

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022100458

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on February 8, 2023, by videoconference.

Claimant was represented by her mother. The names of claimant and her family members are omitted to protect their privacy.

Dr. Thompson Kelly, Director of Clinical Services, and Angela Quinonez, Fair Hearings Coordinator, represented Westside Regional Center (service agency).

The record closed and the matter was submitted for decision at the conclusion of the hearing.

ISSUE

Is claimant eligible for services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon service agency exhibits 2 through 12 and claimant's exhibit A, as well as the testimony of Kaely Shilakes, Psy.D., and claimant's mother.

SUMMARY

Claimant met her burden of establishing by a preponderance of the evidence that she is eligible for services under the Lanterman Act based on her diagnosis of Autism Spectrum Disorder (ASD). The psychologist used by service agency to evaluate claimant diagnosed her with ASD and service agency has presented no contrary expert opinion. Claimant also established that her eligible condition causes substantial disability, as she is significantly impaired in four of the seven areas of major life activity specified by regulations: self-care; self-direction; capacity for independent living; and economic self-sufficiency. Finally, service agency's argument that claimant's major life activity impairments are caused by psychiatric disorders was not borne out by the evidence.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Service agency determines eligibility and provides funding for services to persons with developmental disabilities under the Lanterman Act, among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.; undesignated statutory references are to the Welfare and Institutions Code.)

2. Claimant is a 17-year-old female who was referred to service agency for an eligibility determination in June 2022 on the basis of suspected autism. (Ex. 5.)

3. On August 26, 2022, service agency issued a Notice of Proposed Action, in which claimant's parents were advised that service agency staff concluded claimant was not eligible for regional center services. Specifically, service agency staff had concluded that, although claimant was diagnosed with ASD, they believed claimant's challenges were primarily due to mental health issues. Also, service agency staff did not find claimant has significant functional limitations in at least three areas of major life activity specified in applicable regulations. (Ex. 3.)

4. On October 5, 2022, claimant's mother submitted a Fair Hearing Request (FHR) to service agency. The FHR requested a hearing to appeal service agency's denial of claimant's request to be deemed eligible for services. (Ex. 3.)

5. Official notice is taken that, in connection with a continuance request made after the matter was initially scheduled to be heard on December 13, 2022, claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision. (Exs. 2, 3.)

6. The parties agreed service agency staff would conduct a multidisciplinary observation of claimant in lieu of an informal meeting. The observation was conducted on November 4, 2022. No resolution was reached. (Exs. 4, 7.)

Claimant's Relevant Background Information

7. Claimant lives at home with her parents and two younger siblings. Her younger brother is a service agency consumer, diagnosed with cerebral palsy, ASD, and intellectual disability. Claimant is in the 11th grade at Westview High School (Westview), where she receives special education services as described in more detail below. (Exs. 5, 6.)

8. The record does not depict claimant's early development, except that she reached her major motor milestones by typical ages. (Ex. 5.) However, starting in preschool, claimant was described by her teachers as a sensitive child, having difficulty with sharing, transitions, and participating in non-preferred activities. During the first grade, claimant displayed challenges and a general dislike for reading. Beginning in the third grade, claimant's behavioral issues intensified and she was diagnosed with attention deficit/hyperactivity disorder (ADHD). (Ex. 6.)

9. Currently, claimant is described as socially awkward and delayed. For example, she loves watching an animated television show developed for young children; she is capable of watching the show for hours at a time. Claimant has few friends, little interest in socializing with them, and does not fully understand the concept of friendship. She has no interest in extracurricular activities. Claimant can be abrupt and rude. One friend recently described claimant to claimant's mother as being "very intense." (Ex. 5.)

10. Claimant also has an array of unusual behaviors and fixations. For example, she gravitates toward small objects, such as Legos, bottle caps, and beads. Rather than building or creating things with them, she spends most of her time sorting these items by color, shape, or size. Claimant displays rigid qualities and has difficulty adapting to changes in plans, rules, and routines. She is a picky eater. She has difficulty modulating her emotions; she has tantrums and engages in property destruction when she gets upset. (Ex. 6.)

