

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

**In the Matter of:**

**Claimant,**

**vs.**

**South Central Los Angeles Regional Center,  
Service Agency.**

**DDS No. CS0010232**

**OAH No. 2023110759**

**DECISION**

Administrative Law Judge (Hearing Officer) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter via videoconference on September 6, 2024.

Claimant's mother (Mother) appeared on behalf of Claimant who was not present. (Titles are used to protect the privacy of Claimant and her family.) Spanish-language interpreters Pablo Romero and Manuel Choi appeared by videoconference and provided translation assistance to Mother.

Tami Summerville, Appeals Manager for the South Central Los Angeles Regional Center (Service Agency), appeared on behalf of Service Agency.

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on September 6, 2024.

On September 18, 2024, the Hearing Officer on her own motion reopened the record pursuant to Welfare and Institutions Code section 4712, subdivision (i)(1), to inform the parties of her intent to take official notice of the following five documents and to provide the parties an opportunity to submit written objections: (1) the Department of Developmental Services (DDS) August 5, 2021, Directive to Regional Center Executive Directors, titled "Provisional Eligibility for Regional Center Services" (August 2021 Directive) (marked as Exhibit OAH1); (2) the Chart Comparing Lanterman Act Eligibility and Provisional Eligibility (Eligibility Chart), which accompanied the August 2021 Directive (marked as Exhibit OAH2); (3) the DDS Proposed Trailer Bill Legislation Provisional Eligibility Assessment Requirements Fact Sheet (marked as Exhibit OAH3); (4) the Diagnostic and Statistical Manual – 5th Edition (DSM-5) chapter on Autism Spectrum Disorder (ASD) (marked as Exhibit OAH4); and (5) the DSM-5 chapter on Intellectual Disability (ID) (marked as Exhibit OAH5).

The record remained open until September 25, 2024. Neither party submitted written objections and the Hearing Officer took official notice of Exhibits OAH 1 through OAH 5 and admitted the exhibits into evidence. The record closed and the matter was submitted for decision on September 25, 2024.

## **ISSUE**

Whether Claimant is eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)

## **EVIDENCE RELIED UPON**

Documents: Service Agency's Exhibits 1 through 10; OAH Exhibits 1 through 5.

Testimony: Laurie McKnight Brown, Ph.D.; Mother.

## **SUMMARY**

Claimant is a four-year-old child who received Early Start services from Service Agency. However, upon reassessment at the end of her Early Start services, Service Agency determined Claimant was not eligible for regional center services under the Lanterman Act. Service Agency agrees Claimant has Autism Spectrum Disorder but concludes it is not substantially disabling.

Service Agency assessed Claimant for eligibility under the Lanterman Act pursuant to section 4512, subdivision (a)(1), the Lanterman Act's requirements for determining if an individual has a developmental disability (developmental disability assessment). However, at the time Service Agency denied Claimant's eligibility, in September 2023, the Lanterman Act provided that if a child under five is found not to have a developmental disability under section 4512, subdivision (a)(1), the regional center must assess whether the child is provisionally eligible for Lanterman Act

services pursuant to section 4512, subdivision (a)(2) (provisional eligibility assessment). (Pursuant to recent amendments, the Lanterman Act no longer provides for children under five to undergo a developmental disability assessment.) However, Service Agency failed to conduct the provisional eligibility assessment of Claimant before determining Claimant was not eligible for Lanterman Act services.

Service Agency addressed whether Claimant was provisionally eligible during the hearing but wrongly concluded Claimant should be denied provisional eligibility because Claimant was not substantially disabled. However, provisional eligibility does not require a showing of substantial disability. Contrary to Service Agency's conclusion, Claimant is qualified for provisional eligibility under the Lanterman Act. The record is replete with Early Start assessments and psychological evaluation information demonstrating Claimant has significant limitations in language expression, self-care, and self-direction as evidenced, for example, by her delays in language expression, her lack of appropriate sense of fear or danger of risky behaviors, and her inability to independently toilet though she is now over four years old.

Claimant's appeal is granted. Claimant is eligible for services under the Lanterman Act pursuant to section 4512, subdivision (a)(2), provisional eligibility.

## **FACTUAL FINDINGS**

### **Jurisdiction**

1. Claimant is four years and two months old and resides with Mother, her father, and her 15-year-old brother and 13-year-old sister.

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2. In May 2022, when Claimant was 22 months old, Service Agency found Claimant eligible for services under the California Early Intervention Services Act (Early Start) (Government Code § 95000, et seq.).

