

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STEVEN B.,

Claimant,

vs.

CENTRAL VALLEY REGIONAL
CENTER,

Service Agency.

OAH No. 2012100747

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Visalia, California, on July 10, 2013, and Fresno, California, on July 11, 2013.

The Service Agency, Central Valley Regional Center (CVRC), was represented by Shelley Celaya, Client Appeals Specialist.

Claimant was represented by Margaret Oppel and Mario Espinoza, Office of Clients' Rights Advocacy, Disability Rights California.

Oral and documentary evidence was received. Submission of this matter was deferred pending receipt of closing briefs. Service Agency's Closing Brief and Claimant's Closing Brief were submitted on July 18, 2013, and marked respectively as Exhibits 26 and Ee. The record was closed and the matter submitted for decision on July 18, 2013.

ISSUES

1. Was the original determination that claimant was eligible for regional center services on the basis of autism clearly erroneous pursuant to Welfare and Institutions Code section 4643.5, subdivision (b)?¹

2. If so, does claimant have a condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation [commonly known as the "fifth category"]?

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy who has been eligible for services from CVRC on the basis of autism, after his family became concerned that he had delays in speech and language and social development. He is the youngest of five children and lives in the family home with his parents and several of his siblings. Spanish is the primary language spoken in the home and English is spoken by the siblings. Claimant's English is reportedly more advanced than his Spanish.

2. At the age of twenty-three months, claimant was initially referred to Regional Center of Orange County (RCOC) by his pediatrician "for concerns with speech delay." The RCOC Intake Summary dated February 5, 2007, found his developmental profile to be within his age range except in the areas of expressive and receptive communication that were determined to be at the fourteen month skill level.

An initial Speech and Language Evaluation, completed by Lori Nakken, M.S., CCC, on February 22, 2007, noted that claimant presented with delays in receptive and

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

expressive language. Ms. Nakken stated that claimant's oral motor skills could not be formally assessed due to compliance, and articulation, voice, and fluency could not be evaluated due to lack of verbal output.

3. Claimant's family moved to Hanford, California, within CVRC's catchment area. He qualified for California Early Start services through CVRC, pursuant to the California Early Intervention Services Act², which provides early intervention services for infants and toddlers from birth to two years of age, inclusive, who have disabilities or are at risk of disabilities, to enhance their development and to minimize the potential for developmental delays.

Claimant's Individualized Family Service Plan (IFSP) dated May 15, 2007, provided for services, including speech and language, through United Cerebral Palsy (UCP), a CVRC vendor that immediately began serving claimant.

4. On February 28, 2008, Kings County School Psychologist Betty Ibarra performed a psychoeducational assessment and concluded that claimant did not qualify for special education services at that time. A speech and language assessment was also completed and it was determined that he did not qualify for speech and language services.

5. As claimant's third birthday approached on March 4, 2008, and he would no longer qualify for early intervention services, CVRC began evaluating his eligibility for services pursuant to the Lanterman Developmental Disabilities Services Act.

6. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500, et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines developmental disability as follows:

² California Government Code Section 95000 et. Seq.

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

7. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

- (a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
- (b) The Development Disability shall:
 - (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
- (c) Developmental Disability shall not include handicapping conditions that are:
 - (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even

where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

- (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.
- (3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

8. Welfare and Institutions Code section 4512, subdivision (l), defines substantial disability as:

- (l) The existence of significant functional limitation in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:
 - (1) Self-care.
 - (2) Receptive and expressive language.
 - (3) Learning.
 - (4) Mobility.
 - (5) Self-direction.
 - (6) Capacity for independent living.
 - (7) Economic self-sufficiency.

9. California Code of Regulations, title 17, section 54001, provides:

- (a) "Substantial disability" means:

(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 functional limitation, 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:

(1) Receptive and expressive language.

(2) Learning.

(3) Self-care.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

10. Claimant was referred to The Sullivan Center for Children for "evaluation of his intellectual and adaptive abilities in an effort to determine eligibility of [sic] continued

services." The report compiled by examiner Elizabeth Ganiron, Psy.D. and Supervisor Kathy Sullivan, Ph.D., from the evaluation performed on March 14, 2008, contained the following:

DIAGNOSES:

Axis I 307.9 Communication Disorder, NOS (Predominately

Expressive Language-Rule/Out Receptive Language

Disorder)

314.0 Attention Deficit/Hyperactivity Disorder, Predominately

Inattentive

Rule/Out 313.23 Selective Mutism

Rule/Out 300.23 Social Phobia

Axis II 799.9 Diagnosis Deferred (Current Nonverbal Intellectual

Functioning in the Mild Impairment Range, with

Receptive Language Abilities at the High End of the Low

Average Range, and Mildly Impaired Adaptive Abilities)

Axis III Chronic otitis media, by history

11. The Sullivan Center report found that the results from the Adaptive Behavior Assessment Survey (ABAS-II) "suggest that [claimant's] overall level of adaptive functioning falls in the Moderate impairment range."