11. Claimant was diagnosed with ADHD in elementary school, and later with an anxiety disorder and mood disorder. She is taking psychiatric medications to address her symptoms. She has been in therapy outside of school since childhood, and now also receives school-based counseling. (Ex. 11.)

Claimant's Special Education Services

12. Beginning in the third grade, an individualized education program (IEP) was developed for claimant as her behavioral issues intensified and she continued to have difficulty reading. At that time, claimant qualified for special education as a student with a learning disability (LD) due to her reading deficits (her primary category of eligibility), and other health impairment (OHI) due to ADHD (her secondary category). Claimant's primary special education eligibility was reclassified to OHI in the fifth grade, when she began exhibiting anxiety and fearfulness of specific stimuli. (Ex. 6.)

13. In 2020, claimant attended Culver City High School. In 2021, when she was in the tenth grade, claimant transferred to Westview, a "help group non-public school" that caters to students with Autism, ADHD, emotional disturbance (ED), and

LD. (Exs. 6, 9, 11.) By this time, claimant's reading ability had caught up to her peers so the LD classification was removed from her IEP. (Exs. 6, 11.)

14. By April 2021, claimant was classified as eligible for special education services under the categories of OHI due to ADHD, and ED due to anxiety and mood disorders, with OHI as the primary category. (Ex. 11.)

15. Claimant always has taken regular classes while receiving her special education services. (Ex. 11.)

TESTING IN SPRING 2021

16. In April and May 2021, claimant's school district had her tested in preparation for the development of her triennial IEP in Fall 2021. The testing was conducted by School Psychologist Debra Price. Ms. Price issued her Psychoeducational Report in May 2021 with the results of her testing and recommendations for claimant's special education services. (Ex. 11.)

17. Most of the results of cognitive and academic testing rated claimant in the average range, with some high average scores in visual spatial ability, and low average scores in the areas of attention and executive functioning. None of this testing showed an intellectual impairment or significant communication impairment. (Testimony [Test.] of Shilakes; Exs. 11, 12.)

18. Ms. Price also tested claimant for social and emotional functioning. Claimant's scores indicated deficiencies in reciprocal social behavior that are clinically significant and may lead to mild or moderate interference with everyday social interactions. Claimant rated more significant deficits in the areas of social awareness and social communication, and has difficulty understanding social nuances, nonverbal

language, and interacting with peers. Claimant also rated significant scores in restricted interests and repetitive behavior, having difficulty with changes in routine, and engaging in behaviors others might find odd. (Ex. 11.)

19. Claimant's mother reported to Ms. Price during the testing that claimant had suffered a downward emotional spiral in the beginning of Summer 2020 and then again in October 2020, during which time claimant was getting increasingly depressed. This impacted her attitude, behavior, and performance at school. This time period coincided with remote learning due to the COVID-19 pandemic. Claimant was placed in a partial hospitalization program for depression during the 2020-2021 school year; upon discharge, claimant began meeting regularly with her school counselor and school psychologist. (Ex. 11.)

20. In her Psychoeducational Report, Ms. Price reviewed the criteria making one eligible for special education services under the category of Autism. Ms. Price believed claimant exhibited deficits in verbal communication, nonverbal communication, social interaction, resistance to environmental change, and resistance to change in daily activity. As a result, Ms. Price concluded claimant was eligible for special education services as a student with Autism. (Ex. 11.)

21. Ms. Price opined that, based on the rating scales from the testing, her observations of, and interview with, claimant, and other available reports, claimant was exhibiting behaviors that were characteristic of the eligibility categories of OHI, ED, and Autism. Ms. Price noted eligibility under Autism does not apply if a child is adversely affected primarily by an ED; ED symptoms can co-occur with Autism; and it can be difficult to "tease out" which is the prevalent cause. Thus, Ms. Price recommended claimant's IEP team consider this situation in Fall 2021 when determining claimant's primary category of eligibility. (Ex. 11, pp. A63-64.)