3. Between March and June 2023, Service Agency evaluated Claimant for eligibility under the Lanterman Act.

4. On July 19, 2023, Service Agency found Claimant was not eligible for regional center services under the Lanterman Act. Service Agency informed Claimant of its findings in a Notice of Action (NOA) sent to Claimant on September 14, 2023. The NOA and Service Agency's Position Statement only notified Claimant that she is not eligible for Lanterman Act services because she does not have a developmental disability as defined by section 4512, subdivision (a)(1). Service Agency did not provide Claimant a NOA addressing provisional eligibility and did not provide Claimant notice in its Position Statement regarding her right to be assessed for provisional eligibility. (Exh. 1, pp. A3, A4, & A24.)

5. On September 25, 2023, Claimant submitted a timely Request for a Fair Hearing.

6. The fair hearing was initially scheduled for December 27, 2023. Service Agency requested and was granted two continuances based on the holiday closure of its offices and the unavailability of a witness. Based on Service Agency's requests for continuances, the fair hearing date was rescheduled for April 25, 2024. Claimant then requested two continuances based on Claimant's need for additional time to obtain educational records and then based on Mother's unavailability. These additional continuances resulted in the fair hearing being held on September 6, 2024, nearly a year after the NOA was issued.

## **Claimant's Early Start Eligibility**

7. Claimant was found eligible for Early Start services in May 2022, when she was 22 months old, based on significant delays in the areas of social/emotional and communication skills. (Exh. 10, p. A116.) Service Agency conducted a psycho-social evaluation of Claimant and referred Claimant for a speech evaluation and an occupational therapy (OT) evaluation.

8. Claimant's initial June 1, 2022, Individualized Family Service Plan (IFSP) was not entered in evidence. However, based on Claimant's June 2023 IFSP and the testimony of Laurie McKnight Brown, Ph.D., Claimant's Early Start services were to include weekly OT and speech therapy (ST) services.

### **INITIAL ASSESSMENTS**

#### **Psycho-Social Evaluation**

9. On May 4, 2022, Service Coordinator (SC) Amelia Medrano conducted an Early Start Psycho-Social assessment of Claimant on which Claimant achieved the following scores: Average for the Physical domain, Below Average for the Adaptive Behavior and Cognitive domains, and Delayed in the Social Emotional and Communication domains. (Exh. 2, p. A29.) SC Medrano submitted the case to Service Agency's interdisciplinary team for eligibility, submitted requests for Claimant to receive a speech evaluation and an OT developmental assessment, and recommended Claimant receive follow up care.

#### **Occupational Therapy Evaluation**

10. On May 16, 2022, Gaudalupe E. Thompson, Registered and Licensed Occupational Therapist (OTR/L), conducted an Initial Developmental Evaluation of

Claimant and wrote an Initial Developmental Evaluation. (Exh. 4, pp. A43-A50.) OTR/L Thompson provided the following summary and recommendations:

#### Overall Summary & Recommendations

According to [Claimant's'] performance on the Developmental Assessment of Young Children 2, her developmental levels are as follows: 18 months in cognitive skills, 22 months in social-emotional skills, 18 months in gross motor skills, 15 months in fine motor skills, 25 months in receptive language skills, 12 months in expressive language skills, and 17 months in adaptive skills. There appear to be moderate sensory processing concerns at this time. Areas of concern include tactile, auditory, visual, vestibular, proprioceptive, and oral sensory processing. . . .

#### RECOMMENDATIONS:

1. [Claimant] presents with delays in fine motor and expressive language, in which treatment may be of benefit, pending final decision of the [Service Agency's] Early Start eligibility team, which considers additional developmental and medical history information within a gestalt manner.

a. [Claimant] presents with sensory processing concerns and oral motor difficulties in which [OT] may be of benefit 1x/week, pending final decision of the eligibility team.

[¶] . . . [¶]

(Exh. 4, p. A49.)

### **Speech and Language Evaluation**

11. On May 12, 2022, Michael Coel, M.S., Certified Certificate of Clinical Competence in Speech-Language Pathology (CCC-SLP), conducted a remote Speech and Language Evaluation of Claimant. (Exh. 4, pp. A51-A55.) CCC-SLP Coel assessed Claimant's speech and language using the Rossetti Infant Language Toddler Scale and concluded she presents with deficits in the area of expressive language (greater than 50 percent delayed). (*Id.* at p. A54.) He recommended Claimant receive one hour of speech and language therapy per week. (*Ibid.*)

### **EVALUATIONS DURING RECEIPT OF EARLY START SERVICES**

12. As part of her Early Start services, Claimant was referred to, and received services from, Ninos Del Cielo Inc. (Ninos) for Home-Based Early Intervention Childhood Program (HBEICP) services. Claimant regularly received her HBEICP services five times per month for hourly sessions during her receipt of Early Start services.