The Gilliam Autism Rating Scale (GARS-2), which is designed to evaluate the probability of autism, was also administered. Subtest standard scores of seven or higher

indicate a Very Likely Probability of Autism. Autism Index scores of 85 or higher also indicate a Very likely Probability of Autism. On the GARS-2, claimant received the following scores:

Subscale	Standard Score
Stereotyped Behaviors	6
Communication	6
Social Interaction	9
Autism Index	81

Based on reports by [claimant's mother], [claimant's] overall Probability of Autism is Moderate. His measured communication skills and stereotypical behaviors are Moderately consistent with Autism, while his social interactions are Highly consistent with Autism

STEREOTYPED BEHAVIORS: [Claimant] does not consistently establish eye contact. He frequently stares at his hands or other objects in the environment for extended periods of time. His eating habits are somewhat restricted. On several occasions, [claimant] has been observed whirling around in circles, spinning objects not designed for spinning, and smelling inedible objects.

COMMUNICATION: [Claimant's] speech and language development is delayed. He communicates primarily through

sounds and gestures although he does use words regularly in the home. He does not readily ask for things he needs or wants. [Claimant] does not readily initiate conversations with others.

SOCIAL INTERACTION: [Claimant's] eye contact is inconsistent. He frequently isolates in group situations. At times, he resists physical contact and avoids displays of affection. [Claimant] lines up his toys in order and becomes upset when the order is disturbed. He has difficulty with changes in his routine and can respond negatively to commands, requests, or direction.

12. The following impressions were noted:

Based on observations during this evaluation and reports by his mother and sister, [claimant] does not appear to meet diagnostic criteria for an Autistic Disorder. Given his current overall presentation, he does display some behaviors that are consistent with a diagnosis along the Autism Spectrum.

However, given the quality of interactions between [claimant] and his family members observed during this evaluation, combined with reports by his mother and sister, his social impairments may be better accounted for by an underlying Anxiety Disorder, such as social phobia, or by Selective Mutism. Despite [claimant's] limited interactions with the examiner, the quality of interactions displayed is not indicative of same-aged peers diagnosed with a Pervasive Developmental Disorder. His overall communication abilities

are reportedly age-appropriate in the home, despite his expressive language delays. [Claimant's] aloofness appears more emotionally based rather than an inability to interact with non-family members. Given his speech and language delays and continued limited social interaction, [claimant] is at risk of falling further behind in his development. He would benefit from an enriched preschool program and speech and language therapy. Further evaluation of his overall language abilities may rule out a receptive language deficit. [Claimant] may benefit from a referral for mental health services to effectively rule out an underlying Social Phobia or Selective Mutism. If the introduction of a more structured environment at school and home does not improve his impulsivity and inattentiveness, [claimant] may benefit from a medication referral to address these behaviors. [Claimant] would benefit from a re-evaluation of his overall functioning in one to two years to assess his progress and make any necessary changes to his diagnoses and treatment.

13. In 2008, claimant was initially denied eligibility for CVRC services.

14. In August 2008, Kings County School Psychologist Betty Ibarra again assessed claimant. Her September 5, 2008, report explained that, at the time of her earlier assessment, "Autism was not an area of concern. . . and no assessments in this area were done. However, [claimant's] mother requested another assessment because she had seen changes in [claimant's] behavior, lately." After completing her assessment that included The Childhood Autism Rating Scale (CARS) and the GARS-2, Ms. Ibarra concluded that "based on multiple observations in different settings, questionnaires and interviews with

[claimant's] mother and teachers, some autistic like behaviors were observed across settings. Most of the behaviors observed in all settings are mainly related to expressive language and social interactions." The full score given for the CARS was "35 points which fell within the Mildly-Moderately-Autistic range." The score reported for the GARS-2, 85, "suggested Very Likely probability for autism."

Ms. Ibarra's Summary included the following:

Overall, by parent report, observations and results of the evaluation, [claimant] presents some autistic-like behaviors in all settings that need to be addressed, because they may interfere with his social, adaptive, language and academic skills. The IEP [Individualized Education Program] Team will make the final determination of the eligibility and needed placement in the Least Restrictive Environment (LRE) possible.

15. A Kings County SELPA (Special Education Local Planning Area) IEP dated September 9, 2008, found claimant eligible for special education based on a primary disability of Autism. No secondary disability was noted. Goals were written to address pragmatic and social skills, and expressive language, as areas of need.

16. Claimant, through his parent, filed an appeal to CVRC's denial of eligibility. On May 7, 2009, a Notification of Resolution was filed which contained the following:

Based on the results of recent testing by Dr. Paul Lebby, it has been determined [claimant] is eligible for regional center services under the category of Autism.

17. A May 11, 2009, case note signed by Shelley Celaya, CVRC Client Appeals Specialist, stated:

[Claimant] was assessed by Dr. Paul Lebby on 2/2/09. The evaluation was arranged by the Office of Clients' Rights Advocacy (OCRA). Results of the assessment indicate a diagnosis of Autistic Disorder as defined in the DSM-IV-TR. [Claimant's] case was re-reviewed with the new information and [claimant] has been found eligible for regional center services. A Notification of Resolution was signed by Arthur Lipscomb, Attorney with OCRA, and forwarded to the Office of Administrative Hearings and the Department of Developmental Services. An Order of Dismissal was issued on 5/11/09.

