BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>MICHAEL M.,<br><br>Claimant,<br><br>vs.<br><br>REGIONAL CENTER OF THE EAST BAY,<br><br>Service Agency. | OAH No. N 2006060776 |

**DECISION**

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on August 9, 2006.

Claimant was represented by his mother, Balvinder M.

The service agency was represented by Pamela Higgins, Fair Hearing and Mediation Specialist.

The matter was submitted for decision on August 8, 2006.

ISSUES

The issues raised by the parties are:

1. Whether claimant is eligible for services under the Lanterman Act due to autism.

2. Whether the service agency is entitled to have its own staff members conduct an assessment of claimant.

## FINDINGS AND CONCLUSIONS

### *I. Procedural Background*

Claimant was born on July 2, 2003. He was referred to the service agency in October 2004 and was found eligible for regional center services through the Early Start program because of "developmental delay." Claimant's initial Individualized Family Service Plan (IFSP), written on November 18, 2004, provided for only minimal services: weekly specialized instruction funded by the Alameda County Infant Program and weekly occupational therapy funded by the service agency.

In April 2005, when claimant was 21 months old, Kaiser Permanente's Autism Spectrum Disorders Center diagnosed him with Autistic Disorder. As a result, additional services were added to his IFSP. As of August 2005, claimant was receiving five hours per month of speech therapy, five hours per month of occupational therapy, 25 hours per week of Applied Behavior Analysis (ABA) tutoring, three hours per week of ABA director services, and 25 hours per month of respite, all of which were funded by the service agency, as well as four hours per week of center-based specialized instruction funded by the Alameda County Infant Program. Claimant's IFSP was modified in March 2006 to reduce some of the services he was receiving. Speech therapy was reduced to one hour per week and respite was eliminated.

As claimant approached his third birthday, when eligibility under the Early Start program would end, the service agency referred claimant to Children's Hospital in Oakland for evaluation of his eligibility under the Lanterman Developmental Disabilities Services Act.[1] Under the Lanterman Act, the State of California accepts responsibility for persons over the age of three with developmental disabilities. As defined in the act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, that constitutes a substantial disability for the individual, and that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is commonly known as the "fifth category": "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals."[2]

The Children's Hospital assessment team evaluated claimant on June 12 and June 15, 2006. The team subsequently rendered an Axis I diagnosis of Pervasive Developmental Disorder Not Otherwise Specified and concluded that claimant was not eligible for regional center services under the Lanterman Act.

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[1] Welfare and Institutions Code sections 4500 through 4867.

[2] Welfare and Institutions Code section 4512, subdivision (a).

On June 20, 2006, the service agency notified claimant's mother that claimant was found ineligible for Lanterman Act services. On June 22, 2006, claimant's mother appealed the denial of Lanterman Act eligibility. She requested that the service agency consider whether her son was eligible under the fifth category.

Prior to the service agency's denial notice, claimant had been re-evaluated at Kaiser's Autism Spectrum Disorders Center on June 19, 2006, and a diagnosis of Autistic Disorder was again made. Kaiser's report was subsequently provided to Barbara Scapelitte, supervisor of the service agency's intake and assessment unit. Because the report was inconsistent with the Children's Hospital findings, Scapelitte requested that one of the service agency's intake unit physicians review the file and recommend whether to accept Kaiser's diagnosis, to accept the Children's Hospital diagnosis, or to have claimant evaluated by intake staff.

Service agency staff physician Paul Fujita, M.D., reviewed claimant's case file. He recommended, because of the conflicting opinions in the Kaiser and Children's Hospital reports, that it would be best if more information about claimant could be gathered through an evaluation by an assessment team consisting of service agency staff members. Claimant's mother initially agreed to permit such an evaluation but on July 18, 2006, informed Fujita that she did not want to go forward with the evaluation and preferred to proceed to hearing.

At the hearing, claimant's mother indicated that she was seeking an eligibility determination for her son based only upon autism, and not upon the fifth category. The service agency raised the issue of claimant's mother's decision not to permit in-house staff to evaluate claimant and asserted it was entitled to conduct such an evaluation.