CLAIMANT'S 2021 IEP

22. In October 2021, claimant's IEP team met to develop her triennial IEP. The resulting IEP specifies Autism is claimant's primary eligibility category, and OHI as her secondary category. The IEP states claimant also can meet eligibility for services as a student with an ED. Based on the discussion in the factual finding immediately above, the IEP indicates the IEP team determined Autism was primarily responsible for claimant's deficits, not ED or other mental health diagnoses. (Ex. 12, pp. A66-67.)

23. The IEP team agreed claimant would continue to take regular classes at Westview, with specialized academic instruction to address her deficits. Claimant also receives 60 minutes per week of psychological services, and 30 minutes per week of language and speech services. Those services are provided during an extended school year to minimize the effects of regression during breaks in school. (Ex. 12.)

Service Agency's Evaluation of Claimant

INTAKE ASSESSMENT

24. On a date in 2022 not established, claimant's mother contacted service agency for an eligibility assessment of her daughter. Claimant's mother told service agency staff she suspected claimant had autism, with claimant's primary deficits being lack of socialization with peers, social rigidity, and difficulty handling change. (Ex. 5.)

25. On June 24, 2022, claimant and her mother met on Zoom with service agency Intake Counselor Jennifer Morales for a psychosocial assessment. Pertinent information was obtained about claimant's background and current functioning. Ms. Morales wrote a report from that assessment. Ms. Morales' clinical impressions were that claimant's delivery was uneventful; her developmental milestones emerged at

age-appropriate times; her health status is stable; and her medical history is unremarkable. However, in light of the concerns voiced by claimant's mother, and some of the descriptions of claimant's behaviors and deficits, Ms. Morales recommended a psychological evaluation of claimant to rule out ASD. (Ex. 5.)

PSYCHOLOGICAL EVALUATION

26. Service agency referred claimant for a psychological evaluation by Jeffrey Nishii, Psy.D., a clinical psychologist. Dr. Nishii met in person with claimant and her mother on two days in August 2022, during which he administered to claimant a series of tests, observed claimant's behavior, and interviewed claimant and her mother. Dr. Nishii also reviewed pertinent records. On or about August 16, 2022, Dr. Nishii issued a report of his findings. (Ex. 6.)

27. Dr. Nishii found claimant to be a cooperative subject. However, her response style was short and direct, her responses were often undetailed and uninformative, and she did not participate in reciprocal conversation. Claimant's speech was flat and monotone, she did not display much variation in affect, and she made fleeting eye contact. (Ex. 6.)

28. Claimant was given the Wechsler Adult Intelligence Scale- Fourth Edition, which measures cognitive functioning. Claimant's scores were in the average range, with a few areas in the upper average range. (Ex. 6.) Generally, claimant's scores were slightly higher than the cognitive functioning scores obtained by claimant's school district during its Spring 2021 testing. (Test. of Shilakes.)

29. Claimant was administered the Vineland Adaptive Behavior Scales– Third Edition, a test designed to determine a subject's adaptive functioning in various areas. Overall, claimant's adaptive behavior composite score fell in the low to moderately low

range of functioning. Of particular note, claimant's daily living skills were assessed as being in the low range of functioning. (Ex. 6.)

30. Claimant also was given the Autism Diagnostic Observation Schedule-Second Edition, a direct observational measure of social communication and behaviors used with other measures to determine the presence of ASD. Claimant's overall score was consistent with a diagnosis of ASD, and the comparison score indicated that she displayed high evidence of ASD-related symptoms as compared with children who have ASD and are of the same chronological age. (Ex. 6, p. A27.)

31. Dr. Nishii reviewed the criteria for a diagnosis of ASD pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and concluded claimant met all the required criteria. Based on all the information available to him, Dr. Nishii diagnosed claimant with ASD, with a "Level 1" severity in communication requiring support, and a "Level 2" severity in restricted and repetitive behaviors requiring substantial support. (Ex. 6, pp. A28-29.)