18. In February, 2009, Clinical Neurologist Paul Lebby, Ph.D. conducted a Neuropsychological Evaluation which "included a review of medical, developmental and educational records, interview with [claimant's] parents via the assistance of a Spanish language interpreter, in addition to assessment of [claimant's] functioning." Dr. Lebby's report provided the following:

DIAGNOSIS:

Autistic Disorder (299.00)

[Claimant] presents with autistic disorder, and as is very clear from the information presented above, it is unequivocal that he meets the diagnostic criteria set out by the DSM-IV.³

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) was the current standard for diagnosis and classification. It is a

Additionally, given his scores on multiple autism checklists, it is obvious that [claimant's] symptomatology is highly diagnostic of autistic disorder. The fact that [claimant] demonstrates some limited ability to interact with his mother is not inconsistent with autistic disorder, and should not be used to disqualify him from services provided to those with autistic disorder.

[Claimant] meets the criteria for services through the Regional Center Programs due to his qualifying condition of autism (autistic disorder 299.00). His disability began prior to age 18, and constitutes a substantial disability for him. In addition, his condition is not solely physical or psychiatric in nature, and is not a learning disability.

Dr. Lebby's CLINICAL IMPRESSIONS included the following:

[Claimant's] behavior throughout my examination and as described by his parents was fully diagnostic of autistic

multiaxial system which involves five axes, each of which refers to a different domain of information as follows:

Axis I	Clinical Disorders Other Conditions That May Be a Focus of Clinical Attention
Axis II	Personality Disorders Mental Retardation
Axis III	General Medical Conditions
Axis IV	Psychosocial and Environmental Problems
Axis V	Global Assessment of Functioning

disorder (299.00). At no time did I witness behavior which would preclude such a diagnosis, and nothing his parents communicated to me or that I read in the records would preclude a diagnosis of autistic disorder. [Claimant] does not meet the diagnostic criteria for any other autistic spectrum condition or pervasive developmental disorder; he does not present with symptomatology consistent with Asperger's Syndrome, Rett's Disorder, childhood disintegrative disorder, or pervasive developmental disorder, NOS.

Scores from formal scales/measure of autistic symptomatology were consistently diagnostic of [claimant] having autistic disorder. Specifically, the score for the Childhood Autism Rating Scale (CARS) was 37.5, falling at the border between mild/moderate and severely autistic. Of note this score is consistent with the score documented in [claimant's] psychoeducational assessment report (09/05/2008).

19. DSM-IV-TR section 299.00, Autistic Disorder, states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual... The impairment in reciprocal social interaction is gross and sustained . . .The

impairment in communication is also marked and sustained and affects both verbal and nonverbal skills.

20. The DSM-IV-TR lists criteria that must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

- A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):
 - (1) Qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) Marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction.
 - (b) Failure to develop peer relationships appropriate to developmental level.
 - (c) A lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest).
 - (d) Lack of social or emotional reciprocity.
 - (2) Qualitative impairments in communication as manifested by at least one of the following:
 - (a) Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime).
 - (b) In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others.
 - (c) Stereotyped and repetitive use of language or idiosyncratic language.
 - (d) Lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

- (3) Restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.
 - (b) Apparently inflexible adherence to specific, nonfunctional routines or rituals.
 - (c) Stereotyped and repetitive motor mannerisms (e.g. hand or finger flapping or twisting, or complex whole-body movements).
 - (d) Persistent preoccupation with parts of objects.

- (B) Delays or abnormal functioning in at least one of the following areas, with the onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

- (C) The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

21. Dr. Leiby provided extensive examples to demonstrate that claimant's behavior were observed and/or described to meet all criteria for autistic disorder set forth in the DSM-IV-TR.

22. A CVRC IPP was established for claimant on June 19, 2009. He was subsequently referred to ACES (Autism Comprehensive Educational Service) for a "behavioral assessment to examine behavioral excesses and deficits in the area of communication, social skills, and self-help skills. Based on this assessment, ACES recommended, and CVRC authorized funding for, "15 hours per week of 1:1 tutoring (66 hours per month) with 1500 miles of tutor drive time per month (25 hours per month), in addition to 16 hours per month of consultation and supervision with 375 miles of supervisor drive time per month (6.25 hours per month)."

Claimant was identified as functioning in the moderately low to average range in all areas of adaptive behavior. His areas of relative strength were communication and expressive language and his greatest area of weakness was interpersonal relationships. Maladaptive behaviors were calculated at a clinically significant level.

A Behavior Plan was put in place to address Protest, Assault, Eloping and Self-Injurious behaviors, as well as Stereotypical Behaviors. Program Goals were proposed in the areas of Communication, Social/Play Skills, Behavior, Self-Help, Motor Skills, and Parent Goals. It was expected that claimant's parents participate and learn the therapy techniques so they, and other family members, could maintain consistency in the absence of the ACES staff.

23. ACES began providing services to claimant on August 17, 2009. At that time, he was attending a preschool program four days per week for 3.5 hours per day. He received services from ACES three days per week for five hours per day. Claimant's mother and sister were often present as was claimant's brother. His mother and sister testified that claimant refused to participate unless his brother also participated.

24. ACES 1st Quarter Progress Report dated October 1, 2009, states that claimant "has made significant progress during the first quarter of his ABA (Applied Behavior Analysis) program. He independently asks and responds to social questions and independently plays appropriately with toys."

ACES recommended that "although he is making progress in his ABA program, [claimant] continues to display behavioral excesses and deficits in the areas of communication, social skills, and self-help skills. It is therefore recommended that [claimant] and his family continue to receive 15 hours per week of 1:1 tutoring (66 hours per month)...in addition to 16 hours per month of consultation and supervision . . ."