### **October 2022 Quarterly Evaluation**

13. On October 11, 2022, when Claimant was 27 months old, Carlos Robles, Claimant's Early Start SC, completed an Intervention Childhood Program Initial Evaluation, or quarterly evaluation, of Claimant. (Exh. 5.) The October 2022 quarterly evaluation concludes Claimant met Outcome 4 (Fine Motor), that Outcome 1 (Cognitive) was emerging, and that Claimant did not meet Outcomes 2 (Language) or 3 (Gross Motor). (*Id.* at p. A57.) Outcomes 5 (Social Development) and 6 (Self-Help Development) were added to Claimant's HBEICP program.



14. As part of Claimant's October 2022 quarterly evaluation, Crystal Portillo, M.A., conducted a developmental assessment of Claimant using the Bayley Scales of Infant Toddler Development III (Bayley III) and Claimant's Social and Self-Help skills were evaluated using the Hawaii Early Learning Profile (HELP.) (Exh. 5, p. A57.) Claimant obtained the following scores: Cognitive 24 months; Language Receptive 16 months and Expressive 18 months; Fine Motor Skills 28 months; Gross Motor Skills 15 months; Social Skills 25.5 months; and Self-Help Skills 21 months. Ms. Portillo recommended Claimant continue to receive HBEICP services.

### **January 2023 Quarterly Evaluation**

15. On January 24, 2023, when Claimant was 30 months old, SC Robles completed a January 2023 quarterly evaluation of Claimant. The January 2023 quarterly evaluation concludes Claimant had met Outcomes 1 (Cognitive), 2 (Language), 3 (Gross Motor), 5 (Social Development), and 6 (Self-Help Development), and that Outcome 4 (Fine Motor) was emerging. (Exh. 8, pp. A94-A98.) Jessica Alvarado, M.Ed., conducted a developmental assessment of Claimant using the Bayley III and HELP and reported Claimant obtained the following scores: Cognitive 30 months; Language Receptive 25 months and Expressive 26 months; Fine Motor 27 months; Gross Motor Skills 21 months; Social Skills 30 months; and Self-Help Skills 26 months.

### **CLAIMANT'S EARLY START FINAL EVALUATION**

16. On June 29, 2023, Claimant's Early Start team met for Claimant's IFSP annual review by phone. In attendance was SC Robles, Mother, and Mayra Puente, Early Interventionist with Ninos. At the conclusion of the meeting, Service Agency

finalized Claimant's 2023 IFSP and informed Claimant her Early Start services would end on her third birthday, five days later.

17. Claimant's 2023 IFSP showed the following services had been approved for Claimant during her Early Start Eligibility: one hour per week of Specialized Instruction In-Home Program to be provided by Ninos, between September 1, 2022, and July 4, 2023; one hour per week of ST, to be provided by Maya Borna, Inc. between September 1, 2022, and July 4, 2023; one hour per week of OT to be provided by TLC Pediatric Therapy, between May 15 and August 31, 2023; and that a Transition Meeting Conference was supposed to have been held with Claimant and the Los Angeles Unified School District (LAUSD) sometime between March and April 2023.

18. Although Claimant had a right to receive her OT and ST services during her eligibility for Early Start, Claimant did not receive these services because her health insurance provider has yet to approve these services. Service Agency did not otherwise provide Claimant's OT or ST services because a generic resource (Claimant's health insurance provider) was available to provide these services. Claimant's delay in receiving ST and OT services impaired her development. Regarding the transition meeting to be held with Claimant and her school district, although it was supposed to have been held by the time Claimant was two years and nine months, or 33 months, old. (Exh. 10, p. A119), at the time of the fair hearing, when Claimant was four years and two months old, the meeting had still not been held. (See Exh. 6, pp. A61-A68.)

19. Mother explained once she knew Claimant was eligible for these services, she contacted her health insurance to initiate service approval. Mother has also requested her health insurance provider approve Applied Behavioral Analysis (ABA) services for Claimant. However, mother has been informed by her health insurance

provider it would take over 18 months to obtain the services and was informed by Claimant's doctor they had no availability to provide Claimant OT.

20. Claimant's developmental delays remain present. At the conclusion of her Early Start services Claimant continued to have delays in the two primary areas of concern, motor skills and language skills. The IFSP team's final evaluation of Claimant's development was on April 24, 2023, when Claimant was 33 months old. The evaluation was completed using the HELP, parent report, and SC Robles's inquiry. The IFSP team reported Claimant obtained the following scores: Cognitive 29 months; Language Receptive 23 months and Expressive 26 months; Fine Motor 32 months; Gross Motor 27 months; Social Skills 23 months; and Self-Help Skills 27 months. (Exhs. 8 at p. A91,10 at p. A117.)

21. During Claimant's Early Start eligibility, Claimant's development in the primary areas of concern, motor and language skills, improved slightly in some areas, though still showed delay, and worsened in other areas. During her initial evaluation, Claimant was 22 months old but her gross motor skills were at 18 months (a four-month delay) and her fine motor skills were at 15 months (a seven-month delay). At the time of Claimant's 2023 IFSP, her gross motor delay was six months and her fine motor delay was one month. As such, although Claimant had made progress in her fine motor skills, her gross motor skill delay was two months greater than before her eligibility for Early Start services.

22. Claimant's language skills also remain delayed. At the time of her initial evaluation Claimant's receptive language skills were at 25 months (no delay) and her expressive language skills were at 12 months (a 10-month delay). At the time of Claimant's 2023 IFSP, Claimant had a 10-month delay in receptive language and a seven-month delay in expressive language. Based on this information, during her

eligibility for Early Start services, Claimant developed a receptive language skill delay and although her expressive language delay improved somewhat, she continued to have a seven-month delay in expressive language skills.

## **Service Agency's Assessment for Lanterman Act Eligibility**

### **SERVICE AGENCY EVALUATIONS**

23. In March 2023, when Claimant was 33 months old, Service Agency began its assessment to determine if Claimant was eligible for Lanterman Act services. At this time, the Lanterman Act provided for provisional eligibility for children between three and four years of age, but as originally enacted, a regional center was still required to first conduct a developmental disability assessment. (Assem. Bill No. 136 (2021-2022 Reg. Sess.), § 20.)

### **March 2023 Psychological Evaluation – ASD Assessment**

24. On behalf of Service Agency, on March 2 (by telephone) and 24 (in-person), 2023, Belle Calkin, Psy.D., conducted a Telehealth Psychological Evaluation (2023 psychological evaluation) of Claimant to assess whether Claimant has ASD or an intellectual disability. (Exh. 3.) The 2023 psychological evaluation, which occurred 18 months before the fair hearing, is the most recent evaluation Service Agency conducted of Claimant.

25. Dr. Calkin based her findings on her interview with Mother, behavioral observations during her assessment, and a review of the psycho-social assessment. Dr. Calkin administered the following tests to Claimant: Autism Diagnostic Interview-Revised (ADI-R); Cognitive Assessment of Young Children (CAYC); TELE-ASD PEDS (TAP) a Telemedicine-Based ASD Evaluation Tool for Toddlers and Young Children; and

the Vineland Adaptive Behavioral Scale, Third Edition (VAB-3). Based on these assessments, Dr. Calkin concluded Claimant has ASD with accompanying language impairment and without cognitive impairment; Claimant's ASD is Level 1 (needs support) for social communication and Level 2 (needs substantial support) for repetitive and restrictive behaviors.

26. The ADI-R was administered to assess for whether Claimant has ASD. Claimant's scores exceeded the diagnostic cutoffs in all areas except for abnormalities in communication. Claimant scored 20 in abnormalities in reciprocal interaction, for which the cut off is 10; 12 in restricted and stereotypic patterns of interest, for which the cut off is 3; and 2 in abnormalities in communication, for which the cut off is 7.

27. Dr. Calkin noted the following abnormalities in Claimant's reciprocal social interaction:

[Claimant] does not engage in consistent eye contact. Per [Mother's] report, she will "act as if no one is talking to her."  
... [Claimant] has a limited amount of facial expressions (tends to be neutral or exaggerated). She goes to play with other children but then "acts sad" and won't engage anymore (this may be due to when play is no longer on her terms). Additionally, she does not play reciprocally. She plays parallel to peers and engages in self-preferred tasks. .  
. . [Claimant] does not show comfort or recognize changes in emotions in others. She consistently uses coordinated eye contact and vocalizations to communicate. [Claimant's] expressions are inappropriate in several situations, and she is not interested in others. . . .

(Exh. 3, p. A37.)

28. Throughout Dr. Calkin's evaluation of Claimant, Claimant made ringing noises in a repetitive manner. In addition, Dr. Calkin observed or Mother reported Claimant displays the following restricted, repetitive, and stereotyped patterns of behavior:

[Claimant] has some occupations in spoons, hammers, and screwdrivers. She has a fixated interest in her Cocomelon doll and bottle for the doll. . . . [Claimant] engages in repetitive speech. She lines up toys (by color and size) and/or stacks items. [Claimant] has to eat off a certain plate. She follows routines daily and becomes distressed during transitions or changes. [Claimant] keeps toys in a specific place and becomes upset when touched. [Claimant] jumps up and down and spins in circles repetitively. Additionally, she is hyperactive and has difficulty sitting still. [Claimant] shows difficulty recognizing danger, such as climbing on objects and eloping in public or dangerous settings. She also has other repetitive behaviors, such as turning lights on and off, taking items apart, ripping up, and throwing items. [Claimant] has textural sensitivities, such as sticky items, touching people, or touching her. . . . She complains of things smelling even when perceived as normal smells by her family. . . . [Claimant] looks at items up close and/or out of the corner of her eyes. She becomes emotionally dysregulated often. . . . [Mother] reported that [Claimant]

retains her bowel movements and will not make a bowel movement. She will signal to [Mother] that feces are "bad," and [Mother] cannot convince her otherwise. [Mother] says [Claimant] struggles a lot when it is time to go to the bathroom. She enters her own world until she can no longer hold it and wants to be changed immediately. She has gone through all the medical procedures to check her internal organs, and everything is normal; the pediatrician told [Mother] it's a mental issue, not a physical one.

