

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

In the Matter of:

CLAIMANT,

vs.

**WESTSIDE REGIONAL CENTER,
Service Agency.**

OAH No. 2019090266

DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 16, 2019, in Culver City, California.

Claimant was represented by her mother (Parent). (Claimant and her family members are identified by titles to protect their privacy.)

Westside Regional Center (Service Agency or WRC) was represented by Candice Hein, Fair Hearing Specialist.

Oral and documentary evidence was received. By mutual agreement of the parties, the ALJ ordered a second date of hearing on November 21, 2019 based on

Parent's motion to allow for additional time to gather evidence and schedule claimant's witnesses. The record was closed at the conclusion of the second date of hearing on November 21, 2019 and the matter was submitted for decision.

ISSUE

Is claimant eligible to receive services and supports from Service Agency under the Lanterman Developmental Disabilities Services Act¹ (Lanterman Act)?

EVIDENCE

Documentary: Service Agency's exhibits 1-10; Claimant's exhibits A-C.

Testimonial: Kaely Shilakes, Ph.D.; Rachel Freeman; Deann Wilken; and Parent.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a six-year-old girl who was originally referred to Regional Center by her Parent. Parent is her biological mother.

2. In March 2019, Parent applied to Service Agency for regional center services for claimant on the basis of autism.

¹ Welfare and Institutions Code sections 4500 et. seq.

3. On July 5, 2019, Service Agency sent a letter and Notice of Proposed Action to Parent informing her that it proposed to close claimant's case on the basis that she is not eligible for services. The WRC Eligibility Review Committee, composed of a physician, autism specialist, staff psychologist (Dr. Kaely Shilakes), two psychology consultants, and a manager, determined that claimant is not eligible for services as there was no evidence of claimant being substantially handicapped by conditions related to a qualifying developmental disability, such as intellectual disability, cerebral palsy, epilepsy, autism spectrum disorder or other conditions similar to intellectual disability, as defined in the Lanterman Act (Welfare and Institutions Code section 4512) and Title 17 of the California Code of Regulations.

4. On August 27, 2019, Parent filed a fair hearing request, on claimant's behalf, to appeal Service Agency's decision and to request a hearing. In the fair hearing request, Parent indicated the reason for the appeal was that "[Claimant] needs aid while she goes to her Star camp in the afternoon. She needs someone to shadow her. Her life is in danger because she can hurt herself if she is not supervised. Star camp refuses to accept her, because teachers cannot supervise her all the time."

(Exh. 1.)

Claimant's Background

5. Claimant resides with her Parent and is an only child. Claimant immigrated to the United States from Norway in March 2018. She comes from an ethnically and linguistically diverse background. Parent is from Romania and claimant's father is of Chinese descent. Claimant has been exposed to at least three languages. Claimant has limited contact with her father as he continues to live in Norway and parents are no longer in a relationship. Prior to relocating to the United States from Norway, claimant witnessed her father attempting to murder her Parent. There is no

known family history of developmental disabilities or psychiatric disorders. Aside from father's reported attempt to murder Parent, there was reported history of violence or abuse. Parent denied any trauma or recent changes to the home environment.

6. Claimant was born at 40 weeks via uncomplicated emergency cesarean section delivery in Norway. She was nine pounds and measured 24 inches at birth. Developmental milestones occurred as follows: she sat up unassisted at three months and crawled at nine months. She walked independently at 12 months. She said her first words at 24 months and put words together by 12 months. Claimant was toilet trained at two-and-a-half years. Claimant is reported to be in good health with weight, hearing and vision all reported to be within normal limits. There is no history of significant health concerns. She does not take medication and has no known allergies. Family history for developmental disability is unremarkable.

7. Claimant attends a general education Kindergarten class at Palisades Charter Elementary School. She is eligible for special education and has an Individual Education Plan (IEP). She receives speech and behavioral therapy and has a shadow in school, along with being seen by a Psychologist, and an Occupational Therapist. Claimant is doing well in school academically. She is smart and functioning above average. However, there are ongoing concerns with claimant's social skills, tantrums, and sharing.

WRC Initial Psychological Assessment

8. On March 29, 2019, De'Orlean Clairborne, WRC Service Coordinator, conducted an initial intake interview with claimant and Parent. Clairborne summarized the interview in a written report. (Exh. 5.)

9. Claimant's daily life skills were discussed during the interview. Claimant does not have any difficulties walking, running, or extending her arms. She can ride a tricycle and is able to perform physical activities with no limitations. Claimant is able to use fingers independently, however she has difficulty holding a pencil, fork, and cannot zip or button her clothing. Claimant uses eating utensils with a lot of spills and is able to drink from a cup. She is able to perform some personal care activities with assistance (i.e. brushing her teeth, washing her face, putting clothes on, putting plates in the sink, putting shoes on, cleaning her room, washing her hands, etc.). Claimant has a vocabulary of 30 words or more and is able to use two to three word sentences. According to Clairborne, claimant is easily understood by others when communicating and uses and understands signs and gestures in communication. Parent reported that claimant started to talk in 2018, when she was five-years-old. Claimant can focus on preferred tasks for two minutes, then moves on to something else. Claimant can count to the number 110, and knows the alphabet, shapes, colors, and members of her family. Parent reported that claimant has a very good memory and is able to recall things that she did the previous year, what has been read to her, and what she has been taught. Claimant always needs to be entertained and stimulated. Upon being greeted by Clairborne, claimant established eye contact, verbally greeted Clairborne, and spoke in a normal tone throughout the intake. Clairborne observed claimant to be outgoing and friendly.