*II. Autistic Spectrum Disorders and Lanterman Act Eligibility*

The American Psychiatric Association's Diagnostic and Statistical Manual "is a categorical classification that divides mental disorders into types based on criteria sets with defining features."[3] The DSM-IV-TR lists five conditions under the heading "Pervasive Developmental Disorders": Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS). These five conditions are now most commonly referred to in literature and by professionals in practice as "autistic spectrum disorders" (ASD).[4] As set forth above, autism (Autistic Disorder) is a qualifying condition under the Lanterman Act. None of the other conditions on the autistic disorder spectrum are per se qualifying, although they may be considered qualifying under the fifth category.

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[3] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) (2003).

[4] California Department of Developmental Services, Autism Spectrum Disorders – Best Practice Guidelines for Screening Diagnosis and Assessment (2002), p. 2.

A diagnosis of Autistic Disorder requires a finding that the individual meets specific criteria specified in the DSM-IV-TR. Those diagnostic criteria are:

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 development level

(c) a lack of spontaneous seeking to share enjoyment, interest, 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 gesture 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 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. [5]

A diagnosis of PDD-NOS is used for "presentations that do not meet the criteria for Autistic Disorder because of late age at onset, atypical symptomatology, or subthreshold symptomatology, or all of these."[6]

A diagnosis of Autistic Disorder does not automatically make an individual eligible for Lanterman Act services. As set forth in Welfare and Institutions Code section 4512, subdivision (a), an individual's autism must constitute a substantial handicap for him and must be expected to continue indefinitely. In this case, the service agency takes the position that even if claimant meets the DSM-IV-TR criteria for a diagnosis of Autistic Disorder, it has not been shown that his condition is either substantially handicapping or expected to continue indefinitely.

*III. Multidisciplinary Evaluations*

First Kaiser Evaluation

Claimant was evaluated at Kaiser's Autism Spectrum Disorders Center in San Jose on April 18, 2005, by clinical psychologist Thomas Crawford, Ph.D., and behavioral and developmental physician Damon Korb, M.D. Dr. Crawford subsequently issued a report in which it was found claimant met the DSM-IV diagnostic criteria for Autistic Disorder. In

[5] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, p. 75.

[6] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, p. 84.

particular, it was found that claimant exhibited marked impairments in all four of the social skills areas, in two of the communication areas ((2)(a) and (d), with (2)(b) and (c) marked as "n/a," apparently due to claimant's age and limited language at that time), and in two of the behavior areas ((3)(b) and (d)). As a result of this diagnosis, the services provided to claimant increased dramatically, including 25 hours per week of ABA tutoring, five hours per month of speech therapy, and five hours per month of occupational therapy.

Children's Hospital Evaluation

Fourteen months after the Kaiser evaluation, on June 12 and June 15, 2006, claimant was evaluated at Children's Hospital in Oakland by clinical child psychologist Lori Wensley, Ph.D., and developmental behavioral pediatrician Renee C. Wachtel, M.D. The team issued a report in which it made an Axis I diagnosis of PDD-NOS and an Axis II diagnosis of Developmental Delay. In this team's view, claimant did not meet the diagnostic criteria for Autistic Disorder. He exhibited significant impairments in only two of the social skills areas (failure to develop peer relationships and lack of spontaneous seeking to share), one in the communications area (stereotyped and repetitive use of language), and none in the behavioral area. As to this latter area, the team noted that although no stereotypical behaviors had been observed, some had been reported by his mother. However, it was concluded that these behaviors did not appear to be interfering with his learning and cognitive development.

It was in the areas of learning and cognitive development that the team found claimant's greatest strengths. The Bayley Scales of Infant Development (BISD-III) measure problem-solving skills, conceptual knowledge, and motor and communicative skills. Claimant, who was then 35 months old, achieved on the BISD-III a Cognitive Composite Score of 95 and a Language Composite Score of 103, both of which are within the average range. He was found to function as a 32-month-old child as to cognition, as a 35-month-old child as to receptive language, and as a 37- to 39-month-old child as to expressive language. "[These] test results indicate that [claimant] has an average rate of learning as is expected for his age."

The assessment team also administered the Childhood Autism Rating Scale (CARS), which is designed to evaluate the presence and degree of autism. Scores on this scale can range from 15 to 60, with a higher score representing a greater degree of autism. A CARS score of 30-36 would place a child in the mildly to moderately autistic range. According to the report, claimant scored 25, "which is in the non-autistic range and is not consistent with a diagnosis of Autistic Disorder."