32. Finally, Dr. Nishii made a number of service recommendations for claimant, including a program to assist in developing skills required for living independently; career and vocational development assistance; and a social skills intervention program for young adults. (Ex. 6, pp. A29-30.)

33. Dr. Nishii made no finding attributing any of claimant's deficits to her mental health issues. (Ex. 6.)

SERVICE AGENCY'S DENIAL OF ELIGIBILITY

34. The only evidence in the record explaining service agency's decision to deny claimant eligibility for regional center services is the August 26, 2022 Notice of

Proposed Action, discussed above, in which claimant's parents were advised that a multidisciplinary team comprised of a neurologist, psychologist, and several counselors determined claimant was not eligible. (Ex. 3.)

35. The Notice of Proposed Action recommended services for claimant, including applied behavior analysis (ABA) behavior modification intervention; a social skills program; and vocational training. (Ex. 3.) In the ALJ's experience, all these are services commonly provided to those diagnosed with ASD. (Gov. Code, § 11425.50.)

SERVICE AGENCY OBSERVATION OF CLAIMANT

36. Service agency's eligibility team questioned Dr. Nishii's ASD diagnosis for claimant. Nonetheless, service agency staff believed that, because claimant was "high functioning," the larger question was whether she was substantially impaired by ASD. (Test. of Shilakes.) The eligibility team therefore decided to conduct a multidisciplinary observation (observation) of claimant to gather additional information about her diagnosis and functioning. (Ex. 7.) As discussed above, the observation was conducted in lieu of an informal meeting. (Ex. 4.)

37. The observation was conducted over Zoom on November 4, 2022. The observation was led by Psychologist Kaely Shilakes, a service agency intake manager, and observed by Psychological Consultant Mayra Mendez and Behavior Specialist Jessica Haro. The observation team made findings based on claimant's behavior during the observation, the language she used when interviewed, and claimant's responses to questions about her functioning in seven areas of major life activity. The results of the observation were documented in an observation report. (Ex. 7.)

38. In the observation report, the team described claimant as a depressed teenager with flat affect and short responses. The team concluded claimant has the

capacity to perform self-care tasks and has no significant deficits in receptive/expressive language. During the observation, claimant did not demonstrate repetitive, restricted interests or behaviors; use any stereotyped, atypical, or idiosyncratic speech; or demonstrate insistence on sameness or sensory issues. The team concluded claimant's overall presentation did not reflect an individual substantially disabled by a developmental disability. Instead, the team believed claimant's reported challenges reflected a teenager who has mental health issues that should be explored in consistent psychotherapy. (Ex. 7.)

39. Based on the observation and their review of information gathered, the observation team concluded claimant was ineligible for regional center services. The team recommended claimant continue to receive mental health supports. (Ex. 7.)

40. By letter dated November 9, 2022, claimant's parents were notified of the results of the observation. Claimant's parents were advised that while claimant "does have an ASD diagnosis . . . she is not substantial[ly] disabled by that diagnosis. [Claimant] did not show age-appropriate deficits in any three of the [seven areas of major life activity]." The letter also stated claimant's "presentation appeared to be more reflective of mental health issues as opposed to her ASD diagnosis." (Ex. 4.)

41. Dr. Shilakes testified during the hearing. Her testimony was consistent with the above-described findings contained in the observation team's report. The bulk of her testimony focused on claimant's abilities and deficits in the seven areas of major life activity. Dr. Shilakes offered no elaboration in her testimony concerning why service agency staff attributed claimant's impairments in the areas of major life activity to her mental health issues rather than ASD.

Other Evaluations of Claimant

42. Keeley Dunn is a therapist who worked with claimant in the Discovery Mood & Anxiety Program, which is the partial hospitalization program claimant was placed in after suffering her above-described downward emotional spiral in 2020. In a letter dated March 26, 2021, Ms. Dunn reported claimant has the following challenges: difficulty identifying and expressing emotion, poor memory, low social awareness, rigid thinking and behavior patterns, limited food preferences, low awareness of personal space, and poor hygiene. (Ex. 8.)