10. A. During the interview, Parent reported concerns about claimant's disruptive behavior which negatively impacts social settings and activities. Parent reported that this is a major concern in school and is triggered when claimant does not get what she wants and begins to have very extreme demands. For example, claimant will want certain things and if she does not get them, she will begin to cry. Claimant will ask questions like why is the sun sleeping. Claimant does not display

aggressive behavior. Parent reported that claimant engages in self-injurious behavior (i.e. hits her head on the ground) when she is upset. Claimant does not destroy property intentionally. Parent reported that claimant has run or wandered away from Parent and from school. Claimant reportedly does not understand the concepts of safety or personal space and is very friendly.

B. According to Parent, claimant exhibits emotional outbursts at least daily. Parent reported claimant exhibits repetitive body movements such as shaking her body and drawing things in the air. Claimant is reportedly obsessive (i.e. if she forgets to brush her teeth, she will wake up at 4:00 a.m. screaming she had to brush her teeth) and has to do her routine in order. Claimant is reportedly a very picky eater, she smells food before she eats it, does not like loud sounds, sleeps with a little bit of light on during the night, and tries to have her toys with her.

C. Claimant does well academically, initiates social interactions, has a lot of friends, and plays easily with other children. Parent reported, however, that claimant does not have empathy towards others.

Psychological Report by Jeffrey Nishi, Psy.D.

11. WRC subsequently referred claimant for psychological evaluation to rule out or substantiate a diagnosis of Autism Spectrum Disorder (ASD) and clarify claimant's current level of functioning. Licensed psychologist Jeffrey Nishii, Ph.D., evaluated claimant on April 2, May 2, and May 31, 2019. Dr. Nishii prepared a written report dated June 5, 2019, which summarized his findings and conclusions. (Exh. 4.) Dr. Nishii conducted clinical interviews of claimant and Parent, performed a mental status evaluation of claimant, reviewed records, conducted a school observation, and administered the testing procedures listed in his report, which included the Autism

Diagnostic Observation Schedule, Second Edition, (ADOS-2), the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5), and the Vineland Adaptive Behavior Scales, Third Edition (VABS-III).

12. As part of his written report's background information, Dr. Nishii described Parent's concern regarding claimant's social skills delays, difficulty controlling her emotions, and frequent tantrums.

13. Dr. Nishii also described claimant's previous testing results in his written report.

A. Based on a November 1, 2018 Psychoeducational Assessment, conducted by Amanda Achen at Palisades Elementary, Los Angeles Unified School District (LAUSD), when claimant was five years, two months old, claimant was found to meet special education criteria due to attention deficit hyperactivity disorder (ADHD) and Autism. Claimant demonstrated difficulties in the area of social interaction as evidenced by observations and collateral reports. According to the report, claimant takes time to adapt to environmental changes, engages in repetitive behaviors (i.e. repetitive drawing of stars, specific interest in color yellow, difficulty stopping a task before she thinks it is done). On the Cognitive Assessment Systems, Second Edition, Claimant received the following scores: Planning = 105, Simultaneous = 82, Attention = 82, Successive = 117, Working Memory = 103. On the Woodstock-Johnson Tests of Achievement, Fourth Edition (WCJ-IV),² claimant received scores in the average to

² The WJ IV is a broad-scope assessment system that is based on state-of-the-science tests for individual evaluation of academic achievement, cognitive abilities, and oral language.

superior range on all subtests. On the Autism Spectrum Rating Scales, claimant received very elevated scores on over 95 percent of all scales, as rated by teacher and Parent.

B. Examiner Jacqueline Sidman, Palisades Charter Elementary School, prepared a Resource Specialist Report, dated October 23, 2018, after claimant was referred to determine eligibility for special education services based on report that she was easily distracted, required frequent prompts and redirection, and displayed an impulsive response tendency. On the WCJ-IV, claimant received the following scores: Broad Math = 112, Spelling = 112, Broad Reading = 120, Written Expression = 113. Overall, claimant was reported to work and learn at an average to above average level when compared to peers. However, the report noted that, due to her distractibility, claimant struggles to function within the school environment and requires adult attention to help her moderate her behavior. The report further noted that claimant struggles with peer interactions, with tendencies to hit herself and elope when overwhelmed by her emotions. Claimant was referred to the LAUSD's Individualized Education Plan (IEP) team to determine eligibility for services.

C. Sandra Kaler, Ph.D., conducted a psychological evaluation of claimant when she was four years, six months old. According to Kaler's May 2018 Psychological Report, conducted when claimant was four years, six months old, claimant received scores in the average range on Visual Spatial, Fluid Reasoning, and Visual Working Memory. Claimant's verbal scores were well below the average range. Visual Motor Integration skills were in the average range. Academic testing yielded high average scores on reading skills, alphabet writing fluency, and average scores on listening comprehension, and math problem solving. Claimant received a low average score on Oral Expression. On the Autism Diagnostic Observation Schedule, Second Edition

(ADOS-2), claimant received an overall score of 11, which falls in the Autism range. Claimant displayed delays in use of gestures, atypical eye contact, deficits in joint attention and reciprocal social communication, and poor rapport. She also demonstrated stereotyped and idiosyncratic use of words.