The scores most in keeping with a diagnosis of autism came on the Vineland Adaptive Behavior Scales, which measures functioning in four domains: communication, socialization, daily living skills, and motor skills. The Vineland score is determined through a semi-structured interview with a child's parent or caretaker. Claimant's mother was the respondent in this test.

> [Claimant's] mother reported his highest area of functioning was in communication; which was in the adequate range of functioning. His mother reported that he says at least 200 words, but uses them inconsistently. He speaks in full sentences of four or more words. He points accurately to all body parts and can listen to a story sometimes for 1 to 2 hours. His mother reported that his motor skills were in the moderately low range of functioning. He walks up and down stairs, alternating his feet; however, his mother said that he approaches them carelessly and is somewhat unstable. He plays on high play equipment, but requires close supervision. His running is "shaky" and he falls a lot. He does not hop on one foot while holding onto another person and does not pedal a tricycle. His mother reported that his socialization and daily living skills were both in the low range and showed mild deficit. With respect to socialization, he does not engage in elaborate make-believe play and shows minimal interest in the activities of others. He rarely responds to positive statements and only sometimes shows a desire to please his caregivers. He sometimes imitates adult movements. He does not appear to have a preference for a particular friend. With respect to daily living skills, he is not potty-trained and does not use utensils to feed himself. He only sometimes removes a front-opening coat or sweater. He does not participate in bathing and does not brush his own teeth.

Based upon his mother's report, claimant achieved on the Vineland age-equivalent scores of two years, three months in communication, one year, three months in daily living skills, 10 months in socialization, and 11 months in motor skills.

In its conclusions, the assessment team stated:

> The testing results suggest that [claimant] does not show delays in cognition or language. He demonstrated good problem-solving skills that were within normal limits for his age. He also demonstrated a good understanding of language and good expressive skills. [Claimant's] mother's report confirmed that his communication is adequate for his age. She described his motor skills as slightly lower in the moderately low range. His socialization and daily living skills were his lowest areas of functioning, as described by his mother.
>
> [Claimant's] symptoms, test results, and observed and reported behaviors are consistent with the diagnoses of Pervasive Developmental Disorder, Not Otherwise Specified, and Developmental Delay. . . .

> Although no stereotypical behaviors were observed, some were reported by his mother. Thus far, it does not appear that these behaviors are interfering with his learning and cognitive development. However, it will be important to monitor for changes in stereotypical behavior. If these behaviors increase or begin to interfere with his functioning, it will be important to reassess [him] to clarify his autistic spectrum diagnosis.

Welfare and Institutions Code section 4512, subdivision (l), provides that in determining eligibility under the Lanterman Act, "substantial disability" is defined as "the existence of functional imitations 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; [and] (7) Economic self-sufficiency." Dr. Wachtel, who was a member of the Children's Hospital assessment team, testified that in assessing the disability of a three-year-old, the evaluation is limited to the first four of these areas since the final three generally cannot adequately be evaluated in such a young child. Dr. Wachtel concluded that claimant had no significant limitations in either receptive and expressive language or mobility and therefore could not be found to have a substantial disability within the meaning of the Lanterman Act.

Second Kaiser Evaluation

On June 19, 2006, four days after the second evaluation session at Children's Hospital, claimant was again evaluated at Kaiser's Autistic Spectrum Disorders Center. The evaluators were Dr. Crawford and Shantal DeSilva, M.S., a pediatric speech-language pathologist. The subsequent report was again written by Dr. Crawford.

The Autism Diagnostic Observation Schedule (ADOS) is a semi-structured assessment of communication, social interaction, and play or imaginative use of materials. In administering the ADOS to claimant, the assessment team used Module 2 because claimant had "acquired phrase speech appropriate for the use of this module." However, because claimant used this level of speech ability inconsistently, he was also measured using Module 1. The team reported the following results:

> Using the Module 2 cut-offs, [claimant's] scores exceeded the cut-offs for "Autism" on the domains of Communication and Reciprocal Social Interactions, both on the individual or combined score cut-offs.
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> Using the Module 1 cut-offs, [claimant's] score on the domain of Communications exceeded the cut-off for "Autism" and his score for Reciprocal Social Interactions exceeded the cut-off for

> "autism spectrum" by several points but did not reach the cut-off for "Autism." The score on the Communication + Social Interaction Total exceeded the cut-off for "autism spectrum" but was just short of the cut-off for "autism."
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> Although no cut-offs are available for the domains of Play and Stereotyped Behaviors and Restricted Interests, his scores suggest some difficulties with both. Overall, the results of the ADOS indicated that [claimant] displays several behaviors that are seen in children on the autistic spectrum.