43. Since 2014, psychiatrist Philantha Kon has treated claimant for anxiety, mood lability, impulsivity, inattention, distractibility, and hyperactivity. In a letter dated April 7, 2021, Dr. Kon concluded that claimant suffers from Anxiety Disorder Not Otherwise Specified (NOS), Mood Disorder NOS, and ADHD Combined Type. Dr. Kon also believes claimant struggles with social challenges and experiences, and expresses emotional reactions that are often exaggerated and/or not appropriate to context. Claimant also struggles with social awareness, rigid thinking, perseveration, and poor self-care. (Ex. 9.)

44. Samantha Persoff is a psychotherapist who has worked with claimant and her family since 2012. Ms. Persoff has treated claimant for oppositionality, attentional deficit, distractibility, and impulsivity. In a letter dated April 29, 2022, Ms. Persoff describes claimant as having the following problems: difficulty following directions and completing tasks; limited self-awareness and the effect of her behavior on others; difficulty comprehending implicit messages or figurative language; rigid thinking; communication challenges; limited food preferences; intolerance of certain food textures; perseveration on ideas and objects; and interests in things that are immature for her age. (Ex. 10.)

45. Sheila Zaft is the principal of Westview. In her letter dated January 28, 2023, Principal Zaft wrote that claimant has struggled with social difficulties, attention, anxiety, and rigidity; needs a small school in order to support her needs in the classroom; and benefits from small class size, taking breaks, and the chunking of material. (Ex. A.)

46. Each author of these four letters recommend claimant's referral to a regional center for evaluation of her eligibility for services. (Exs. 8, 9, 10, A.)

Impairments in Claimant's Major Areas of Life Activity

47. As discussed in the Legal Conclusions below, eligibility for services under the Lanterman Act also requires the eligible condition to cause a substantial disability. In making that determination, each of the seven areas of major life activity listed below must be analyzed for the presence of a significant functional limitation.

RECEPTIVE AND EXPRESSIVE LANGUAGE

48. Neither party contends claimant has a significant functional limitation in receptive and expressive language.

LEARNING

49. Neither party contends claimant has a significant functional limitation in learning.

SELF-CARE

50. Service agency contends claimant does not have a significant functional limitation in her self-care caused by ASD. Dr. Shilakes testified claimant is capable of caring for herself, but that her mental health issues interfere with her motivation to

follow through on her self-care. In support of her conclusion, Dr. Shilakes points to claimant's October 2021 IEP, in which her adaptive skills are described as age appropriate, and to claimant's observation in 2022, during which claimant described her efforts to get herself ready for school in the morning.

51. However, Dr. Nishii rated claimant's personal daily living skills as within the low range of functioning. (Ex. 6.) Claimant's therapist, Ms. Dunn, describes claimant as having hygiene challenges, with a low regard for keeping herself clean. (Ex. 8.) And claimant's psychiatrist, Dr. Kon, wrote that claimant has poor self-care skills. (Ex. 9.)

52. While the observation report portrays claimant's self-care skills as age appropriate, claimant's mother testified the situation is more dire in reality. For example, claimant's father has to give out her psychiatric medications each morning. Claimant was placed on birth control to limit her menses because she refuses to use feminine hygiene products. Even though claimant reports to those who ask her that she brushes her teeth every day, the toothbrush she uses has a phone application which shows claimant only brushes her teeth 11 seconds each day. Claimant also tells people she takes showers regularly, but claimant's mother reports she must get in the shower with her daughter to clean her. Claimant's mother also reports her daughter will wear disheveled clothes when left on her own, blow her nose in her jacket, and pick her nose in front of others.

53. Based on the above, it was established by a preponderance of the evidence that claimant has a significant functional limitation in self-care caused by ASD.

