

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**EAST LOS ANGELES REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2021090016**

**DECISION**

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter by videoconference on November 19, 2021.

Jacob Romero, Fair Hearing Specialist, represented East Los Angeles Regional Center (ELARC or Service Agency).

Claimant was represented by his mother (Mother). (Titles are used to protect the family's privacy.) Claimant was not present at the hearing.

The ALJ received testimony and documentary evidence at hearing. The ALJ kept the record open until January 31, 2022, to allow Claimant to submit into evidence additional reports from his school in addition to psychological and psychiatric

evaluations and to allow ELARC to file a response. Claimant filed four documents: a September 2, 2021 Whittier School District Individualized Education Program (IEP) report, marked as Exhibit A; a December 15, 2021 letter from Erica Zoe Shoemaker, M.D., M.P.H, marked as Exhibit B; a November 10, 2021 Pediatric Visit Summary report from LAC+USC Pediatrics, marked as Exhibit C; and a December 14, 2021 letter from Anna Salmeron, L.M.F.T., and Kristina Tran, L.C.S.W., of The Whole Child, marked as Exhibit D. ELARC did not object to the admissibility of the exhibits, and the ALJ admitted Exhibits A, B, C, and D into evidence. ELARC filed English and Spanish responses to Claimant's exhibits, which were marked as Exhibits 11 and 12, respectively.

The ALJ closed the record and deemed the matter submitted for decision on January 31, 2022.

### **ISSUE PRESENTED**

Does Claimant have a developmental disability that would make him eligible for supports and services under the Lanterman Developmental Disability Services Act, Welfare and Institutions Code (Code), section 4500 et seq. (Lanterman Act)?

### **EVIDENCE RELIED UPON**

Documents: Service Agency Exhibits 1 through 10; Claimant Exhibits A through D.

Testimony: On behalf of Service Agency, Dr. Randi Bienstock, consulting psychologist. On behalf of Claimant, Mother.

## **SUMMARY**

On May 20, 2021, Claimant was evaluated by a psychologist retained by ELARC to assess Claimant's eligibility for Lanterman Act supports and services. The psychologist conducted the assessment by videoconference because of the COVID-19 pandemic. Based on the assessment, ELARC determined Claimant was ineligible for regional center services. Mother then requested an in-person reevaluation of Claimant, citing deficiencies she perceived with the video assessment and the worsening of Claimant's behavior and academic performance. At hearing, Mother also asserted that Claimant suffered from autism spectrum disorder (ASD) and therefore was eligible for Lanterman Act supports and services even without further testing.

At hearing, ELARC's consulting psychologist testified Claimant should receive another psychological assessment because of the limitations of the video format but no sooner than a year after the most recent assessment to ensure the accuracy of results. Documentation provided by Mother at the hearing did not establish Claimant's eligibility for Lanterman Act supports and services based on an ASD diagnosis. Accordingly, ELARC shall arrange an in-person reassessment of Claimant 12 months from his May 20, 2021 evaluation or as soon as COVID-19 protocols allow for such assessment.

## **FACTUAL FINDINGS**

1. Claimant is an eight-year-old male who was referred to ELARC by Mother who contends Claimant presents with ASD. After conducting a psychological assessment of Claimant, ELARC determined Claimant did not present with ASD or any other qualifying condition for Lanterman Act supports or services. On July 28, 2021,

ELARC wrote to Mother informing her of Claimant's ineligibility. On August 16, 2012<sup>1</sup>, Mother timely filed a fair hearing request appealing ELARC's decision.

## **Background**

2. Claimant resides with his parents and younger sister. His younger sister was recently diagnosed with ASD and is an ELARC client. Claimant was seen in the Early Intervention program at ELARC because of concerns about speech delays, but he was never evaluated for regional center services under the Lanterman Act.

3. Claimant had a normal birth and is in good physical health. He has no history of hospitalization, surgery, traumas, accidents, seizures, or major illness. He has no vision or hearing difficulties and is fully ambulatory. Claimant can dress and undress himself, but he has difficulties with buttoning. Claimant is toilet trained, although he has wetting accidents approximately once per week at school.

4. Claimant was first referred to his school's Special Education Services in 2016. According to his IEP report dated September 5, 2019, Claimant initially qualified for special education services under the categories of Speech and Language Impairment. In first grade, Claimant attended a general education classroom and received speech and language therapy in a small group setting twice per week for a total of 60 minutes. (Ex. 5, A45.)