The Mullen Scales of Early Learning are used to assess Gross Motor, Visual Perception, Fine Motor, Receptive Language, and Expressive Language Skills. Claimant, who was 35 months old, achieved age-equivalent scores of 30 months in both Gross Motor and Visual Perception skills, 26 months in Fine Motor skills, 25 months in Receptive Language skills, and 32 months in Expressive Language. The Visual Perception and Expressive Language scores were in the average range, the Receptive Language score was in the below average range, and the Fine Motor score was in the very low range. Claimant's age was outside the available age norms for the Gross Motor subscale, but when measured against the norms for 33-month-old children his score was in the average range. In all domains except Fine Motor skills, claimant had improved since the Mullen was administered to him when he was 21 months old. Then, claimant had achieved age-equivalent scores of 14 months in Gross Motor skills (very low range), 16 months in both Visual Reception and Fine Motor skills (below average and very low, respectively), and 10 months in both Receptive and Expressive Language skills (both very low).

Measured against the DSM-IV-TR diagnostic criteria, the team found that claimant exhibited the same marked impairments found in the April 2005 evaluation and also in the two areas in the communication category that had previously been considered inapplicable due to claimant's limited language skills. Thus, claimant was found to have marked impairment in all four of the social skills areas, all four of the communication areas, and two of the behavior areas, thereby again qualifying him for a diagnosis of Autistic Disorder.

Dr. Crawford wrote:

> [Claimant] continues to present with significant impairments in socialization, especially with development of peer relationships and reciprocal social interactions. These deficits in conjunction with his insistence on routine and preoccupations with parts of objects (including sensory seeking behavior) are consistent with an ASD and he meets the criteria for Autistic Disorder. [Claimant's] developing intellectual abilities and language skills place him more toward the higher functioning end of the autistic spectrum.

> [Claimant's] distractibility and high activity level are likely the result of his ASD features leading him to focus on his own interests at the expense of attending to and controlling his behavior in response to the broader social context (i.e., his lack of social and emotional reciprocity). Likewise, his emotional lability and acting out behaviors seems [sic] more a product of anxiety that is caused by the difficulties of his ASD symptoms (i.e., rigidity, social and communication deficits, etc.) that make it difficult to adapt and function effectively within his environment.

*IV. Discussion*

In this proceeding, the burden of proof is on claimant to show by a preponderance of the evidence that he qualifies for Lanterman Act services. The case is a close one, as even Dr. Wachtel, who opined that claimant did not meet the diagnostic criteria for Autistic Disorder, acknowledged that claimant is "right on the line" between PDD NOS and Autistic Disorder. She further acknowledged that there are more similarities than differences between the Children's Hospital assessment and the subsequent Kaiser assessment and pointed out that the different results may be due to the fact that different measures were used by the teams (the BISD-III, CARS, and Vineland by Children's Hospital, the ADOS and Mullen by Kaiser.) But when all the evidence presented is considered, it is found that the Children's Hospital conclusion that claimant does not meet the diagnostic criteria for Autistic Disorder is more persuasive than the Kaiser conclusion that he does.

First, Dr. Crawford's April 2005 diagnosis of Autistic Disorder was undercut a month later when Dr. Korb, the physician who had participated in the evaluation, wrote a letter to claimant's pediatrician in which he stated about claimant: "We suspect general cognitive delays with some symptoms of an autistic spectrum disorder." "Some symptoms of autistic spectrum disorder" is a far cry from a diagnosis of Autistic Disorder. Dr. Korb did not participate in the subsequent June 2006 evaluation.

Second, those involved with claimant and his treatment observed and documented substantial improvement in his cognition and language and communication skills. Adrienne Canales, an early childhood special educator with the Alameda County Infant & Family Support Program, reported on May 15, 2006 that claimant had been receiving developmental services through the program since November 2004 and in that time had "made incredible progress." Blanca Zea-Kramer, program director of Milestones, claimant's ABA provider, reported on June 13, 2006 that claimant had been a Milestones client since June 15, 2005 and had made "remarkable improvements" in receptive and expressive language and communication skills and "significant progress" in cognitive skills. Liisa Hanninen-Danner, Ph.D., a school psychologist with the Livermore Valley Joint Unified School District, evaluated claimant in June 2006. She reported that claimant had "made significant gains in his cognitive development and/or his ability to communicate" since the April 2005 Kaiser evaluation. Shelley Jackson-Harmon, a speech/language pathologist with Speak Right Now,

claimant's speech therapy provider, reported on June 14, 2006 that claimant's speech and language skills were within normal limits. All of these findings show that claimant's skills are currently in great flux, a fact that also tends to undercut the strength of a definitive diagnosis of Autistic Disorder.