25. Claimant's mother and sister testified that originally the therapy focus was on diminishing disruptive behaviors. As those behaviors improved, the focus shifted to

addressing behaviors and skills necessary for claimant to transition successfully to kindergarten. The ACES sessions were structured “like a school” with the behaviorist acting as the teacher. Visual aids, picture and charts, were displayed throughout the home to demonstrate steps claimant could use to accomplish such tasks as dressing, brushing his teeth and waiting his turn.

Both claimant’s mother and his sister testified to numerous examples of behavioral concerns they witnessed with claimant. Examples include: a desire to continually wear his pajamas and to prefer certain clothing materials; to exhibit tantrum behavior when required to wait for things; eating a very limited food selection, including refusing to eat a fruit or vegetable; limited interaction with peers, and habitually lining up and/or tying together his toys and family furniture.

26. Claimant continued to make progress in his ACES ABA program. ACES provided monthly progress reports noting program overview of strengths and concerns. More comprehensive reports were provided quarterly that also addressed changes to program behavior plans and goals. ACES continued to provide 1:1 support three days per week for five hours each day until October 2010.

27. Claimant began kindergarten in August 2010 and his ACES hours were subsequently reduced to ten hours per week of 1:1 tutoring with thirteen hours per month of consultation and supervision.

28. In February 2011, claimant’s mother requested an IEP meeting “to voice concerns about [claimant’s] work completion.” The meeting notes explained that she would like to “have some type of reinforcement system, to provide him with rewards for getting work done” and “would like someone in the class to be more hands on with [claimant] in the classroom to redirect him.” It was also noted that he “struggles with completing his classroom work.” This IEP indicated that his primarily disability was Autism (AUT), with a secondary disability of Speech or Language Impairment (SLI).

The IEP noted that claimant's "area of strength is his relationships with peers and he has developed many friendships. [Claimant] interacts very well with other students. He also communicates his needs and desires with his teacher. [Claimant] also does well during carpet time by sitting properly and following directions."

The speech and language therapist shared that claimant "has been attending weekly speech therapy session in a small group (with one or two other kindergarten or first grade students). He has made good progress in participating in social/language activities with less prompting. [Claimant] continues to be 'quiet' in a group. However, he is spontaneously using questions and requests in cooperative play activities in order to participate in the activity (game). He is initiating with the speech therapist. He has not been observed to initiate with a peer unless prompted in the group setting. [Claimant] has been observed to increase his volume of speech, frequency of questions and comments as he has become more familiar with the other students in the group."

Claimant's "Communication Development" was described as follows:

[Claimant] has made excellent progress in his communication skills. Currently his speech and language goals included improving pragmatic language skills including initiation with peers. This included initiation of conversation or any type of interaction. [Claimant] has been observed over several occasions to initiate conversation among peers, respond to conversational repair [sic?] requests, ask for clarification, and maintain a topic of conversation. [Claimant] exhibits appropriate eye-contact skills, turn taking, and attending skills. [Claimant] follows directions well in class and participates in all activities.

[Claimant] presents sometimes as a shy boy. He may be hesitant to speak to new people. However he adjusts quickly and is a friendly child.

Description of "Social Emotion/Behavioral" levels explained:

Relationship with peers: [Claimant] gets along with most peers in his class. [Claimant] loves socializing and playing with the children outside. He has made several friends at school.

Relationships with teachers: [Claimant] seems to feel comfortable communicating with teachers in and outside of the classroom.

29. At the February 7, 2011 IEP meeting the "team discussed the need to reassess [claimant] to determine continued eligibility and areas of need. As [claimant] has already met the goals that he came in with, the team feels that it will be important to have updated assessment data to determine appropriate next goals." In noting that his "Participation" goal was met, the IEP stated that [claimant] is "engaging and participating during structured and unstructured time. He has typical social skills outside and interacts with the other children appropriate [sic]. Not seeing any autistic like behaviors at school at this time."

30. The ACES 7th Quarter Progress Report dated April 1, 2011, included the following summary:

[Claimant] is an interactive boy with many skills. He continues to demonstrate deficits in the area of behavior, self help and social skills; however he has currently mastered over 45 program goals within his current ABA program. It is therefore

recommended that [claimant] and his family receive a decrease to 6 hours per week of 1:1 direct services (30 hours per month) . . .

31. On May 6, 2011, claimant was exited from special education and returned to regular education after being found to be no longer eligible. The IEP stated that "a re-assessment of speech and language skills was completed revealing the following: [claimant] does not display areas of significant deficit for receptive/expressive language, articulation, or pragmatic communication skills in comparison to same-aged peers." It was "recommended that [claimant] be removed from DIS speech and language services."

"The team discussed the eligibility criteria for Autistic-like Behaviors. While there are behaviors seen in the home setting, these same behaviors are not seen in the school environment. At this time, [claimant] does not meet the eligibility criteria as a student with Autistic-like Behaviors."

32. The ACES 8th Quarter Progress Report dated July 1, 2011, included the following summary:

He continues to demonstrate deficits in the area of behavior, self help and social skills. It is therefore recommended that [claimant] and his family continue to receive 6 hours per week of 1:1 direct services . . .per month for the months of August and September and decrease to 4 hours per week . . .for the month of October, with October being the last month of direct services.