(Exh. 3, pp. A37-A38.)

29. Dr. Calkin assessed Claimant under the DSM-5 definition for ASD and found Claimant presented with the following persistent deficits in social communication and social interaction across contexts: deficits in social emotional reciprocity; nonverbal communicative behaviors; and developing and maintaining relationships. (Exh. 3, p. A38.) Regarding restrictive and repetitive patterns of behavior, interests, or activities, Dr. Calkin found Claimant demonstrated the following four symptoms identified by the DSM-5: stereotyped or repetitive speech, motor movements, or use of objects; excessive adherence to routines, ritualized patterns of verbal or non-verbal behavior, or excessive resistance to change; highly restricted fixated interests that are abnormal in intensity or focus; and hyper or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. (*Id.* at p. A39.)

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## **March 2023 Psychological Evaluation – Cognitive and Adaptive Functioning Assessments**

30. Dr. Calkin also administered the CAYC to Claimant to assess her cognitive functions. Dr. Calkin found Claimant's cognitive score fell in the poor range which suggests Claimant should also be diagnosed with an intellectual disability. (Exh. 3, p. A39.) However, because of Claimant's related diagnosis of ASD, Dr. Calkin concluded Claimant's cognitive scores may not accurately represent Claimant's cognitive abilities and for this reason Dr. Calkin diagnosed Claimant with Global Developmental Delay. (*Id.*)

31. Claimant obtained the following scores on ABAS-3, assessing Claimant's adaptive functioning: Adaptive Behavior 83, Moderately Low; Communication Domain 83, Moderately Low, with subsets Receptive 12, Moderately Low, and Expressive 11, Moderately Low; Daily Living 80, Moderately Low; Socialization 94, Adequate, with subset scores of Play and Leisure and Coping Skills 15, Adequate, and Interpersonal Skills 11, Moderately Low; and finally Motor Skills 93, Adequate.

## **March 2023 Psychological Evaluation - Recommendations**

32. Dr. Calkin recommended Claimant receive supportive services to assist in the mitigation of developmental delays, speech services to increase Claimant's ability to communicate verbally, and a behavioral assessment to receive ABA services to reduce tantrums, resistance, and other maladaptive behaviors. Dr. Calkin further recommended Claimant be evaluated by an occupational therapist to determine if there are sensory processing deficits and for Claimant to be provided with intervention as needed. Finally, Dr. Calkin recommended Claimant be evaluated by LAUSD for



special education services under the eligibility category of ASD and that Claimant be evaluated for cognitive functioning in approximately two years. (Exh. 3, p. A39.)

### **March 2023 OT Evaluation**

33. On March 23, 2023, when Claimant was 32 months and 19 days old, Jacqueline Vasquez, OTR/L, with Exceptional Children's Foundation Early Start Program, conducted an Occupational Therapy Developmental Evaluation of Claimant (2023 OT Evaluation). OTR/L Vasquez assessed Claimant using the following assessment tools: clinical observation; parent observation and interview; Developmental Programming for Infants and Young Children (Volume 2): Early Intervention Developmental Profile; and the Toddler Sensory Profile 2- Caregiver Questionnaire. (Exh. 8, p. A84.)

34. Based on OTR/L Vasquez's assessments, Claimant demonstrated the following skill level: Fine Motor and Perceptual Skill 31 months (one-month delay); Gross Motor Skills 31 months (one-month delay); Cognitive Skills 32 months (no delay); Social Skills 31 months (one-month delay); Self-Care Skills 24-31 months, (one-month to eight-month delay); and Oral Motor and Feeding 32 months (no delay). OTR/L Vasquez noted "[Claimant] presents with marked difficulty with sensory modulation as scored by [Mother]" (Exhibit 8, page A87), and under "Problem List" noted "Sensory processing- general processing, oral sensory processing affecting her self-care skills, body awareness and her behavioral responses" (*Id.* at p. A88.)

