder. Claimant is seeking mental health services, but otherwise the record does not establish that his deficits can be attributed to a psychiatric diagnosis.

13. There is insufficient evidence at this time regarding Claimant's eligibility for Lanterman Act services under the Fifth Category. The assessment of whether Claimant suffers from a Fifth Category condition requires consideration of both prongs of potential Fifth Category eligibility, i.e., whether Claimant suffers from a disabling condition found to be closely related to Intellectual Disability or whether Claimant requires treatment similar to that required for individuals with Intellectual Disability. (Welf. & Inst. Code § 4512, subd. (a); emphasis added.)

14. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127 (*Mason*), the appellate court held that "the fifth category condition must be very similar to [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.*, at p. 1129.)

15. Under the DSM-5, which was enacted after *Mason*, adaptive functioning is a critical component of the analysis, not just standardized test scores and mathematical measures of cognitive ability. Claimant's adaptive deficits at this time are not severely deficient in at least three of the seven categories delineated under the Lanterman Act.

16. Consistent with Dr. William's analysis, Claimant may benefit from a reassessment at a later time particularly after school interventions are implemented and/or if Claimant's adaptive functioning declines, to reconsider Claimant's eligibility under the categories of Intellectual Disability and Fifth Category. For similar reasons, Claimant may wish to revisit eligibility under the category of Autism, but Dr. Williams appeared to be clearer about his rejection of eligibility under this category.

ORDER

1. Claimant is ineligible for regional center services and supports under the category of Intellectual Disability, Fifth Category and Autism and under the Lanterman Act.

2. Claimant's appeal from the Service Agency's determination that he is not eligible for regional center services and supports under the category of Intellectual Disability, Fifth Category and Autism is denied.

DATE: January 19, 2021

EILEEN COHN

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.