Consultation and supervision hours were to remain at thirteen hours per month.

33. On October 4, 2011, the Hanford Elementary School District Student Study Team/Section 504 Team met and found claimant to be eligible for 504 accommodations/interventions.

34. CVRC referred claimant to Clinical Psychologist Gena Wilson, Ph.D., for "assessment of intellectual and adaptive functioning as part of the eligibility process." Dr. Wilson conducted her evaluation on October 20, 2011, and January 18, 2012. She administered the Vineland II Adaptive Behavior Scales, Survey Interview Form, Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III)-Language Scales, and the Social Communication Questionnaire.

Dr. Wilson reported the following:

Current data of this evaluation indicates that his Adaptive Behavior Composite on the Vineland II were in the borderline range with Communication and Socialization listed as in the range of mild deficit, and Daily Living Skills and Motor Skills in the low average to average range. [Claimant] scored in the low average to average range on Global Language Composite on the WPPSI-III. His mother reports a variety of behaviors consistent with Autism Spectrum. For this reason, he was seen a second time for a play interview, and with regard to the Diagnostic Criteria for Autistic Disorder as enumerated in the DSM-IV-TR, in the area of reciprocal social interaction, I did note that there were some concerns with eye contact related to his shyness possibly. However, he has good use of facial expressions, does facial referencing. I did not see odd gestures or peculiar body postures. There is no failure to develop peer relationships that are appropriate by school records dated

5/6/2011. I noted some seeking to share enjoyment, interests and achievements with others so this is not lacking. He was very interested in showing his ring construction for example. His mother reports some problems with social and emotional reciprocity; however, I noted that he interacted in a fluid way. He returned a smile and asked for Graham Crackers for his brother, so I do not believe he lacks social or emotional reciprocity. This would give him perhaps one symptom marginally in social interaction.

In the area of communication, there was a delay in the development of spoken language. I do not believe he lacks the ability to initiate and sustain conversation as he did so with me during play interview to the limits of his ability. There is no stereotyped or repetitive use of language or idiosyncratic language reported or observed. His mother reports a lack of varied, spontaneous make-believe play and social imitative play; however, he was able to understand the birthday ritual and perform that, and I saw him doing some pretend play, although not a very advanced form of that. I do not have a good verbal IQ on [claimant], and I think with more opportunity and time with him that I would see more make-believe play. I do not believe he lacks make-believe play and social imitative play. This would give him one symptom in communication, that being the delay in the development of spoken language.

In the area of activities and interests, there is no encompassing preoccupation with stereotyped and restrictive patterns of interest that are abnormal either in intensity or focus. With regard to apparently inflexible adherence to specific non-functional routines or rituals, his mother reports that he lines and stacks things. I saw him twice for observations, and I did not observe those behaviors. He also has no repetitive behaviors of other kinds that were reported. I do not believe he has any persistent preoccupation with sensory aspects of objects. I did not observe any rubbing or smelling for example. He does have holes in his shirt collar so he may be chewing his shirt but that would be the extent of it. If that is, in fact, a symptom, that would be one symptom in activities and interests.

My observations and interactions with [claimant] are not consistent with a diagnosis of Autistic Disorder and he is not mentally retarded. School observations are also not consistent with the diagnosis of Autistic Disorder.

DIAGNOSES:

Axis I	R/O 314.0	AttentionDeficit/Hyperactivity Disorder, Predominantly Inattentive
	R/O 313.23	Selective Mutism
Axis II	V71.09	No Diagnosis

35. The CVRC Eligibility Review Team determined on February 22, 2012, that claimant was "not eligible" for regional center services. The redetermination noted, "current psychological indicates no dx on Axis II & R/O mutism (selective) and R/O ADHD."

36. As a result of the eligibility team determination, a Notice of Proposed Action (NOPA) was issued informing claimant of CVRC's intent to close claimant's case, effective October 13, 2012, based on the determination that he does not meet the requirements for regional center services pursuant to section 4512, subdivision (a).

37. Claimant filed a Fair Hearing Request, dated October 4, 2012, disagreeing with the finding that claimant no longer qualifies for regional center services, and seeking a continuation of services.

38. Hanford Elementary School District continued to provide Section 504 accommodations to claimant, which included a daily behavior contract to monitor work completion. The Student Study Team noted "he seems to be responding well to the teacher/developing and [sic] connection with her and gets along well with peers in class. He seems to be participating in class and asks the teacher for help. He is making progress and seems to be showing age appropriate behaviors." It was also explained that "mom had shared previously that [claimant] can be very defiant at home. School staff has not seen that behavior and has been extremely impressed with his progress." Math "is [claimant's] best subject." "Writing is the area that he struggles with the most."

39. The Student Study Team referred claimant for an evaluation for special education services at a meeting on October 30, 2012. School Psychologist, Ivan Alvarez, completed a Multidisciplinary Psychoeducational report after testing in November and December 2012. The reason for the referral stated, "the academic concerns by the Student Study Team for [claimant] are in the area of mathematics, reading and writing. There are no behavioral concerns at this time. Based on the referral, the suspected areas of disability is: specific learning disability."