35. Regarding language skills, OTR/L Vasquez deferred to a ST report which was not submitted in evidence. (Exh. 8, p. A86.) OTR/L Vasquez provided the following summary regarding her OT evaluation of Claimant (the following typographic and grammatical errors appear in the original):

[Claimant] presents with sensory processing and sensory modulation difficulties affecting her self-care skills and overall responses to the environment. She presents behavior issues related to sensory processing issues and also appears to be scared of her bowel movements as she is aware of her bowel movements and retains her stool. She engages in tantrums when she is having a bowel movement. [Claimant] is in the process of further evaluations as her x-rays show a normal gas pattern. She presents with decreased body awareness and tends to crash with objects or appears clumsy. She is also presenting with oral sensory issues affecting her feeding skill. She gags with certain food and will sometimes overstuff. She is having difficulties with tolerance to toothbrushing and hair brushing, this relates to sensory avoiding and sensory sensitivity. Parent is eager to learn new ways to aid [Claimant] in reaching her highest potential.

(Exh. 8, p. A89.)

### **TESTIMONY OF LAURIE MCKNIGHT BROWN, PH.D.**

36. Dr. Brown has served as a Lead Psychologist Consultant for Service Agency for seven years and is a member of Service Agency's Multidisciplinary Team. In this capacity, she reviewed Claimant's Early Start records as summarized in Factual Findings 12 through 21. Dr. Brown did not meet or evaluate Claimant and was uncertain whether any of her developmental delays qualifying her for Early Start services had been resolved. Both in her testimony and in Service Agency's closing

argument, Service Agency concluded Claimant was not eligible for Lanterman Act services because it found Claimant does not have a developmental disability which constitutes a substantial disability, as defined by the Lanterman Act and California Code of Regulations, title 17 (Regulations), section 54001.

37. Dr. Brown explained that although Dr. Calkin diagnosed Claimant with ASD, because Dr. Calkin found Claimant's ASD is Level 1 for social communication and Level 2 for repetitive and restrictive behaviors, the Multidisciplinary Team determined Claimant's ASD does not constitute a substantial disability. However, Dr. Brown agreed with Claimant that Claimant has significant limitations in the major life activity of receptive and expressive language.

38. Although not considered in Dr. Calkin's psychological evaluation, and although it is not mentioned in Service Agency's NOA or Position Statement, Dr. Brown added at hearing that Claimant was also not eligible for regional center services under the definition of provisional eligibility. Dr. Brown based this conclusion on Service Agency's determination that Claimant is not substantially disabled in two or three (Dr. Brown's testimony varied as to how many) areas of major life activities and therefore does not have a developmental disability. However, contrary to Service Agency's representation, provisional eligibility does not require a child to be substantially disabled. (See Exh. OAH2, p. OAH4.)

39. In conclusion, Dr. Brown opined that Service Agency does not know how Claimant functions because it has been 18 months since she was last assessed. On behalf of Service Agency, Dr. Brown suggested Claimant return to Service Agency in a year to be reassessed. Notably, Claimant will turn five years old in less than eight months, at which point she will have aged out of provisional eligibility. Once Claimant is five years old, she can only be found eligible for services under the Lanterman Act if

she is found to have a developmental disability as defined in section 4512, subdivision (a)(1).

## **Claimant's Evidence**

40. Mother testified at the fair hearing and presented medical evidence on behalf of Claimant. Mother's primary concern is Claimant's language delays. She explained Claimant has received ST through Claimant's school since August 2023 which has been helpful. Mother described Claimant's behaviors as alarming both at school and at home. For example, Claimant has wanted to jump from a second floor to the ground and is hyperactive. Mother also expressed her concerns about Claimant's safety because Claimant, now four years old, frequently grabs knives and cuts her hair and clothing. Similarly, Claimant will run into the street without fear or consideration as to whether a car may be coming.

41. Mother also expressed concern about Claimant's inability to have a bowel movement, for which Claimant takes Miralax and Lactalose, but without resolution of the problem. Claimant has had three emergency room visits based on her constipation and insomnia. Claimant is incapable of caring for her own toileting and Mother must be there and assist with every part of toileting.

42. Finally, Mother introduced a January 9, 2024, letter from Claimant's Early Childhood Special Education Teacher Desi Hernandez, who had worked with Claimant since August 2023. Ms. Hernandez has observed Claimant have difficulty with bowel movements. Claimant, at three and-one-half years old when the letter was written, used a pull up for bowel movement and was absent several times during school year for this issue. (Exh. 6, p. A69.)

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## **LEGAL CONCLUSIONS**

### **Jurisdiction**

1. The Lanterman Act governs this case. An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) (Factual Findings 1-5.)

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

2. The party asserting a condition that would make the individual eligible for a benefit or service has the burden of proof to establish they have the condition. (*Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 160-161.) In this case, Claimant bears the burden of proving by a preponderance of the evidence she is eligible under the Lanterman Act for regional center services. (Evid. Code, § 115.)

### **Lanterman Act Eligibility Requirements**

3. An individual can be eligible for regional center services under the Lanterman Act either by meeting the definition of a developmental disability or by meeting the provisional eligibility requirements. (§ 4512, subd. (a)(1) & (2).)