MOBILITY

54. Neither party contends claimant has a significant functional limitation in mobility.

SELF-DIRECTION

55. At hearing, the parties agreed claimant has a significant functional limitation in self-direction caused by ASD.

CAPACITY FOR INDEPENDENT LIVING

56. Section 4512, subdivision (/), provides that the "areas of major life activity" should be applied "as appropriate to the age of the person." Therefore, claimant's degree of independent living skills should be viewed in comparison to those of other young people around her age.

57. At hearing, neither party specifically addressed this area of major life activity. While claimant is not at an age to live independently, she is at an age where an average functioning teenager of equivalent age would be allowed to go to school or into the community unescorted, left home alone for brief periods of time, or to care for younger children unsupervised (either siblings or as a babysitter). In this case, no evidence suggests claimant is allowed to go into the community alone, stay at home alone for any period of time, or care for younger children unsupervised.

58. In fact, Dr. Nishii wrote in his report that claimant "is not able to travel throughout the community . . . independently." (Ex. 6, p. A27.) During the observation, claimant reported to Dr. Shilakes that her parents take her and pick her up from school; she does not have a driver's license and is not interested in getting one; and she does not go anywhere by herself. (Ex. 7, p. A34.)

59. During the observation, claimant's mother reported that claimant has poor safety awareness of people on social media. (Ex. 7.) Dr. Nishii similarly reported claimant "does not avoid being manipulated by others and does not always think through consequences of her actions." (Ex. 6, p. A27.) Claimant's mother also reported a recent incident when claimant dismantled a pencil sharpener to use the blade to cut furniture in the house. (Ex. 7.)

60. Based on the above, claimant established by a preponderance of the evidence that she has a significant functional limitation in her capacity for independent living caused by ASD.

ECONOMIC SELF-SUFFICIENCY

61. The discussion above concerning capacity for independent living also applies to this major life activity. While one would not expect a typically developing teenager to be economically self-sufficient, one would expect such an individual to be capable of working after-school or during school breaks, as well as contemplating realistic vocational interests.

62. Service agency agrees such an analysis is appropriate for claimant. Dr. Shilakes testified claimant is not significantly limited in this area because she has expressed an interest in going to college, becoming an elementary school teacher, or possibly becoming an attorney. In addition, during the observation claimant said she had a job at Westview doing office work, which she found boring.

63. Claimant's mother provided in her testimony examples of how Dr. Shilakes' points above are misleading. Once claimant's uncle put claimant to work in his coffee shop; the experiment was abandoned within an hour because claimant was rude to customers. Claimant's uncle told claimant's mother that claimant was

“unemployable.” While claimant did office work at Westview as part of the Workability Program, claimant’s mother found claimant’s uncashed paychecks at home after they had expired and were no longer valid. Claimant assisted adults during a summer school arts and crafts program for young children, but the program director told claimant’s mother claimant was too argumentative with the adults and not mature enough. Claimant wants to attend college, but claimant’s mother does not think she can handle it without extensive supports, including a shadow to help her get to class and take notes. Claimant cannot be trusted with cash because she will lose it.

64. Based on the above, it was established by a preponderance of the evidence that claimant has a significant functional limitation in economic self-sufficiency caused by ASD.

Mental Health Issues

65. Service agency stated in conclusory fashion in the Notice of Proposed Action and observation report that claimant’s deficits discussed above are solely or primarily attributed to her mental health diagnoses. Neither document provided a detailed explanation for that contention. Nor did service agency provide any meaningful evidence at hearing supporting its argument. Dr. Shilakes did not elaborate on the point in her testimony.

66. It is not apparent that claimant’s psychiatric disorders are solely or primarily causing the impairments in her areas of major life activity. In fact, service agency concedes the impairment in claimant’s self-direction is based on her ASD. It is not the case that claimant is capable of independent living or economic self-sufficiency but lacks motivation to function in those areas due to her anxiety and mood disorders. Rather, she is incapable of performing in those areas due to social

and communication impairments caused by her ASD. While some of claimant's failures in the area of self-care could be attributed to lack of motivation caused by her psychiatric disorders, the bulk of the impairment is related to her failure to grasp that her appearance, hygiene, and behavior are judged by others, and her lack of ability to care about that, which are hallmarks of ASD.