Mr. Alvarez reviewed background information, current assessment information through teacher interview and observations and administered the following assessments:

Intellectual Assessments

Kaufman Assessment Battery for Children-II (KABC-II)

Achievement Assessments

Woodcock Johnson Tests of Achievement-III (WJ-III ACH)

Processing Assessments

Berry Developmental Test of Visual-Motor Integration (VMI)

Test of Auditory Processing Skills-Third Edition (TAPS-3)

40. The examiner chose the KABC-II "as the most appropriate assessment tool for this student based upon the fact that it is a comprehensive assessment of intellectual functioning that has been found to be valid for this age of child." The WJ-III ACH was chosen "as the most appropriate assessment tool for this student based upon the fact that the following measure is a comprehensive assessment, which measures all academic areas necessary for consideration of Special Education eligibility. As well, the assessment measure has been found to be a valid measure when used with children of this age." The VMI and TAPS-3 were chosen "as the most appropriate assessment tools for this student based upon the fact that the following assessments are valid measures of the areas of processing which need to be addressed to determine eligibility under the category of Specific Learning Disability, and based upon this examiner's knowledge of the student."

41. Mr. Alvarez summarized the test results as follows:

Current assessment results, as measured by the Kaufman Assessment Battery for Children-II (KABC-II), indicate that [claimant's overall cognitive abilities fell in the Above Average range SS: 122). [Claimant's] performance on the cognitive subtest of Sequential (Gsm SS: 134) fell in the Upper Extreme range of ability. Next, his performance on the cognitive subtests of Simultaneous (Gv SS: 122, and Planning subtests (Gf SS: 128) fell in the Above Average range of ability. In comparison, the cognitive subtests of Learning (Glr SS: 100), Knowledge (Gc SS: 97) fell in the Average range of ability.

Achievement assessment results, as measured by the Woodcock-Johnson III, indicate Very Low to Average academic skills in all areas of achievement. [Claimant's] math calculation skills (SS: 104), broad math (SS: 90) fell in the Average range. Finally, [claimant's] math fluency (SS: 82) fell in the Low Average range. [Claimant's] basic reading skills (SS: 79), mathematics reasoning skills (SS: 79), written expression skills (SS: 72), reading fluency (SS: 70), and broad written language ability (SS: 70) fell in the Low range. [Claimant's] reading comprehension skills (SS: 65) and broad reading skills (SS: 59) fell in the Very Low range.

Modality assessment results, measured by the Berry Developmental Test of Visual-Motor Integration-5th Edition indicate that [claimant's] overall visual motor integration skills

(S: 104) and motor coordination (SS: 109) fall in the Average range. His visual perception skills (SS: 88) fell in the Below Average range. His overall auditory processing skills (SS: 86) as measured by the Test of Auditory process fell in the Average range. [Claimant's] auditory memory (SS: 96) fell in the Average range. Finally, [claimant's] cohesion ability (S: 70) and phonological skills (SS: 83) each fell in the below average range.

[Claimant] exhibits a significant discrepancy between his full scale IQ (SS: 122), and his academics in the areas of reading fluency (SS; 70), basic reading skills (SS: 79), reading comprehension (SS: 65), written expression (SS: 72), and mathematics reasoning (SS: 79). It is determined, based on the modality assessment, that [claimant] demonstrates deficits in the area of visual processing (visual perception) and auditory processing (cohesion). Therefore, current assessment findings indicate that [claimant] meets the criteria to be identified as a student with a Specific Learning Disability.

42. The examiner noted in his "Testing Observations" that he established rapport with claimant and that claimant "entered the testing situation appearing comfortable and attentive to directions." Mr. Alvarez stated that claimant "was friendly and was highly interested in the tasks presented during testing." He opined, "the present evaluation provides a valid and reliable measure of [claimant's] intellectual abilities and skills."

43. Claimant's Kings County SELPA IEP dated January 11, 2013, found him eligible for special education based on Specific Learning Disability (SLD). No secondary

disability was given. The IEP noted, "due to [claimant's] difficulty with auditory processing, which has impacted his progress in the area of written expression, basic reading skills, reading comprehension, math reasoning, and reading fluency, he requires resource support (RSP) in order to access the general education curriculum (inclusion) and to remediate academic skills (pull out)."

Of interest, the IEP stated that claimant "is very social and has become attached to certain students in the class (i.e. always hugging them, arms around their shoulders, holding their hand.)" Also, he can "express his needs/wants clearly and with complete thoughts."

44. In preparation for the IEP, Kings County Office of Education Occupational Therapist, John Goodfellow, evaluated claimant. He noted the following behavior:

No behavioral concerns were noted during testing. Overall, [claimant] was a friendly and cooperative child during testing. He attempted all tasks requested of him to the best of his ability. He easily transitioned to/from the testing room, and he easily transitioned from one task to another during the course of testing.

45. Disability Rights California referred claimant to Clinical Psychologist Pegeen Cronin, Ph.D. for a Psychological Evaluation "as part of an appeal to prevent [claimant's] eligibility termination for services" from CVRC. Dr. Cronin has extensive experience in the treatment and assessment of individuals on the autism spectrum. Most notably, from 1997 through 2012, she was first the Assistant Director and then the Clinical Director for the Autism Evaluation Clinic, Department of Child Psychiatry, UCLA Semel Institute for Neuroscience and Human Behavior. She has maintained a private assessment practice since that time. Dr. Cronin was a member of the team of professionals that developed the

Autism Spectrum Disorders: Best Practice Guidelines for Screening, Diagnosis and Assessment published in 2002 by the California Department of Developmental Services (DDS).