### **DEVELOPMENTAL DISABILITY**

4. A developmental disability is a disability that originates before an individual turns 18 years old and continues, or can be expected to continue, indefinitely and constitutes a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, ASD, Intellectual Disability, or “5th category,” a disabling condition 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)(1); Cal. Code Regs., tit. 17, § 54000.)

5. A condition is not a developmental disability if it is solely psychiatric, learning, or physical in nature. (Welf. & Inst. Code, § 4512, subd. (a)(1); Regulations, § 54000, subd. (c).)

6. "Substantial disability" means:

(a) (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. [1] . . . [1]

(Regulations, § 54001; see § 4512 (1)(1).)

## **PROVISIONAL ELIGIBILITY**

7. Section 4512, subdivision (a)(2), provides the following:

(2)(A) A child who is under five years of age shall be provisionally eligible for regional center services if the child has a disability that is not solely physical in nature and has significant functional limitations in at least two of the following areas of major life activity, as determined by a regional center and as appropriate to the age of the child:

(i) Self-care.

(ii) Receptive and expressive language.

(iii) Learning.

(iv) Mobility.

(v) Self-direction.

(B) To be provisionally eligible, a child is not required to have one of the developmental disabilities listed in [section 4512, subdivision (a)(1).

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## **2021 Original Enactment**

8. Provisional eligibility was first enacted pursuant to Assembly Bill No. 136 (2021-2022 Reg. Sess.) section 20 (original enactment), effective July 16, 2021. The original enactment amended section 4512 which provides the definition of a developmental disability.

9. With the original enactment, Assembly Bill 136 created a new definition of eligibility under the Lanterman Act, provisional eligibility. By adding subdivision (a)(2)(A), to section 4512, the Legislature provided provisional eligibility to children three or four years of age who were not eligible for Lanterman Act services under section 4512, subdivision (a)(1), if the child has a disability that was not solely physical in nature and has significant functional limitations in at least two of the following areas of major life activity: self-care; receptive and expressive language; learning; mobility; or self-direction, collectively provisional eligibility major life activities. (Assem. Bill No. 136 (2021-2022 Reg. Sess., § 20.)

10. The original enactment further provided that to be provisionally eligible, a child is not required to have one of the developmental disabilities listed in section 4512, subdivision (a)(1), and that an infant or toddler eligible for Early Start services must be assessed by the regional center at least 90 days before the date they turn three years of age for purposes of determining their ongoing eligibility for regional center services. Further, that assessment was required to initially determine if the child has a developmental disability under section 4512, subdivision (a)(1), and if not, the regional center was required to determine if the child is provisionally eligible for regional center services under section 4512, subdivision (a)(2).

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11. Provisional eligibility was enacted before Claimant became eligible for Early Start Services. Accordingly, even under the original enactment, Service Agency was required to assess Claimant for provisional eligibility 90 days before she turned three years old. However, Service Agency failed to make this assessment. (Factual Findings 19-42.)

12. The Department of Developmental Services issued the August 2021 Directive and accompanying Eligibility Chart to regional centers intended to compare the two eligibility requirements. The Eligibility Chart clarifies that upon its initial enactment, the only requirements for a child to be provisionally eligible were that the child is three or four years of age, the disability is not solely physical in nature, and the child has significant functional limitations in at least two of the five areas of provisional eligibility major life activities. (Exh. OAH 2, p. OAH 4.) “Substantial Disability” is not a criterion for or requirement of provisional eligibility. (*Id.*)

## **2023 Amendments**

13. Section 4512’s definition of provisional eligibility was amended in 2023 pursuant to Assembly Bill 121 (2023-2024 Reg. Sess.), section 14, effective July 10, 2023 (2023 amendments). Pursuant to the 2023 amendments, section 4512, subdivision (a)(2), was amended by expanding the age of provisional eligibility from children three to four years of age to children under five years of age. (Assem. Bill No. 121 (2023-2024 Reg. Sess., § 14.) Further, the 2023 amendments added subdivision (a)(3)(A), to section 4512, which required that for an infant or toddler found eligible for Early Start services the regional center must determine if the child is also provisionally eligible for regional center services on the basis of section 4512, subdivision (a)(2). Based on the 2023 amendments, a child found eligible for Early Start services no

longer had to wait until 90 days before the end of their Early Start service to be assessed for provisional eligibility.

14. At the time of the 2023 amendments Claimant, whose date of birth is July 4, had aged out of Early Start Services but had not been assessed for provisional eligibility.