5. As a result of the COVID-19 pandemic, Claimant was required to attend most of the second grade through distance learning. His participation in online speech and language therapy was consequently limited, and Claimant required repeated cues to engage during the online sessions he attended. (Ex. 7.) His IEP was modified in September 2020 to add program accommodations to allow Claimant additional time to respond to questions and to provide Claimant with additional cues and multiple

opportunities to practice targeted skills. In addition to continuing speech and language therapy, the IEP team provided Claimant would receive specialized academic instruction three sessions per week for a total of 90 minutes in a separate classroom. (Ex. 7, A74.)

### **District Confidential Multi-Disciplinary Team Report**

6. Claimant continued to struggle academically in the second grade. In Spring 2021, Claimant's school district (District) evaluated Claimant's academic deficits. The District prepared a May 27, 2021 Confidential Multi-Disciplinary Report containing its findings (District Report). (Ex. 8.)

7. The District Report contained the results of several tests administered by school personnel. None indicated Claimant suffered from ASD or intellectual disability. On the Kaufman Assessment Battery for Children-Second Edition (KABC-II), Claimant scored Below Average on the Nonverbal Index and the Fluid Crystallized Index. The District noted a significant amount of variability in Claimant's performance on different areas of the KABC-II, which made it difficult to obtain an accurate representation of Claimant's true intellectual functioning. The District believed this variability reflected how significantly Claimant's delays in attention and memory affected his overall functioning. According to the District Report, Claimant seemed to have been most successful when asked to call upon his nonverbal problem-solving abilities, visual processing, and his ability to perceive, manipulate, and think with visual patterns. However, the District Report stated Claimant struggled most on tasks that placed demands on his language functioning, particularly his expressive language skills. (Ex. 8, p. A107.)

8. In testing, the District Report noted Claimant displayed significant difficulties in his ability to sustain attention on all tasks. Claimant needed frequent

breaks from testing, and while he attempted to work hard, he was very unfocused and inattentive. Scoring on tests of Claimant's attention processing skills ranged from Below Average to Lower Extreme on the KABC-II and the Woodcock Johnson Tests of Oral Language.

9. Academically, based on the administration of the Woodcock Johnson IV Tests of Achievement, Claimant scored in the low range for broad reading ability. He showed strength in reading comprehension but had significant weakness in oral reading. (Ex. 8, 106.) Claimant tested in the low average range for broad mathematics, with strong scores in computation and delays in applied problem-solving. Claimant scored in the low range for broad written language. His reading fluency was at the mid-kindergarten level.

10. Based on testing and observation, the Multidisciplinary Group determined Claimant met the eligibility criteria for special education because he also presented with a Specific Learning Disability relating to attention and phonological processing in addition to Speech and Language Impairment. Claimant's eligibility under Speech and Language Impairment was confirmed in a separate Speech and Language Assessment Report, dated May 27, 2014. (Ex. 9.)

11. At Claimant's May 27, 2021 IEP meeting, based on the District Report, the IEP team agreed to move Claimant to a special education mild/moderate day class for small group instruction and to continue Claimant's speech and language therapy. The IEP team also agreed Claimant was eligible for extended summer school. (Ex. 10 A149-150.) According to his IEP, Claimant moved into a special education classroom on June 5, 2021.

12. Claimant is currently in the third grade where he is placed in a mild/moderate special day class for small group instruction because of his Specific Learning Disability and Speech and Language Impairment. (Ex. A.). Claimant performs at below grade-level standards. He receives speech and language therapy for 30 minutes per session twice weekly. According to his September 2021 IEP, Claimant's "deficits in comprehension and expressive language impact his ability to participate in classroom activities and communicate. Language and speech services and instructional accommodations provided within the class are needed for [Claimant] to access and make progress in the general education curriculum." (*Id.*, p. B1.) Claimant also has mainstreaming opportunities during lunch and recess, science, social studies, music, art, and physical education classes, grade-level field trips, and school assemblies. The September 2021 IEP makes no mention of ASD.

### **Evaluation By Roberto De Candia Ph.D.**

13. Roberto De Candia Ph.D., a licensed psychologist, performed a telehealth psychological evaluation of Claimant on May 20, 2021. The video conference lasted one hour, 21 minutes, and 40 seconds. The purpose of the evaluation was to diagnose for the presence or absence of developmental delays attributable to intellectual disability or ASD. In addition to meeting with Claimant by videoconference, Dr. De Candia reviewed a letter from Claimant's parents and a copy of the 2019 IEP. Dr. De Candia did not have access to the District Report when he completed his own assessment.