67. Finally, the decision of claimant's IEP team in Fall 2021 to deem claimant eligible for special education services primarily due to Autism, and to render ED as a tertiary category, undercuts service agency's contention.

LEGAL CONCLUSIONS

Jurisdiction

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (§§ 4700-4716.) Claimant's mother requested a hearing to contest service agency's denial of claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-6.)

2. One is eligible for services under the Lanterman Act if it is established she is suffering from a substantial disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category. (§ 4512, subd. (a).) The fifth category condition is specifically defined as "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (§ 4512, subd. (a).) A qualifying condition must originate before one's 18th birthday and continue indefinitely. (§ 4512.)

3. Pursuant to California Code of Regulations, title 17, section (Regulation) 54000, subdivision (c)(1), a developmental disability shall not include handicapping conditions that are "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.

Burden and Standard of Proof

4. When an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on her. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In this case, claimant bears the burden of establishing she is eligible for services because she has a qualifying condition that is substantially disabling.

5. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

Claimant Has the Qualifying Condition of Autism

6. The Lanterman Act and its implementing regulations contain no specific definition of the neurodevelopmental condition of "autism." However, the DSM-5, which came into effect in May 2013, provides ASD as the single diagnostic category for the various disorders previously considered when deciding whether one has autism,

i.e., Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Disorder, and Autistic Disorder. Therefore, a person diagnosed with ASD should be considered someone with the qualifying condition of "autism" pursuant to the Lanterman Act.

7. In this case, claimant met her burden of proving by a preponderance of the evidence that she has the qualifying condition of ASD, or for purposes of the Lanterman Act, autism. While service agency quibbled with Dr. Nishii's diagnosis of ASD for claimant, it offered no competing expert opinion that claimant does not have ASD. Dr. Nishii's diagnosis is corroborated by the decision of claimant's IEP team in Fall 2021 to deem claimant primarily eligible for special education services under the category of Autism. Moreover, claimant's case is marked by several classic indications she has ASD, including claimant's manifestation during elementary school of difficulty in sharing, transitioning, and participating in non-preferred activities. Now that claimant is in high school, she is showing the hallmarks of ASD, i.e., a lack of ability to socialize with peers or others, persistence in atypical or non-productive activities or interests, and impairment in understanding nonverbal cues. (Factual Findings 7-46.)

Claimant is Substantially Disabled by Autism

8. A qualifying condition also must cause a substantial disability. (§ 4512, subd. (a); Reg. 54000, subd. (b)(3).) A "substantial disability" is defined by Regulation 54001, subdivision (a), as:

(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.

9. Claimant established by a preponderance of the evidence that her ASD results in major impairment of her social functioning, which requires interdisciplinary planning and coordination of special or generic services. (Reg. 54001, subd. (a)(1).) Both Dr. Nishii in his report and service agency in its Notice of Proposed Action recommend services for claimant aimed primarily at her substantial social deficits and are typically received by a child diagnosed with ASD. Claimant's school district currently is providing her with language and speech services. Thus, claimant will require, and benefit from, a coordination of special and generic services to assist her in achieving maximum potential. (Factual Findings 7-46.)

10. Claimant also established by a preponderance of the evidence that she has significant functional limitations in four areas of major life activity caused by ASD, i.e., self-direction, self-care, the capacity for independent living, and economic self-sufficiency. (Reg. 54001, subd. (a)(2).) By doing so, claimant established that her eligible condition is substantially disabling. Service agency's argument that claimant's

functional impairments are solely or primarily caused by her psychiatric disorders was not borne out by the evidence. (Factual Findings 7-67.)

Claimant is Eligible for Services

11. Since claimant established she has the qualifying developmental disability of autism, and that her condition is substantially disabling, it was established by a preponderance of the evidence that she is eligible for regional center services under the Lanterman Act. (Factual Findings 1-67; Legal Conclusions 1-10.)

ORDER

Claimant's appeal is granted. Claimant is eligible for services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act.

DATE:

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.