46. Dr. Cronin performed an extensive evaluation with results documented in a detailed thirty-five-page report. She gave detailed developmental, family, medical, and intervention/educational history. She also conducted a thorough record review and discussed all previous assessments providing her professional opinion about the consistency or inconsistency of tests results and the appropriateness of various tests administered. Dr. Cronin administered the following testing instruments:

Autism Diagnostic Interview-Revised (ADI-R)

Autism Diagnostic Observation Scale [Schedule]-Second Edition (ADOS-2)-Module 3⁴

Vineland Adaptive Behavior Scales-Second Edition (VABS-II)

Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV)

47. The ADI-R consisted of a diagnostic interview with claimant's mother and one of his older sisters to "ascertain [his] developmental history and abilities in the areas of social adaptation, communication, and repetitive behaviors and interests that also includes inflexibility or adherence to nonfunctional routines. Dr. Cronin concluded that the "results from this are consistent with prior reports and observations that indicate [claimant] demonstrates significant delays and deficits in his social abilities, communication and

⁴ The ADIR and the ADOS are recommended "Best Practice" assessment instruments.

repetitive behaviors that indicate the diagnosis of Autistic Disorder. Therefore, as part of this psychological evaluation, this interview indicates the diagnosis of Autistic Disorder.”

48. The VABS-II is an interview, that was also parent and sister reported, administered to assess claimant’s adaptive functioning in three areas: Communication, Daily Living Skills (e.g. self-help), and Socialization.

49. The WISC-IV was administered to measure claimant’s intellectual functioning with the following results:

Verbal Comprehension Index (VCI)	75
Perceptual Reasoning Index (PRI)	92
Working Memory Index (WMI)	83
Processing Speed (PSI)	83
Full Scale IQ (FSIQ)	78 ⁵

50. The ADOS-2 is a measure of social behavior and communication used as a diagnostic indicator for Autistic Disorder. Items presented in this schedule provide a variety of opportunities for the participant to engage in typical social interactions and exchanges. Based on a participant’s social interactions, scores are derived to determine whether there are diagnostic indicators for Autism Spectrum Disorders (ASD) including Autistic Disorder.

Dr. Cronin concluded that the “results of this measure indicate that [claimant] continues to present with delays and deficits in social communication and repetitive

⁵ Dr. Cronin noted that the WISC-IV is now ten years old and based on the “Flynn effect” may overestimate claimant’s cognitive abilities by 0.3 points per year. Therefore she suggests that current standard score results overestimate his cognitive abilities by 3 standard scores points. She also advised that the FSIQ should be interpreted with caution because of significant differences between subtest scores.

behaviors and interests consistent with his diagnosis of Autistic Disorder. This measure indicates Autistic Disorder as part of this psychological evaluation.”

51. Dr. Cronin’s summary included the following:

[Claimant] demonstrates notable delays and deficits in his cognitive functioning and adaptation. Results and reports continue to document that [claimant] demonstrates delays and deficits in his social adaptation consistent with his diagnosis of Autistic Disorder. Results from this psychological evaluation indicate that [claimant] presents with a diagnosis of Autistic Disorder that is substantially disabling for him.

When diagnosing Autistic Disorder, the child’s qualitative functioning is consider in the areas of reciprocal social interaction and communication in addition to restricted, repetitive, and stereotyped patterns of behaviors and interests. Overall, [claimant] meets the diagnostic criteria as delineated by the Diagnostic and Statistical Manual-Fourth Edition (DSM-IV). Specifically, [claimant] exhibits deficits in his reciprocal social interaction that include the following: problems developing age-appropriate peer relationships (e.g. lack of cooperative and imaginary play with other children, lack of reciprocal friendships), lack of shared enjoyment (e.g. lack of shared enjoyment of a variety of interests with others), lack of nonverbal behaviors to regulate social interactions (e.g. lack of eye contact and facial expressions), and poor socioemotional reciprocity (e.g. inconsistent social overtures and responses).

He demonstrates long-standing repetitive behaviors and interests, including difficulties with transitions, and motor mannerism (e.g. flapping, rocking, pacing).

[Claimant's] developmental history is remarkable for delays and abnormalities in communication (i.e. delayed language development, lack of spontaneous make-believe play, poor reciprocal conversations, and stereotyped or repetitive speech). Further, [claimant's] development was notable for qualitative abnormalities in reciprocal social interaction (e.g. impairment in peer relationships, limited socioemotional reciprocity) and stereotyped interests and patterns of behaviors and interests (e.g. collecting items/cars, repeatedly placing them in lines). Additionally, [claimant] displays substantial impairments in his verbal communication, such as problems with social chatting and conversations, stereotyped and repetitive speech including verbal rituals, and his narrative is often disorganized. [Claimant] also has problems modulating his voice, which interferes with his intelligibility. Finally, [claimant] exhibits several restricted, repetitive, and stereotyped patterns of behaviors and interests that significantly impact his functioning, such as repetitive play, overfocus on minor details, and significant rigidity and inflexibility that lead to difficulties with transitions. [Claimant's] social communication skills were directly evaluated through a diagnostic schedule that provided him with ample

opportunities to engage in typical social and behavioral interactions with the examiner.

52. Dr. Cronin concluded as follows:

DIAGNOSES:

Axis I: 299.0 Autistic Disorder.