14. Dr. De Candia administered several tests to Claimant via video. During the test-taking, Dr. De Candia observed Claimant was cooperative in answering questions and participating in testing tasks. He noticed Claimant had difficulties remaining attentive and was easily distracted. According to Dr. De Candia, Claimant was "squirmy " in his seat throughout the entire session. He believed Claimant's demeanor

was serious when answering questions and seemed, in Dr. De Candia's view, that Claimant was working to the best of his abilities. Dr. De Candia found the test results were valid and reflective of Claimant's intellectual and adaptive functioning abilities.

15. Dr. De Candia found Claimant did not present with an intellectual disability based on his score on the Wechsler Intelligence Test for Children, Fifth Edition (WISC). Claimant scored in the 70th percentile for verbal comprehension (VCI) on the WISC and in the 16th percentile for Fluid Reasoning. According to Dr. De Candia, Claimant's performance on the WISC was "pretty consistent," except for vocabulary, where he scored within the high average range. Dr. De Candia noted in his report that the WISC scores could not be interpreted quantitatively because the virtual administration of the tests "violate their operationalized procedures." (Ex. 4, p. A30.) However, Dr. De Candia opined Claimant's participation in the test, the answers he provided, and how he participated and responded could be interpreted qualitatively and served to rule out the presence of intellectual disabilities.

16. Dr. De Candia found Claimant suffered from mild adaptive deficits based on results from the Vineland 3 test, in which Mother served as the informant. Claimant scored a composite score of 69, which corresponded to the second percentile and is indicative of mild adaptive deficits. In response to questions, Mother indicated Claimant cannot coordinate the use of knives and forks, has bedwetting accidents, needs prompting to brush his teeth and wash well, needs reminders to do minor household chores, has difficulty sharing belongings, and has tantrums occurring three or four times a day lasting approximately 30 minutes in which he yells.

17. Dr. De Candia found the testing, his conversations with Mother, and his observations of Claimant did not support or identify any behaviors suggestive of the presence of ASD. Claimant's score on the Childhood Autism Rating Scale, 2d edition,



was less than 20, which indicated Claimant was in the non-autistic range. Pertinent to excluding an ASD diagnosis, Dr. De Candia noted Claimant played with other children, understood when Mother was angry, and could describe how he felt.

18. Dr. De Candia could not obtain a direct measure of Claimant's academic abilities through the videoconference format.

19. Dr. De Candia diagnosed Claimant with nocturnal and diurnal enuresis, suspected Attention Deficit Hyperactivity Disorder (ADHD), combined presentation. He made several recommendations, including having Claimant receive a comprehensive evaluation by mental health professionals to confirm ADHD and a further comprehensive psychoeducational evaluation from the school district to determine whether he suffered from a specific learning disability; continued communication skills training, including speech and language therapy services; and obtaining a mental health assessment for the possible presence of ADHD as well as therapy to address the presence of enuresis, which could result from emotional issues. Dr. De Candia also recommended a reevaluation of Claimant in one year to assess his intellectual, academic, and adaptive functioning.

20. On July 16, 2021, Heike Ballmaier, Psy.D., reviewed Dr. De Candia's assessment on behalf of ELARC. Based on Dr. De Candia's assessment, Dr. Ballmaier determined Claimant was not eligible for regional center services due to the absence of a developmental disability. (Ex. 6, p. A58.) Dr. Ballmaier reaffirmed Dr. De Candia's recommendations for continued speech and language therapy, additional monitoring for learning disabilities, and further assessment and treatment of possible ADHD. She also recommended Claimant participate in structured social activities with peers. Dr. Ballmaier further recommended a re-evaluation of Claimant in two to three years to monitor his cognitive and adaptive skills. (*Ibid.*)

## **Testimony by Regional Center**

21. Randi Bienstock, Ph.D., a licensed psychologist, testified on behalf of ELARC. Dr. Bienstock has worked with ELARC for 20 years. She did not personally evaluate Claimant but reviewed the reports from the District and Dr. De Candia. Based on her review, Dr. Bienstock agreed with Dr. De Candia's findings that Claimant did not present with behaviors consistent with autism and did not manifest evidence of intellectual disability. Consistent with Dr. De Candia's recommendation, Dr. Bienstock testified Claimant should be re-evaluated in person one year after his assessment, i.e., at the end of May 2022, to ensure the validity of Dr. De Candia's observations by teleconference.