## **2024 Amendments**

15. Section 4512's definition of provisional eligibility was most recently amended pursuant to Assembly Bill No. 162 (2023-2024 Reg. Sess.), section 3 (2024 amendments), effective July 2, 2024, more than two months before the fair hearing date. The Department of Developmental Services (Department) proposed the 2024 amendments to "streamline eligibility assessments for children accessing regional center services by removing current requirements to conduct full [Lanterman Act] eligibility assessments to determine if a child is ineligible but could qualify through provisional eligibility for Lanterman Act services." (Exh. OAH 3, p. OAH5.)

16. The 2024 amendments "remove the language adopted in 2021 that requires a child under the age of five to be assessed for Lanterman Act eligibility to receive services and amend the order of conducting assessments on a child by requiring that a child referred to Early Start be concurrently screened and assessed for provisional eligibility." (Exh. OAH 3, p. OAH5.) Pursuant to the Department's Fact Sheet regarding the 2024 amendments, the 2024 amendments "align with guiding principles of provisional eligibility" including "[t]o minimize the number of assessments conducted to qualify children ages birth through five for regional center services. (*Id.* at p. OAH6.)

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## **Claimant's Eligibility for Services Under the Lanterman Act**

### **CLAIMANT'S ELIGIBILITY DUE TO A DEVELOPMENT DISABILITY**

17. At the time Service Agency issued the NOA both a developmental disability assessment and a provisional eligibility assessment were required by section 4512. Service Agency cannot be faulted for conducting a developmental disability assessment as it was required to do at the time. However, the law requires "a court [to] apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." (*Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711.)

18. Before the fair hearing commenced, the 2024 amendments eliminated the requirement of a developmental disability assessment under section 4512 for a child under five. The purpose of this amendment was, in part, both to limit the number of assessments a child under five must undergo and to expedite the provision of services. (Exh. OAH3.) (Legal Conclusions 15-16.) Applying the Lanterman Act as it was in affect at the time of the fair hearing would not result in manifest injustice and is consistent with legislative history. Accordingly, whether Claimant has a developmental disability as defined in section 4512, subdivision (a)(1), is moot.

19. Despite the issue being moot, it will be noted that the evidence was insufficient to establish Claimant's eligibility under section 4512, subdivision (a)(1), which has more stringent eligibility requirements than provisional eligibility. Dr. Calkin's evaluation is over 18 months old and she was limited in her ability to full assess Claimant for intellectual disability. For these reasons, Dr. Calkin recommended Claimant be evaluated for cognitive functioning two years from March 2023, or in five months. (Factual Finding 32.)

## **CLAIMANT'S PROVISIONAL ELIGIBILITY**

20. In consideration of the evidence presented, including Claimant's Early Start Assessments, Dr. Calkin's psychological evaluation, and Mother's testimony generally and regarding Claimant's current functioning, Claimant has met the requirements of provisional eligibility as provided in section 4512, subdivision (a)(2). Claimant is under five years age. Pursuant to Dr. Calkin's psychological evaluation, and as Service Agency agrees, Claimant has a disability, ASD. Further, Claimant has significant functional limitations in three major life activities, self-care, receptive and expressive language; and self-direction. (Factual Findings 7-42; Legal Conclusions 7, 15,16.)

21. Service Agency agrees Claimant has significant functional limitations in the major life activity of receptive and expressive language. Claimant's Early Start assessments repeatedly show she had and continues to have significant limitations in gross motor skills and expressive language. Claimant's limitations in these areas worsened during her Early Start eligibility. (Factual Findings 7-42.)

22. In addition to her significant functional language limitations, both Mother and Dr. Calkin have observed how Claimant's ASD and other behaviors result in significant functional limitations in the major life activity of self-direction. This limitation can be seen, for example, by Claimant's (who is of preschool age) limited ability to tolerate transitions or change, her repeated tantrums related to changes in routine, and her lack of appropriate sense of fear or danger of risky behaviors, such as using scissors and crossing the street, and Claimant's limited ability to engage in age-appropriate interactive play with peers. (See Exh. 7, the "Association of Regional Center Associations Recommendations for Assessing 'Substantial Disability' for the California Regional Centers".) (Factual Findings 7-42.)

23. Finally, the evidence established Claimant has significant functional limitations in the major life activity of self-care. This limitation can be seen, for example, in Claimant's difficulty eating, her restricted eating patterns and her inability at four years of age to have a bowel movement without the assistance of Mother. (Factual Findings 7-42.)

24. Based on Claimant's eligibility for provisional eligibility under the Lanterman Act, Claimant's appeal is granted.

### **ORDER**

Claimant's appeal is granted. Claimant satisfies the requirements for provisional eligibility and is eligible for services under the Lanterman Act.

DATE:

CHANTAL M. SAMPOGNA  
Administrative Law Judge  
Office of Administrative Hearings

### **NOTICE**

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration under Welfare and Institutions Code section 4713, subdivision (b), within 15 days of receiving the decision, or appeal the

decision to a court of competent jurisdiction within 180 days of receiving the final decision.