Axis II: Borderline Intellectual Functioning; rule out mild mental retardation in the future.

Axis III: Ongoing comprehensive audiology evaluations to ensure appropriate hearing in light of a significant history of ear infections that persist to this date.

Axis IV: Stressors: Access to diagnostic-specific educational and community based interventions including targeted educational services to facilitate social adaptation during structured and unstructured activities; access to community-based interventions to foster social adaptation across community activities and increase independent functioning across settings; adaptive functioning deficits.

Axis V: Current global assessment of functioning 50.

53. In her report, Dr. Cronin also noted the claimant meets the current criteria for Autism Spectrum Disorder set forth in the DSM-V.⁶

54. Dr. Cronin agreed with the results of Dr. Lebbby's assessment and also stated that "as a result of his autism diagnosis, [claimant] evidences substantial disability, which is gross and sustained, is evident across multiple areas of adaptation and functioning, and cannot be attributed to other family/cultural issues." She disagreed with Mr. Alvarez's conclusion that claimant has a learning disability. She contends that CVRC's original determination that claimant qualifies for services on the basis of autism was correct. She attributes the improvements he has made to the supports/interventions (including ABA services) he received, and testified that he is "a success story."

55. Carol Sharp, Ph.D., CVRC Staff Psychologist, reviewed claimant's records, observed him on two occasions, and testified at hearing. Dr. Sharp opined that claimant does not meet the DSM-IV criteria for a diagnosis of autism. She also testified that claimant's adaptive skills are not substantially handicapping.

56. Dr. Sharp first met with claimant and his mother on August 15, 2008, to review the previously completed Sullivan Center Psychological Evaluation, and Multidisciplinary Team eligibility determination. During this hour-long meeting, she made the following observations:

When he entered, he was initially shy and reserved, but gradually warmed. He was able to establish good eye contact. Joint attention was observed, as was social-emotional

⁶ The 5th Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) was released in May 2013. While relevant to a current eligibility determination, the standard in effect at the time claimant was found eligible for regional center services was the DSM-IV.

reciprocity. In addition, no stereotypic behavior was observed. [Claimant] engaged in interactive play with this psychologist. He was able to take turns, and he was able to anticipate reactions. When his overtures were not attended to, he increased his efforts to obtain a response. Nonetheless, his behavior was age-appropriate. [Claimant] did display difficulties with language. While he attempted to communicate, most of his language was unintelligible. However, the content of his communication was clear.

Based on the observations made at this time, it is evident that [claimant] does not display the deficits in social interact and stereotypic behaviors associated with Autistic Disorder.

Dr. Sharp testified that during this meeting, claimant's mother acknowledged that he did not have mental retardation or meet the criteria for Autistic Disorder, and her primary concern was that he had "characteristics" associated with autism and that he might become autistic. Claimant's mother adamantly disputed this with her own testimony.

57. Dr. Sharp further testified that although claimant was not found eligible for regional center services in 2008, CVRC would "rather err" on the side of providing services. Therefore, it chose to "resolve instead of going to hearing and take another look later."

58. After Dr. Wilson's reassessment and CVRC's subsequent determination that claimant did not have a qualifying condition for regional center services, it was determined that Dr. Sharp would observe claimant at school "to see if he exhibited behaviors in that setting that were indicative of a qualifying condition." Her observation notes concluded that he "exhibited no behaviors that would call more attention to him than to the other students. He exhibited good eye contact and appropriate facial expressions. He was able to

engage in conversation. He sought help from peers as needed and offered assistance to others. He does have difficulty expressing his thoughts in writing.”

59. Dr. Sharp testified that she agreed with Dr. Wilson’s determination that claimant does meet the criteria for Autistic Disorder. She was concerned that some of the autistic-like behaviors noted by others did not appear to be evidenced across all settings.

LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512. As follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. Under Welfare and Institutions Code section 4643.5, subdivision (b):

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. After initially denying eligibility, CVRC determined in 2009, based on an assessment by Dr. Paul Lebby, that claimant had a developmental disability (Autism) that qualified him for regional center services. CVRC now believes that determination was clearly erroneous.

CVRC contends that this determination was the result of a Hearing Resolution and required that claimant be reevaluated at a later time. However, the evidence was not clear that the autism determination was limited.

4. There was a tremendous amount of conflicting information in this matter. Findings were inconsistent and behaviors were reported to be observed in some settings but not others. If this were an initial eligibility determination case, claimant may not prevail on the current record. He would carry the burden of demonstrating by a preponderance of the evidence that he has autism which is expected to continue, indefinitely, and constitutes a substantial disability for him. In the alternative, he would carry the burden of establishing "fifth category" eligibility. However, the appropriate inquiry in this case requires that any change in claimant's eligibility for regional center services be supported by evidence that the original determination of eligibility was "clearly erroneous." CVRC bears this heavier burden.

5. Having considered the matters contained in the Findings set forth above, CVRC did not establish that its original determination that claimant qualified as an individual with autism is clearly erroneous. Given this determination, it is unnecessary to determine whether claimant has a disabling condition that is closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation.

6. Claimant remains eligible for continued services through CVRC.

ORDER

Claimant's appeal from the Central Valley Regional Center's denial of eligibility for continued services is granted. Claimant is eligible for continued regional center services under the Lanterman Act.

DATED: July 29, 2013

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)