Finally, Dr. Crawford's June 2006 report itself contains findings that tend to belie the diagnosis of Autistic Disorder. In particular, the results achieved on the ADOS do not fully support that diagnosis. While claimant's scores exceeded the autism cut-offs in both the Communication and Reciprocal Social Interactions domains when the Module 2 scale was used, this was not true when the Module 1 scale was used. Then, claimant exceeded the autism cut-off only in the Communication domain. On the Reciprocal Social Interactions domain he exceeded the cut-off for autism spectrum but not for autism itself. His total score also fell short of the autism cut-off. And, Dr. Crawford noted, the overall results of the ADOS indicated that claimant displayed "several behaviors that are seen in children on the autistic spectrum." Once again, "several behaviors" of children on "the autistic spectrum" does not seem to equate with a diagnosis of Autistic Disorder.

The decidedly mixed results obtained on the ADOS depending on whether Module 1 or Module 2 scoring was used tends to support Dr. Wachtel's conclusion that claimant is "on the line" between Autistic Disorder and PPD-NOS.

But as the service agency pointed out, even if claimant was properly diagnosed with Autistic Disorder, this does not automatically qualify him for Lanterman Act services. There must also be a finding that his condition constitutes a substantial disability for him. As noted above, substantial disability is evaluated under the definition in Welfare and Institutions Code section 4512, subdivision (l), as modified to reflect claimant's young age. In order to be found substantially disabled, claimant would have to demonstrate significant functional limitations in three or more of the listed areas.[7] Although Dr. Wachtel testified that for a three-year-old only the first four areas are evaluated (self-care, receptive and expressive language, learning, and mobility), guidelines proposed by the Association of Regional Center Agencies require evaluation in a fifth area, self-direction. It is appropriate, therefore, to consider all five of those areas.

The evidence is very clear that claimant does not have significant functional limitations in either receptive and expressive language or learning. In both areas, he has progressed greatly over the past year or so and his abilities are at or close to his age level. Although claimant's mother reports that claimant has some mobility issues, these were not shown to be any more than relatively minor. Since claimant does not have significant functional limitations in three of the five appropriate areas, he cannot meet the Lanterman Act's definition of substantial disability. It is true that claimant has exhibited substantial

[7] The definition of substantial disability in Welfare and Institutions Code section 4512, subdivision (l), is further refined in title 17, California Code of Regulations, section 54001, subdivision (a), to require that a functional limitation must rise to the level of a "major impairment."

deficits in the area of social skills. These were found both by the Kaiser and Children's Hospital assessment teams. But it is important to note that deficits in social skills are not directly considered in determining substantial disability for eligibility purposes. Claimant has failed to demonstrate by a preponderance of the evidence that his condition, whether characterized as Autistic Disorder or PDD-NOS, constitutes a substantial disability within the meaning of the Lanterman Act.[8]

Welfare and Institutions Code section 4512, subdivision (a), requires that for Lanterman Act eligibility a developmental disability must not only be substantially disabling but must also "be expected to continue indefinitely." As noted above, claimant has shown significant progress in cognition and language during the past year. In the opinion of the service agency's physician, Dr. Fujita, claimant's average verbal IQ and his performance IQ score that "wasn't too low" (low average) provide claimant a good prognosis for further improvement. In his view, claimant is already exhibiting language capabilities rarely seen in eligible children. In his April 2005 report, Kaiser's Dr. Crawford noted:

> Presently, children are being referred for evaluation regarding suspicion of an Autistic Spectrum Disorder (ASD) at young ages. Although developmentally trained professionals are able to make a definitive diagnosis at a young age, the stability of the diagnosis within the spectrum is [not] static and may fluctuate. This is often the case for children who are very young or those at the extreme ends of the spectrum. It is not uncommon for children to satisfy criteria for an ASD at age 18 to 48 months of age and then at ages five to about six years be described as off the spectrum. Symptoms and behaviors may change considerably with intensive multimodal interventions, particularly as language-communication and social skills progress.