14. A. During claimant's first appointment's behavioral observation, Dr. Nishii described that claimant immediately displayed a verbally interactive presence and made frequent and comfortable eye contact during reciprocal social exchanges. Dr. Nishii further observed that claimant displayed a normal, coordinated gait with no limitations in mobility. She also exhibited what appeared to be a preoccupation with numbers, asking questions and making reference to which floor number they would be going to and which office number. As the WPPSI-IV was administered, claimant was described as a bright girl with good expressive and receptive communication skills. Dr. Nishii noted claimant's affect and emotional expression as appearing to fall within the normal range. Claimant displayed moments of distractibility with her attention span deteriorating as the test grew challenging. While reading her book, claimant suddenly erupted in crying and yelling, stating "I really wanted to go to computer lab!" (Exh. 4, p. 4.) Despite Parent's attempts to console and contain her, claimant went on to perseverate on this matter, eventually collapsing to the floor and stomping on the ground, while continuing to cry out, "I want to do paperwork!" (*Id.*)

B. During the second appointment's behavioral observation, Dr. Nishii observed that claimant continued to display a talkative disposition, initiating conversation with Parent and Dr. Nishii throughout the appointment. As the ADOS-2 was administered, claimant was uninterested with engaging in childish play activities. However, as Dr. Nishii had claimant control more of the activity, claimant showed more interest. Claimant repeated some of the questions and statements over and over again

(i.e., how old is the baby, stating her own age, "Did you buy it from Amazon?"). Overall, Dr. Nishii described claimant as displaying a good capacity for joint attention, displaying a range of affective states, including joy, excitement, and curiosity. Claimant displayed good art skills when she was allowed to draw at the end of the appointment. As it was time to end the session, claimant was resistant to stopping her drawing activity and had difficulty transitioning.

C. During Dr. Nishii's school observation of claimant at Pacific Palisades Elementary Schools, he observed claimant participating in a general education classroom setting with approximately 20-25 total students and three teaching staff members. Claimant was accompanied by a one-on-one Behavioral Interventionist (BI). Shortly after the school observation began, claimant displayed her first mild meltdown. Her BI attempted to reassure her, "This is fine!" Claimant protested, "This is not fine!!!" Next, claimant ran to her teacher to request white-out. After receiving reassurance and support, claimant managed to calm down and avoided moving into a full-on tantrum. According to Dr. Nishii, this cycle of experiencing frustration and disappointments followed by a period of consolation and encouragement would repeat several more times within a short 20-minute time span, usually as a result of feeling disappointed about making a perceived error on her work. (Exh. 4, p. 5.)

Dr. Nishii observed that claimant displayed good joint attention and prolonged reciprocal interactions, mostly with adult teaching staff and to a lesser degree with peers. She had some difficulty following directions and a perfectionistic tendency to perseverate on details relating to her own work while also showing interest in her neighbors work. Claimant was observed displaying frequent and consistent oral sensory-related behaviors, such as chewing on her dress on several occasions and frequently playing with her saliva. Dr. Nishii described that, at one point, claimant

placed her hands on her ears and screamed at the top of her lungs. When approached by her BI in response to claimant's screaming, claimant told her BI that she wanted to use the restroom.

During the school's 15-minute recess, Dr. Nishii observed claimant engage with four to five peers and her favorite teachers in brief interactions. Claimant was described as displaying eye contact, positive affect, and brief and reciprocal verbal exchanges. On the other hand, claimant was also observed displaying poor awareness for rules regarding play; social interactions were described as brief and short lived; and claimant's behavior and play activity was observed as disorganized and tangential with claimant bouncing from one place on the playground to another and from one child or group of children to the next. Claimant's interactions with her favorite teaching staff was observed as consistent.

15. A. Dr. Nishii administered the WPPSI-IV to assess claimant's cognitive functioning. Claimant's WPPSI-IV composite scores were as follows: Verbal Comprehension Index = 117 (high average), Visual Spatial Index = 115 (high average), Fluid Reasoning Index = 121 (superior), Full Scale IQ = 111 (high average).

B. Additionally, Dr. Nishii administered the VABS-II to assess adaptive functioning with Parent acting as informant. Claimant's adaptive functioning domain standard scores were as follows: Communication = 92 (adequate), Daily Living Skills = 79 (adequate), Daily Living Skills = 79 (moderately low), Socialization = 77 (moderately low). Overall, her Adaptive Behavior Composite fell within the moderately low range of functioning.

C. To measure affective/behavioral functioning, Dr. Nishii administered the ADOS-2 to claimant. Claimant's overall total score on the ADOS-2, Module 2 algorithm

was eight and is consistent with an ADOS-2 Classification of Autism; claimant's overall total fell on the autism spectrum cutoff. Claimant's ADOS-2 Comparison Score further indicated that, on the ADOS-2, she displayed Low Evidence of autism spectrum-related symptoms as compared with children who have ASD and are of the same chronological age and language level.

16. Based on the evaluation, Dr. Nishii diagnosed claimant with ASD; Social Communication & Restricted, Level 1 (Requiring Support); Repetitive Behaviors, Level 2 (Requiring Substantial Support). In addition, Dr. Nishii diagnosed as a rule out for attention-deficit/hyperactivity disorder, predominantly hyperactive/impulsive presentation. Dr. Nishii opined that, in order to meet the diagnostic criteria for ASD, the following must be met (the portion of the quote in regular font below represents the diagnostic criteria description; the bold italicized font represents Dr. Nishii's evaluation of claimant as applied to the diagnostic criteria):

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:

1. Deficits in social-emotional reciprocity, ranging from abnormal social approach and failure of back-and-forth conversation; to reduced sharing of interests, emotion, or affect; to failure to initiate or respond to social interactions – *SOME EVIDENCE; initiates and responds to social interaction; displays a range of affect and emotional states; reciprocal interactions are somewhat restricted to personal interests and preferred activities.*

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging from poorly integrated

verbal and nonverbal communications; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication – *SOME EVIDENCE; engaged in frequent, comfortable periods of eye contact; displays range of facial expressions; challenges with reading social cues, empathy and perspective taking.*

3. Deficits in developing, maintaining, and understanding relationships, ranging from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers – *MET; difficulty adjusting behavior to suit social contexts (e.g., difficulty following rules and behaving appropriately in social situations; deficits in play skills; failed to ask permission and make polite requests); tends not to engage in imaginary play; was observed to engage with a number of peers, but did not appear to show preference for particular peers; instead showed preference for an adult figure.*

Severity Level: 1 Requiring Support

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the three following, current or by history:

1. Stereotyped or repetitive motor movements, use of objects, or speech – *MET; repetitive speech, will*

repeat the simple questions (e.g., "how old are you", "what's your name?"); hand and head wiggling when under pressure to hurry.

- 2 Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior – *MET; must follow through with rules and routines (e.g., bath time, brushing her teeth, taking her vitamins); rigid perfectionism; difficulty with transitions when specific personal demands are not met.*
- 3 Highly restricted, fixated interests that are abnormal in intensity or focus – *NOT MET.*
4. Hyper – or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment – *MET; difficulty tolerating loud sounds (e.g., music class, loud fans, hair dryers, noisy environments), will say "you're hurting my ears"; oral sensory behaviors (e.g., chewing on clothing, playing with saliva, putting objects in mouth); smelling objects.*

Severity Level: 2 Requiring Substantial Support

- C. Symptoms must be present in the early developmental period, but may not become fully manifested until social demands exceed limited capacities, or may be masked by learned strategies in later life. *MET.*

- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning. *MET.*

- E. These disturbances are not better explained by intellectual disability or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur, to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level. *MET.*

(Exh. 4, pgs. 9-10.)

Service Agency Determination

17. On June 26, 2019, the WRC Eligibility Review Committee (see Factual Finding 3 for the committee's member composition) reviewed claimant's case to determine her eligibility for services. (Exh. 3.) The committee was unable to meet "consensus" on claimant's ASD diagnosis, with some members of the committee agreeing with Dr. Nishii's ASD diagnosis, with others disagreeing with his diagnosis. WRC would not specify at hearing which members of the team endorsed Dr. Nishii's ASD diagnosis and which disagreed with his ASD diagnosis for claimant and the basis for the varying opinions. Dr. Shilakes testified that one of the reasons Dr. Nishii's ASD diagnosis was questioned by some members of the committee was because he diagnosed claimant with ASD when there was only "some evidence" of deficits in social-emotional reciprocity and in nonverbal communicative behaviors used for social interaction. (Factual Finding 16.) According to Dr. Shilakes, for a diagnosis of ASD

consistent with DSM-V guidelines, the foregoing areas should have been “met.” Dr. Shilakes’ testimony regarding claimant’s ASD diagnosis was not corroborated by documentary support and is provided less weight than the psychological evaluation findings of Dr. Nishii, which were based on multiple observations and assessments.

18. The committee unanimously agreed, however, that claimant did not meet three areas of Substantial Handicap as required by the Lanterman Act to be found eligible for regional services based on an ASD diagnosis. (Exh. 3.) The committee did not specify which Substantial Handicap categories (Expressive & Receptive Language; Learning; Self-care; Capacity for independent living; Economic self-sufficiency; Self-direction; Mobility) were met by claimant. Instead, the committee noted follow-up recommendations for claimant including “ABA, Strong IEP to support behaviors, OT, social”. (*Id.*)

School Observation by Psychologist Kaely Shilakes, Psy.D.

19. On October 11, 2019, Dr. Kaely Shilakes, the staff psychologist member of the WRC committee who determined claimant ineligible for WRC services (who was subsequently promoted to WRC Chief Psychologist and Manager of Intake Services), conducted a one hour and twenty-minute school observation of claimant at Palisades Elementary School. The school observation was conducted to gather additional information regarding claimant’s eligibility for services based on ongoing communication with Parent and because of the committee’s inability to reach consensus on claimant’s ASD diagnosis.

20. Claimant’s BI was with claimant throughout the school observation, except for the BI’s 30-minute break. Dr. Shilakes testified at hearing regarding WRC’s

finding of claimant's ineligibility for services and completed a written report of her school observation of claimant. (Exh. 10.)

21. During her observation, Dr. Shilakes' observed claimant used eye contact, engage in joint attention, transition from one activity to another, engage with peers and adults, and for the most part followed directions. (Exh. 10.) According to Dr. Shilakes, claimant used verbal and non-verbal means to communicate. On the day of the observation, the school was following a "rainy day" schedule due to wildfires causing poor air quality. According to Dr. Shilakes, when she entered the classroom with the principal, claimant turned toward them and said, "There's smoke outside." (Exh, 10, p. 1.) Among other things, Dr. Shilakes observed claimant working on an assignment at her desk; following the teacher's instructions; showing her work to her BI; interacting with peers; using language in the proper context; asking the teaching assistant to use the restroom; going to use the restroom (accompanied by a peer); and returning from using the restroom to resume the class activity. When the teacher asked students if certain words were supposed to match with the "T" side of the assignment or the "I" side, claimant responded that it was with the "poo poo" side. Because claimant's response was inappropriate, the teacher instructed claimant to move her clip down (teacher's classroom behavior tool), which caused claimant to reportedly "briefly" whine. (*Id.* at p. 3.) During recess, Dr. Shilakes observed claimant whine and cry briefly (without tears) after a boy threw her backpack and then used an "I" statement, after instruction by the teacher, to tell the boy, "I don't like it when you throw my backpack." (*Id.*)

22. During the observation both claimant's BI and teacher reported to Dr. Shilakes that claimant has tantrums, is inflexible, has a hard time with transitions, is social, has peer friends, uses age appropriate language, reads, is very intelligent, and is

performing well academically. To the extent the BI and teacher opinions regarding whether claimant is autistic was included in Dr. Shilakes' report, their hearsay opinions are afforded little evidentiary weight because they lack foundation, and are therefore not considered in this decision.

23. Based on her observation, including claimant's observed eye contact, engagement in joint attention, transitioning from one activity to another, engaging with peers and adults, for the most part following directions, using verbal and non-verbal means to communicate, minimal whining necessitating minimal redirection, Dr. Shilakes opined that claimant does not have issues with the relevant areas of self-care, learning, and receptive/expressive language, and mobility, and therefore does not demonstrate substantial impact in three or more areas, necessary to be eligible for WRC services. The other two areas of substantial disability, economic self-sufficiency and capacity for independent living, were not considered because they were not deemed currently applicable to claimant based on her young age.

24. Dr. Shilakes' testified at hearing that claimant's substantial handicap is limited to one area, self-direction. She highlighted that a determination by LAUSD of special education eligibility based on an ASD diagnosis for claimant is different from regional center eligibility because different criteria are used to diagnose ASD in each instance. Regional centers refer to the diagnostic criteria in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, commonly referred to as the DSM-5, to determine eligibility under the Lanterman Act, while LAUSD's diagnostic criteria are based on the Education Code. While Dr. Shilakes was reticent in providing a definitive opinion as to whether she agreed or disagreed with Dr. Nishii's ASD diagnosis of claimant, she opined that claimant's LAUSD assessments did not indicate ASD, but appeared to indicate that claimant had behavioral and emotional issues.

Parent's Evidence

25. Parent testified and presented evidence at hearing regarding claimant's eligibility for WRC services. She expressed frustration at WRC's ongoing lack of clarification regarding whether or not Dr. Nishii's ASD diagnosis of claimant was accepted by Service Agency, and asserted that claimant is not only autistic, but is substantially handicapped in at least three of the relevant areas including expressive and receptive language, self-direction, learning, and self-care. She argued that Dr. Shilakes's school observation should be afforded less evidentiary weight than Dr. Nishii's ASD diagnosis, noting that it differed from prior diagnostic assessments and was conducted primarily when claimant BI was present to redirect claimant's behaviors. In support of her assertions, Parent presented documentary evidence including claimant's October 16, 2019 IEP, an October 2019 Mid-Term Warning issued by claimant's teacher, and the November 4, 2019 LAUSD Language and Speech Assessment Report prepared by Theresa Maas, M.A., CCC-SLP. In addition, Parent presented the testimony of two witnesses from claimant's former after-school program, STAR, from which claimant was involuntarily removed because of the demands of managing claimant's behavioral issues.

26. According to Claimant's October 16, 2019 IEP, claimant continues to be eligible for special education services based on her autism diagnosis. (Exh. A.) Based on the IEP evaluation, the impact of claimant's autism included her ability to self-regulate and ability to express herself when upset, which negatively impacts her involvement and progress in the general education curriculum in the areas of writing, vocational, behavior, social emotional, and pragmatic language.

27. In the vocational area, the IEP described claimant as being similar "to any other kindergarten [*sic*] student" when she is "calm." (Exhibit A, p. 3.) However, it noted

that “[Claimant’s] work is often incomplete because [claimant] was unable to stay on task and [claimant] displayed verbal and physical outbursts. This behavior is distracting for other students and causes instruction to be stopped.” (*Id.*) With regards to behavior, the IEP described claimant as speaking in full sentences and as being understood when she is calm. However, following directions and transitioning from one activity to another was identified as an area that can cause claimant to become upset. According to the IEP, claimant’s behavior when she is upset is “extremely distracting and also dangerous to herself and to other students in the classroom. [Claimant] will scream, run out of the room, throw things, or flail her arms and legs around wildly. There have been occasions when the students were on the rug and [claimant] kicked another student in the back. Presently [claimant] needs 12-15 adult prompts per incident in the classroom.” (*Id.* at p. 4.)

28. In the social emotional performance area, the IEP described claimant as demonstrating progress in her ability to listen to a peer and ask a peer a question and in her ability to participate in classroom activities and follow directions. With regards to social awareness, the IEP noted that claimant was interested in peers and will initiate interactions, including asking a peer to play. Claimant was reported to enjoy building waffle blocks, asks to share blocks with peers (preferring yellow blocks), and “is able to engage in reciprocal interactions and conversations with peers at recess and lunch, however, [claimant] wants to be in control of the play.” (Exh. A, p. 5.) The IEP identified claimant as struggling to identify and communicate her feelings in a calm manner and dealing with transitions and changes in her daily routine, describing that, when escalated, “[claimant] will scream, elope, and throw things.” (*Id.*)

29. In the area of pragmatic language, the IEP described that claimant receives 240 minutes per month of Language & Speech (LAS) services under the

eligibility of autism to target pragmatic language skills. Claimant exceeded her goal to formulate one to two sentences to express negative feelings with 80 percent accuracy in four out of five opportunities, given minimal verbal or visual cues. According to the IEP, claimant “consistently states and describes her feelings using complete sentences without support when emotionally regulated, and demonstrates them accurately without support.” (Exh. A, p. 6.) Claimant’s continued need was described as follows, “While [claimant] has met her inner-language goal, [claimant] has not yet generalized this knowledge to apply it in real time, per clinical observation, teacher, & other staff report. [Claimant’s] skills expressing her negative feelings continue to emerge, and the prognosis for [claimant] achievement is highly positive given more time.” (*Id.*)

30. In October 2019, claimant’s teacher issued Parent a school Mid-Term Warning Notice based on ongoing issues with claimant’s classroom behavior. (Exh. B.) The notice was issued to notify Parent that claimant was in danger of not meeting grade level standards in the area of “effectively communicates and collaborates” and “acts responsibly, ethically, and is productive citizen.” (*Id.*) No issues in claimant’s ability to learn academic subjects were noted in the warning.

31. On November 4, 2019, Theresa Maas, M.A., CCC-SLP, completed a Language and Speech Assessment (LAS) Report based on her assessment of claimant on October 16 and 23, 2019. (Exh. C.) According to the LAS, with regard to language background, claimant’s “underlying language skills in English are within average to above ranges for her age.” (Exh. C, p. 1.) Based on Parent interview, areas of main concern are with claimant’s ability to apply her language skills to communicate on a daily basis. Parent described that claimant gets frustrated easily and then can’t control her actions and can’t communicate. Parent described claimant’s language as “very

good," with a "very big vocabulary," but indicated that claimant doesn't apply her language skills to the real world in the right moment. (*Id.* at p. 2.)

32. As part of the LAS, Maas observed claimant in the classroom during an academic lesson and during circle time, on the playground during claimant's lunchtime and during recess, and in the clinical setting during the one-on-one assessment. Maas described claimant as focused on her lesson, asking for help when needed ("excuse me, I have a question"), making good eye contact with adults, and complying with directions. (Exh. C, p. 3.) In addition, Maas observed claimant follow multistep directions and have some difficulty during unexpected transitions requiring BI intervention and calming of claimant. In the clinical testing setting, Maas described claimant as being largely cooperative and well-behaved when given plenty of warnings before transitions and clear expectations for behavior. Claimant was reported as demonstrating many positive social skills, including good eye contact with the examiner and topic maintenance, including reciprocated conversation with Maas and asking appropriate clarifying questions during testing.

33. Some of claimant's behaviors were described as less appropriate, including frequent interruptions of examiner and self-talk. During recess, claimant was observed to transition well with her class to the picnic tables outside, engage in small conversations with peers sitting near her, laughing and smiling with peers, showing good eye contact when talking with peers, and good body language. One tantrum was observed by Maas which occurred when claimant became upset while walking back to her classroom after a testing session and the examiner did not know how long her lunchbreak was. Claimant began to cry and scream, yelling illogical comments including "It's too loud!" when she was the only one making noise. Claimant continued to cry after arriving in the classroom and as the students filed outside for their lunch

break. She sat on the ground near the lunch tables and cried for most of the lunch period, and would not allow adults, peers, or her BI to calm her down, screaming "NO! I'm still crying!" (Exh. C, p. 4.) As reported to Maas by claimant's BI during the tantrum, claimant's tantrums lasted longer when she had an audience, seemed to be attention-seeking, and lead the BI to ignore claimant during her tantrums after claimant refused her first trying attempt to calm claimant. After her tantrum, claimant was reported to eventually calm down and approach one of the aides from another kindergarten classroom and ask for art supplies and then draw for the remainder of the lunch period.

34. As part of the LAS, Maas interviewed many of the people who interact with claimant on a regular basis, including her classroom teacher, her BI, the school psychologist, the school SLP, her classroom aide, and the classroom aide for claimant's Transitional Kindergarten class. The reports of the classroom teacher, BI, and school psychologist as described in the report are summarized below.

A. Claimant's classroom teacher reported that claimant is performing at grade level in every subject. He stated that her speech and language skills do not interfere with her ability to perform in the classroom. Teacher further reported that claimant speaks coherently, uses appropriate vocabulary and grammar, and does not avoid speaking in class. Claimant reportedly can be difficult to understand if she is speaking too quickly and quietly, and needs reminders to use a calm voice when she is upset.

B. Claimant's BI reported that she is usually not present during claimant's recess and lunch because that is when the BI takes her breaks. BI reported that claimant needs her more in the classroom to minimize tantrums and stay on task.

According to the BI, claimant has friends in the class, but sharing is hard for claimant and she becomes easily upset when things don't go her way.

C. The school psychologist reported that claimant does very well during therapy sessions with adults in general. Claimant was reported to have a more difficult time using positive social skills with her peers. For example, the psychologist described that claimant doesn't always know what to say if she is told to initiate a conversation with a peer by asking a question. However, the psychologist described that claimant plays nicely with peers when observed on the playground, though claimant does have a preoccupation with the color yellow and can get upset if she does not get to use the yellow blocks.

35. According to Maas, claimant's articulation and phonology was judged to be at or near 100 percent intelligible to an unfamiliar listener throughout her observations and assessment. Minor speech sound errors were deemed age appropriate and as not impacting intelligibility. Maas concluded that claimant's speech sounds are likely to develop naturally as she grows, without the need of therapeutic intervention. (Exh. C, p. 6.)

36. Claimant's language was assessed by Maas using the Comprehensive Assessment of Spoken Language – Second Edition (CASL-2), Pragmatic Language Skills Inventory (PLSI), Narrative Retell, and Spontaneous language sample.

A. The CASL-2 is a norm referenced oral language assessment battery of tests for children and young adults aged 3 through 21. The results provide information on oral language skills that children and adolescents need to become literate as well as to succeed in school and in the work environment. For claimant, one test was administered, the Pragmatic Language test. The Pragmatic Language test assesses the

knowledge and application of pragmatic language rules that are recognized by society to be appropriate in a given context. Claimant's score was in the average range for her age, indicating age-appropriate knowledge of societal norms and expected response in social situations. Claimant responded correctly to the following situations: expressing and responding to gratitude, greeting a teacher, making requests from a parent, making requests from a sibling, making requests from a group of peers, requesting information, politely refusing, giving compliments, meeting a new person, and ordering in a restaurant. Claimant responded incorrectly to the following situations: expressing regret after making a mistake, expressing regret to a disappointed peer, expressing sympathy, and evaluating nonverbal cues of sadness in order to express concern. Based on claimant's responses, Maas concluded that "[claimant] has the most difficulty using language in situations that involve negative emotions, either her own or others'. Though [claimant's] overall score on this test was in the average range, it suggests that [claimant] would have difficulty with situations such as expressing regret, apologizing, comforting a peer, recognizing when a peer is sad, and showing sympathy to others." (Exh. C at p. 7.)

B. The PLSI is a norm-referenced rating scale. Raters use a nine-point scale to rate individuals on 45 total items in the categories of Classroom Interaction, Social Interaction, and Personal Interaction. The PLSI was completed by Parent and claimant's teacher. The ratings for both Parent and teacher yielded an overall Pragmatic Language Index that was in the average range, with similar overall scores (90 from Parent and 92 from teacher). However, Maas noted that the teacher's rating differed significantly from Parent's rating on many of the individual items, which she attributed to, among other things, claimant's behaviors and social interactions differing significantly between home and school environment. Obeying classroom rules for behavior was identified as an area of relative weakness by both Parent and teacher.

C. A narrative retell of the story "Frog Where Are You?" by Mercer Mayer was attempted by Maas in order to assess claimant's ability to comprehend and retell a story coherently and clearly. However, an analyzable sample was not obtained due to claimant's unwillingness to participate in the task. Specifically, claimant refused to retell parts of the story which she said were "too scary" or which she "didn't like." (Exh C., p. 11.) Maas concluded that claimant's performance on this task "does have significant implications for [claimant] willingness or unwillingness to participate in academic activities which are not self-chosen or which she does not enjoy." (*Id.*)

D. A spontaneous language sample was obtained in order to measure claimant's ability to produce language in natural contexts. Claimant's semantic usage (vocabulary and word finding) was determined to be age-appropriate. Grammatical structure (syntax and morphology) was also age appropriate and adequate for conveying thoughts and ideas to others. Pragmatics (social language) was reported to be, for the most part, engaging and appropriate. However, Maas determined, based on claimant's responses, that claimant wanted to communicate on her own terms in that topic initiation was always on a preferred or self-chosen topic. Claimant's Phonology (level of intelligibility) was 90 percent intelligible, with 90 percent of claimant's utterances entirely intelligible. Based on the results, Maas concluded that there were no significant concerns with claimant's phonology during spontaneous speech.

37. In summary, in the area of strengths, Maas concluded that claimant's "speech (articulation, voice, fluency) is not an area of concern at this time and continues to develop appropriately for her age and gender." In the areas of need, Maas determined that claimant needs support to interact with peers appropriately, especially when claimant is emotionally dysregulated, leading to claimant becoming pre-occupied with her own interests and tending to ignore or interrupt others,

refusing to participate in activities or conversations that do not interest her. Further, Maas noted that claimant's "tendency to tantrums and violent outbursts isolates her further from her peers. [Claimant] behavior is a big barrier to her success." (Exh. C., p. 13.) Behavior Intervention and counseling and guidance were noted as services that were already in place to address claimant's self-calming strategies to manage negative behaviors. Maas concluded that claimant's "deficits in pragmatic language, secondary to her diagnosis of Autism, impact her ability to communicate effectively with her classmates and form meaningful relationships with them." (*Id.*) As a result, continuation of DIS/LAS services was recommended.

38. Rachel Freeman, Site Director, STAR program, Pacific Palisades Charter Elementary, testified at hearing regarding claimant's involuntary removal from the afterschool STAR program based on claimant's observed behaviors. According to Parent, claimant attended the afterschool program during the fall 2019 for approximately four days before she was told that STAR could not accommodate claimant's behavioral issues, including frequent tantrums during which claimant hit herself and eloping. Ms. Freeman corroborated Parent's testimony regarding claimant's removal from the STAR program, describing how she observed claimant on one occasion screaming, crying, hitting herself, and eloping, as a STAR staff member attempted, unsuccessfully to calm claimant. Ms. Freeman brought her safety concerns regarding claimant's behavior to the attention of the STAR administration and the decision was made to ask claimant to leave the program based on her demonstrated behavior and safety concerns.

39. Deann Wilken, cluster leader for STAR education who supervises the Palisades STAR program that claimant attended, testified that claimant was asked to leave the program based on safety concerns and the lack of staff to manage claimant's

behavior issues (including frequent tantrums and eloping), and that claimant would not be allowed to return to the program unless she was accompanied by a BI.

Service Agency Rebuttal to Claimant's Evidence

40. Dr. Shilakes testified in rebuttal to claimant's evidence at hearing, asserting that none of the evidence presented at hearing supported a finding of eligibility for claimant. Specifically, while Dr. Shilakes would not clarify whether WRC accepted the ASD diagnosis for claimant, she maintained that, whether or not claimant's ASD diagnosis was accepted by WRC, claimant was ineligible for services because she did not exhibit substantial disability in three of the seven areas identified by the Lanterman Act under an ASD diagnosis, as more fully detailed in Factual Findings 23-24. Dr. Shilakes continued to maintain that there is no dispute that claimant exhibits substantial disability in only one area, self-direction. However, she insisted that Maas's LAS report of deficits in some aspects of claimant's pragmatic language, especially when claimant was emotionally dysregulated, was insufficient to support a finding of substantial disability in claimant's expressive and receptive language based on claimant's language ability, as demonstrated by observations, assessments, the October 2019 IEP, and Maas's LAS results for claimant.

LEGAL CONCLUSIONS

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (Welf. & Inst. Code, §§ 4700-4716.) Parent requested a hearing, on claimant's behalf, to contest Service Agency's proposed denial of claimant's eligibility for services

under the Lanterman Act and therefore jurisdiction for this appeal was established.
(Factual Findings 1-5.)

2. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on her to prove by a preponderance of the evidence that she meets the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; Evid. Code, §§ 115, 500.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations] . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

[A] disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a qualifying developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l)(1):

"Substantial disability" means the existence of significant functional limitations 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:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction.
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

5. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(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 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.

6. California Code of Regulations, title 17, section 54001, subdivision (b), provides, in pertinent part, that the "assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines," and the "group shall include as a minimum a program coordinator, a physician, and a psychologist."

7. In addition to proving that she suffers from a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are

specified as: intellectual disability, epilepsy, autism, and cerebral palsy. The fifth and last category of eligibility is listed as “Disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability.” (Welf. & Inst. Code, § 4512.)

Discussion

8. The preponderance of the evidence does not support a finding that claimant is eligible to receive regional center services. (Factual Findings 1-40.)

Qualifying Disability

9. WRC’s committee did not reach consensus on whether they agreed with Dr. Nishii’s ASD diagnosis of claimant. Dr. Nishii’s diagnosis was supported by empirical evidence and assessments. (Factual Findings 13-16.) Dr. Shilakes was vague in her testimony and unwilling to be forthcoming regarding whether she agreed with Dr. Nishi’s ASD diagnosis of claimant. Accordingly, WRC failed to provide an empirical basis to dispute Dr. Nishii’s ASD diagnosis of claimant. Accordingly, in balance, the weight of the credible evidence, established that claimant suffers from the eligible developmental disability of ASD pursuant to Welfare and Institutions Code section 4512. No evidence was presented that claimant has diagnoses of cerebral palsy, epilepsy, or intellectual disability or a closely related condition.

No Substantial Disability

10. The WRC committee determined that claimant does not have a “substantial disability” within the meaning of Welfare and Institutions Code section 4512, subdivision (l)(1), and California Code of Regulations, title 17, section 54001, without specifying which areas of substantial disability were inapplicable. With regards

to whether claimant's ASD is substantially disabling in three or more of the seven qualifying areas, at hearing, there was no dispute between the parties that claimant is substantially disabled in the area of self-direction. With regards to expressive and receptive language, Parent did not establish through a preponderance of the evidence that claimant is substantially disabled. Dr. Shilakes's hearing testimony that claimant's identified pragmatic language deficits based on the LAS report of Maas, as described in Factual Findings 29, 36, and 37, do not support a finding of disability in the area of receptive and expressive language was convincing. While claimant has some pragmatic language deficits, claimant's ability to understand and express herself verbally does not rise to the level of "substantial disability," as supported by empirical as well as observational evidence of claimant's ability to use expressive and receptive language. (Factual Findings 9, 13C, 14A-14C, 15-16, 21-23, 26-29, 31-35, 36A, 36D, and 37.)

11. Claimant's functional skills in the other relevant areas of learning, self-care and mobility were not substantially disabling. In terms of self-care, claimant's ability is age-appropriate. She toilets independently and can perform personal hygiene tasks with assistance can perform personal hygiene tasks (i.e., brushing teeth, showering, and changing clothes). While claimant's behavioral issues can interfere with her learning, there was no evidence of deficits in claimant's learning ability. On the contrary, claimant is enrolled in general education classroom, performs well academically, and her scores on cognitive function assessments fell into the high average and superior range. The last two areas (i.e., capacity for independent living and economic self-sufficiency) are not applicable to claimant, who is six years old and lives at home with Parent.

12. Based on the foregoing, claimant is not eligible for regional center services under the Lanterman Act. Claimant's appeal shall be denied. (Factual Findings 1-40; Legal Conclusions 1-11.)

ORDER

Claimant's appeal is denied. Service Agency's determination that claimant is not eligible for services under the Lanterman Act is upheld.

DATE:

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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