## **Mother's Testimony**

22. Mother is a strong advocate for her son and has pursued extra supports and services for his benefit. She spoke about her concern regarding Claimant's academic performance and behavior at home. According to Mother, Claimant cannot read or write, continues to have wetting accidents, and spends increasing amounts of time alone. Mother testified she sometimes has difficulties understanding Claimant because he is unable to clearly articulate his words. She reported Claimant has become very frustrated and acts out aggressively. Mother noted Claimant suffers from anxiety and tends to stress a lot when he is in class. He has difficulty keeping calm, and his confidence has been adversely affected by his frustrations at school. Claimant is not social with other children and tends to be rough when he is dealing with other children. Mother wants help for Claimant so he can learn at school and deal with his aggressive impulses.

23. Based on Mother's concerns, Claimant's pediatrician prescribed ABA services to Claimant, which he is currently receiving, although the frequency was not made known at the hearing. Claimant also receives weekly psychological counseling at school.

24. Mother submitted several documents in support of Claimant's eligibility for Lanterman Act supports and services. (Exs. B, D.) In her letter dated December 15, 2021, Dr. Erica Zoe Shoemaker, Chief of Child and Adolescent Psychiatry at LAC+USC Medical Center, diagnosed Claimant with ASD and intellectual disability and states Claimant has a life-long disability. According to the letter, Dr. Shoemaker's diagnoses were based on a clinical interview, history, review of Claimant's school report, and her examination of Claimant. However, Dr. Shoemaker provides no detail to support her diagnoses, and it is unclear from her letter what, if any, psychological tests she administered to Claimant to make her determinations and the results of such tests. Although Dr. Shoemaker points to various adaptive limitations and troubling behaviors, she does not link Claimant's conduct to her diagnoses. Her opinion that Claimant suffers from conditions making him eligible for regional center services therefore is afforded limited weight.

25. A letter dated December 14, 2021, submitted by Claimant's current therapist, Ana Salmeron, LMFT, does not support Claimant's eligibility for Lanterman Act supports and services. In the letter, Ms. Salmeron states Claimant has received counseling services from Ms. Salmeron since August 23, 2021. (Ex. D.) According to Ms. Salmeron, Claimant was referred to her because he exhibited irritability, did not follow directives, threw things, and hit his mother and sister when he was angry. Ms. Salmeron further noted Claimant has poor self-control and is constantly fidgeting. She stated that Claimant demonstrated characteristics associated with Oppositional Defiant Disorder

and ADHD Other Type. The letter makes no mention of an ASD or intellectual disability diagnosis.

## **LEGAL CONCLUSIONS**

### **Standard and Burden of Proof**

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (Code, §§ 4700–4716.) Claimant requested a hearing to contest ELARC’s denial of Claimant’s eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Finding 1.)

2. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him to prove by a preponderance of the evidence that he 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 (Italics in original).)

### **Eligibility for Regional Center Services**

3. To be eligible for Lanterman Act supports and services, Claimant must demonstrate he presents with a qualifying developmental disability. Code section 4512, subdivision (a), defines “developmental disability” as:

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. . . . This [includes] intellectual disability, cerebral palsy, epilepsy, and autism. [It also includes] 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. 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."

5. To prove the existence of a developmental disability within the meaning of Code section 4512, Claimant must show that his disability constitutes a "substantial disability." California Code of Regulations, title 17, section 54001 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.

## **Analysis**

6. Claimant did not establish by a preponderance of the evidence he has a "developmental disability" as defined by Code section 4512. Claimant did not establish he is eligible for Lanterman Act supports and services because there is insufficient evidence, he presents with ASD, intellectual disability, epilepsy, cerebral palsy, or a condition similar to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability. (Factual Findings 2–25.)

7. However, Dr. De Candia and Dr. Bienstock both acknowledged conducting Claimant's assessment by video conference limited Dr. De Candia's ability to observe Claimant fully and administer all relevant tests. (Factual Findings 19, 21.) Dr. Ballmaier too recommended that Claimant be reevaluated, although at a later time. (Factual Finding 20.) In addition, Dr. Shoemaker diagnosed Claimant with ASD. (Factual Finding 24.) Thus, consistent with Dr. De Candia and Dr. Bienstock's recommendations and in light of Dr. Shoemaker's diagnosis, Claimant shall be re-evaluated in person in May 2022 or as soon thereafter as COVID-19 safety measures permit, to determine whether he has exhibited any changes in his cognitive, intellectual, or adaptive skills that would impact his eligibility for Lanterman Act supports and services.

## **ORDER**

Claimant's appeal is denied. East Los Angeles Regional Center shall re-assess Claimant's eligibility for Lanterman Act supports and services through an in-person evaluation in May 2022 or as soon thereafter as COVID-19 safety measures permit.

DATE:

CINDY F. FORMAN

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.