Dr. Crawford then recommended that claimant be re-evaluated in a year "in order to assess if his behaviors observed during this assessment maintain at their current level, continue to improve, or decline."[9] In her testimony, Dr. Wachtel agreed that diagnoses of young children are subject to change and she also recommended that claimant's development

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[8] Although in her appeal of the service agency's denial of eligibility claimant's mother requested that her son be evaluated under the fifth category, she withdrew that request at the hearing. While it is therefore no longer necessary to address the fifth category issue, suffice it to say that the finding that claimant has not demonstrated that he has a substantially disabling condition would be sufficient to preclude a determination of fifth category eligibility.

[9] Of course, Dr. Crawford did re-evaluate claimant in a year and made no change in his diagnosis of Autistic Disorder. But the Children's Hospital assessment at the same time came up with a non-qualifying diagnosis.

be evaluated again in the future, particularly at age five. All of this raises questions whether even a diagnosis of PDD-NOS might be expected to continue indefinitely.

*V. Service Agency's Entitlement to New Evaluation*

After reviewing the conflicting diagnoses of the Kaiser and Children's Hospital assessment teams and speaking with claimant's speech therapist, service agency physician Paul Fujita concluded that "The available information does not provide a clear or consistent picture." He recommended that claimant undergo another multidisciplinary evaluation, this one conducted by service agency staff members. This assessment would be a more thorough assessment than those conducted by Kaiser or Children's Hospital. It would include tasks not previously undertaken, including observation of claimant in non-clinical settings such as school, discussions with his teachers, and discussions with the various service providers who had worked with claimant over the prior year.

Claimant's mother at first agreed to this new assessment, but on the day before it was to begin she called Dr. Fujita to cancel the evaluation. As she explained at the hearing, she did so because of a number of concerns. Her son had recently been evaluated by both Kaiser and Children's Hospital and she felt that causing him to undergo another evaluation so quickly would not only be redundant, but would be treating her son "like a guinea pig." In addition, she stated that each time claimant's daily routine was changed by undergoing testing and observations, he demonstrated behavioral changes that were difficult to manage. The service agency asserts that it is entitled to an assessment of claimant's eligibility conducted by its own staff.

Regional center responsibilities under the Lanterman Act are described in Welfare and Institutions Code sections 4640 through 4659. Section 4642 provides that any person believed to have a developmental disability "shall be entitled for initial intake and assessment services in the regional centers." Assessment procedures are set forth in section 4643. "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs . . . ."[10] A regional center "may consider evaluations and tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources."[11]

While the foregoing provisions place the responsibility for eligibility assessments upon the regional centers, nothing in these sections gives a regional center the right to have an eligibility assessment conducted by its own staff. In this case, after initially denying claimant's eligibility, the service agency requested permission to conduct its

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[10] Welfare and Institutions Code section 4643, subdivision (a).

[11] Welfare and Institutions Code section 4643, subdivision (b).

own assessment as a "tie-breaker" between the conflicting prior assessments. While this request was not unreasonable and was probably in claimant's best interest since the service agency was essentially giving him an opportunity for a new evaluation after it had already denied eligibility, it must be recognized that the Children's Hospital assessment was, for all intents and purposes, the service agency's assessment: It was the service agency that referred claimant to Children's Hospital for an eligibility assessment and the letterhead on the report issued by Children's Hospital bore the names and addresses of both Children's Hospital and Regional Center of the East Bay. Thus, while fairness to the service agency might in some circumstances require that it be permitted to conduct its own assessment, under the circumstances in this case this is not required.

*VI. Conclusions*

Claimant has failed to carry his burden of showing that he has a qualifying developmental disability, that any developmental disability he does have is substantially disabling within the meaning of the Lanterman Act, or that any developmental disability he does have can be expected to continue indefinitely. For all three reasons, claimant does not meet the eligibility requirements of Welfare and Institutions Code section 4512, subdivision (a). While claimant might well benefit from some of the services provided by the service agency, that fact alone is insufficient to find him eligible under the Lanterman Act.

ORDER

Claimant's appeal of the service agency's denial of eligibility for services under the Lanterman Act is denied. He is not eligible for regional center services.

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.

DATED: _____

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MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings