

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

In the Matter of:

OAH No. 2011100375

TRAVON D.,

Claimant,

vs.

NORTH LOS ANGELES REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on March 6, 2012, in Lancaster, California. Travon D. (Claimant) was represented by Eddie Lee D., his father and authorized representative.¹ North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by its Contract Officer, Rhonda Campbell.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on March 6, 2012.

ISSUE

Does Claimant have a developmental disability which makes him eligible for regional center services?

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¹ Claimant's and his father's initials are used in lieu of their last names to protect their privacy.

FACTUAL FINDINGS

1. Claimant is a 6-year-old male (born July 1, 2005). He claims to be eligible for regional center services based upon a diagnosis of autism. (Exhibit 1.)

2. The Service Agency determined that Claimant is not eligible for regional center services because he does not suffer from autism or any other qualifying developmental disability, as set forth in Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001. Based on this determination, the Service Agency denied services to Claimant. (Exhibit 1.)

3. Claimant's mother was reportedly a Regional Center consumer with a drug abuse history. Claimant's two older siblings were born drug addicted and taken away from their mother. Claimant currently lives with his father. Claimant had previously been removed from his home by the Department of Children and Family Services (DCFS) and spent five months (June through November 2010) in out-of-home placement after wandering away from his home at about 9:00 p.m. He and his father attend counseling once per week at Valley Children's Guidance Center. (Exhibits 5 and 9.)

4(a). Claimant attends a public elementary school and is in a general education first grade class. After performing a psycho-educational evaluation in June 2011, Claimant's school district determined that he qualifies for special education services under the category of "Autism" for "autistic-like behavior." (Exhibit 10.)

4(b). Although his school district categorized Claimant under the category of "Autism," for "autistic like behavior," this categorization was solely for the purposes of determining Claimant's eligibility for special education services under their categories and was not a formal diagnosis of Autistic Disorder. The school district's educational categorization was based upon different and less stringent criteria than those set forth in the recognized diagnostic manual. (Exhibits 10 and 13; Testimony of Heike Ballmaier, Psy.D.)

5. Claimant's school records indicate that he began experiencing academic and behavioral problems following his return home from foster placement.

(a). In a Student Study meeting on November 17, 2010, Claimant's school district noted academic and behavioral concerns. At that time, Claimant only knew his numbers through 10, and could not repeat directions or follow multi-step directions. He could not focus for more than three minutes. He said inappropriate things and threatened to hit his peers and teachers. (Exhibit 3.)

(b). In an Abbreviated Teacher Questionnaire, dated April 27, 2011, Claimant's kindergarten teacher noted that he was "restless and overactive," "disturbs other children," "fails to finish things he . . . starts (short attention span)," "constantly fidgeting," "inattentive, easily distracted," "demands must be met immediately (easily frustrated)," and "cries often and easily." The teacher added that Claimant "does not comply with directions. Usually he

lays on [the] floor or sits and does nothing. Today, I insisted he comply and he started working himself into a rage – very bizarre.” (Exhibit 4.)

(c). As noted in a May 3, 2011 Study Team Referral Form, Claimant is “defiant/disrupts the classroom,” and his “defiant behavior is an increasing concern” which was inhibiting his academic progress. Claimant’s teacher noted that he “repeats things over and over,” and he uses profanity and has severe behavior problems. Claimant takes medication for his asthma, which his physician confirmed attributed to his hyperactivity. Claimant had been absent from school for 14 days of the school year due to his asthma. (Exhibit 7.)

(d). Claimant’s behavior concerns were noted during his bus transportation to and from school as well. In May 2011, there were several reports of his “excessive or malicious horseplay,” “excessive noise,” and “abusive body contact,” which included pulling another student’s hair.

6. After Claimant’s referral, NLACRC conducted a Social Assessment on April 29, 2011, via telephone interview of Claimant’s father. The following was noted:

(a). Claimant was social before age three. He initiates social interaction in familiar and unfamiliar environments. His play activities appear more parallel than interactive. He takes turns playing with toys. He shares his interests or achievements with others and will show his father a new toy or a new way he can play with a toy. Claimant recognizes the emotions of others and will ask his seven-year-old sister, “What is wrong[?] [y]ou look sad[.]” He enjoys riding his bicycle and scooter and playing catch with his father. Claimant] does not have repetitive behaviors. His eye contact is “fair to good.” (Exhibit 5.)

(b). Claimant does not have a history of speech delay. He speaks in complete sentences and is able to initiate and engage in reciprocal conversations. He is able to follow one step directions. The NLACRC interviewer noted concern regarding his receptive language skills and that he was being further evaluated through the IEP process. (Exhibit 5.)

(c). Behavioral concerns include Claimant’s lying on the floor and grunting or snorting. Claimant’s father described him as “hyper and needing attention all of the time.” No aggressive or self-injurious behaviors were reported. Since the night Claimant wandered and was taken from his home, his wandering has not been an issue. Claimant has had difficulty sleeping through the night since returning home. Claimant’s father was not concerned with Claimant’s behaviors until Claimant was put in placement. Since returning from placement, Claimant has had behavioral issues and “is not the same person.” (Exhibit 5.)

7(a). On May 10, 2011, licensed psychologist Heike Ballmaier, Psy.D., BCBA., conducted a psychological evaluation of Claimant at the request of DCFS. The assessment included a review of records, an interview with Claimant and his father, observations of

Claimant, and administration of diagnostic tools for measuring cognitive functioning, academic functioning and adaptive skills and for ascertaining characteristics of autism. (Exhibit 9.)

7(b). Dr. Ballmaier observed:

Upon being greeted, he smiled somewhat and exhibited good eye contact. . . . During testing he was cooperative at times and completed most tasks[. H]owever he seemed to exert little effort and appeared agitated and restless throughout testing. He occasionally blurted out nonsensical answers and generally talked excessively. In addition, [Claimant] continued to demonstrate good eye contact throughout testing, mostly smiled, and was able to point and use gestures spontaneously. He spontaneously initiated conversation with the examiner, such as he spoke about recent experiences at school[. H]owever, his father later stated that [Claimant] will make up stories and is not a reliable reporter. Additionally, [Claimant] engaged in frequent social referencing and shared enjoyment with the examiner and was able to follow the examiner's gaze. Overall, it is the examiner's impression that the conditions for testing were satisfactory and that the test results are judged to provide a valid estimate of current functioning. [Claimant's] lack of perseverance and focus[,] however[,] appear to have negatively impacted his performance, so that his true ability is judged to be somewhat higher than his current test results suggest.

It should be noted that [Claimant's] father seemed upset and frustrated with having [Claimant] come to the Regional Center for an evaluation and repeatedly stated that all of [Claimant's] current difficulties are the result of his experiences while he was in foster care placement. (Exhibit 9.)

7(c). To assess Claimant's cognitive functioning, Dr. Ballmaier administered the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III). Since Claimant did not complete the Symbol Search subtest, a Full Scale IQ could not be calculated. On the Verbal IQ, he scored in the borderline range (standard score of 78), and on the Performance IQ, he scored in the mild deficit range (standard score 67). According to Dr. Ballmaier, Claimant demonstrated low average performance on subtests that measured verbal comprehension and reasoning skills. However, his performance fell below borderline level on individual subtests of visual perceptual and nonverbal reasoning skills. Overall, Dr. Ballmaier estimated that Claimant's cognitive skills are in the borderline functioning range. However, she noted that he may need to be evaluated again in the future when he may be more focused and motivated to do well on testing tasks. (Exhibit 9.)

7(d). In the area of academic functioning, Dr. Ballmaier administered the Wide

Range Achievement Test, Revision 4 (WRAT-4). Claimants score for Word Reading was in the average range (standard score 96). He was able to read two sight words and to identify up to 20 numbers. However, he was unable to demonstrate the concept of “more or less” and did not solve simple word problems. According to Dr. Ballmaier, Claimant was functioning at the beginning or below Kindergarten level in basic reading and math subjects. (Exhibit 9.)

7(e). In the area of adaptive functioning, Dr. Ballmaier administered the Adaptive Behavior Assessment System, Second Edition (ABAS-II); Claimant’s father provided the responses necessary for the completion of this test. His general adaptive functioning was in the average range (standard score 104). His Conceptual Skills (Communication, Functional Academics, Self-Direction) were in the high average range (standard score 116) and Practical Skills (Community Use, Home Living, Health and Safety and Self-Care) were in the average range (standard score 107). Claimant’s Social Composite score on the ABAS-II reflected borderline functioning (standard score 78). His communication skills, as measured by the ABAS-II were in the high average range. Dr. Ballmaier noted, “Given [his] presentation during testing (e.g., lack of attention, cooperation and effort, oppositional tendencies), results of adaptive functioning appear to indicate an overestimate of his current functioning level. (Exhibit 9.)

7(f). To address autism concerns, Dr. Ballmaier administered the Autism Diagnostic Observation Schedule (Module 2) and the Gilliam Autism Rating Scale, Second Edition (GARS-2). The ADOS-2 is based on examiner ratings of direct social and play interactions via semi-structured play scenarios designed to give samples of typical communication patterns and social interactions. According to Dr. Ballmaier:

[Claimant] maintained good eye contact, responded to his name immediately, and was able to draw the examiner’s attention, as well as respond to the examiner by coordinating his gaze between the examiner and objects or by being able to follow the examiner’s gaze or pointing. It is noteworthy that difficulties were noted with overall quality of social responsiveness and rapport as [Claimant] primarily acted in an impulsive and oppositional fashion when interacting with the examiner. For example, he did not seem to enjoy interactions with the examiner as he frequently did not follow directions[. H]owever, he smiled as he responded in a knowingly inappropriate or incorrect fashion. In addition, his reciprocal social communication skills were limited, both in terms of level of articulation and content of conversation. No stereotyped behaviors and restricted interests were observed during the ADOS administration. (Exhibit 9.)

7(g) Dr. Ballmaier noted that “no significant elevations were apparent” on the GARS-2, based on parental responses. Dr. Ballmaier further noted:

[Claimant] reportedly does not exhibit any repetitive behaviors[. H]owever, he is overly active and was reported to shake his feet

repeatedly even when he sits down and this is considered to be a reflection of his impulsive and hyperactive tendencies. He has good eye contact at home, responds to his name, exhibits appropriate facial expressions, and seems interested in interacting with others for the sake of sharing his interests and activities. He does not withdraw from groups situations [*sic*], is affectionate towards others, and does not insist on nonfunctional daily rituals or routines. It should be noted that [Claimant] appears to be afraid of taking daily baths and his father suspects that this appears to be associated with potentially negative experiences while in foster care placement. No significant social delays and abnormal functioning in social interactions before age three were reported. In summary, [Claimant] does not demonstrate developmentally appropriate peer interactions[. H]owever, he does not otherwise exhibit any significant characteristics that reflect the presence of Autistic Disorder. (Exhibit 9.)

7(h). Dr. Ballmaier diagnosed Claimant as follows:

AXIS I: Attention Deficit Hyperactivity Disorder, Predominantly Hyperactive-Impulsive type²

[Claimant] was observed to fidget with his hands and feet, have difficulty remaining in his seat, talk excessively, and blurt out answers before considering all available options. He further displays a lack of focus in school as he cannot repeat or follow multiple-step directions.

[Rule Out (R/O)] Oppositional Defiant Disorder

[Claimant] often actively defies and refuses to comply with requests made by teachers and his father, often argues with adults, often deliberately annoys people, and is often angry and resentful.

R/O Adjustment Disorder with Disturbance of Conduct

[Claimant] reportedly became defiant and aggressive following his foster home placement and a significant change in behavior has occurred since that time.

² The diagnosis was derived from the Diagnostic and Statistical Manual of Mental Disorders, 4th ed., Text Revised (DSM-IV-TR), published by the American Psychiatric Association. The Administrative Law Judge takes official notice of the DSM-IV-TR as a generally accepted tool for diagnosing mental and developmental disorders.

AXIS II: Borderline Intellectual Functioning

AXIS III: Refer to medical records.

(Exhibit 9.)

7(i). Dr. Ballmaier recommended the following:

1. [Claimant] should be evaluated through his school district. It is estimated that he might qualify for special education services based on symptoms of ADHD. A learning disability should also be considered and rule[d] out based on a more in-depth [assessment] of his academic skills, such as auditory and visual processing skills.

2. [Claimant] should be evaluated by a psychiatrist to rule out Attention-Deficit Hyperactivity Disorder and to consider possible medication management of such symptoms.

3. If behavior challenges persist in school, [Claimant] may need a formal behavior plan to reduce defiance and disruptive behavior in the classroom.

(Exhibit 9.)

8(a). Following Dr. Ballmaier's evaluation, Claimant's school district conducted a psycho-educational evaluation of Claimant in June 2011. The assessment team consisted of Claimant's father, a school psychologist, a resource specialist teacher, Claimant's general education teacher, a speech specialist and a school nurse. (Exhibit 10.)

8(b). It was noted that Claimant's physician had previously diagnosed him with asthma and with ADHD, and Pervasive Developmental Disorder (PDD), and Mood Disorder, Not Otherwise Specified (NOS). According to Claimant's father, he was taking Albuterol for his asthma which could be contributing to his hyperactive behavior. He was also taking eight milliliters of Prednisone daily. (Exhibit 10.)

8(c). The examiners noted:

As per the teacher, [Claimant] demonstrates defiant and disruptive behavior at school. While [Claimant] has attended school . . . , he has become increasingly more aggressive and non-complaint, resulting in many conflicts with his age peers as well as older age students. [Claimant] is not being successful in performing math, reading and written language work. His behavior significantly interferes with his educational success. He is not generally redirected to appropriate behavior with the school staff's verbal or nonverbal prompts.

[Claimant] demonstrates poor interaction with peers and adults, has poor attention, is uncooperative, disrupts classroom instruction by being fidgety, uses profanity, makes disruptive noises, does not complete homework, demonstrates poor on-task behavior, demonstrates difficulty in following directions, has poor organizational skills, and has difficulty in copying from the school board.

He participates when he chooses to do so, often he lays down and spawls [*sic*] out on the floor, “zones out,” and does nothing or makes noises from farting noises to other oddities for attention. [Claimant] does as he chooses, tries to instigate others to have difficulties, wanders around the classroom, does little or no classwork, and requires constant monitoring.

The teacher reports that [Claimant] requires constant attention in order to ensure his safety and that of others. He may leave the classroom or designated area in the school . . .

(Exhibit 10.)

8(d). The examiners also noted:

In the testing situation, [Claimant] was able to attend for only a few minutes at a time and then he required a break of [at] least 5-10 minutes. He was easily distractible, fidgety and found it difficult to remain focused on tasks that involved too much stimuli on one page. He was overwhelmed and needed problems on a page to be exposed one at a time so he would not become discouraged and stop working on a given task.

(Exhibit 10.)

8(e). In assessing characteristics related to ADHD, the evaluators administered the Conners' Rating Scale-Revised Short form, which focused on several areas, including Oppositional, Cognitive Problems/Inattention, and Hyperactivity. The following was noted:

Oppositional behavior includes breaking rules, difficulties with authority, being easily annoyed and angered [more] than most individuals of the same age. Cognitive Problems/Inattention characteristics are reflected by problems in organizing work, competing tasks, and appearing to have trouble concentrating on tasks that require sustained mental effort. Hyperactivity characteristics are reflected by difficulty in sitting still, feeling restless and impulsive [more] than age peers, and needing to always be on the go. . . . Ratings of both the parent and teacher support that oppositional behavior and inattention

fall within the clinically significant range. The rating for hyperactive behavior falls within the at-risk range for the teacher's input and such a rating falls in the clinically significant range for the parent input.

(Exhibit 10.)

8(f). The GARS-2 was administered as a screening test for identifying persons with autism. The evaluators noted:

Ratings of the teacher support that [Claimant] demonstrates behaviors that are similar to that of 27% of children diagnosed with autism. The father's ratings indicate that [Claimant] demonstrates behaviors that are similar to that of 1% of children diagnosed with autism. Overall the teacher's ratings support that the presence of autistic-like behavior is Very [Likely] and the ratings of the parent support that the presence of autistic behavior is Unlikely. Similarly, the Resource Specialist and the Language and Speech [S]pecialist report that [Claimant] has much difficulty in pragmatic language. He seems to be disconnected from what is happening around him. He engages in odd social interactions with others, both adults and other children. Both specialists also report that [Claimant] uses odd communication skills that frequently consist of off-topic and irrelevant responses.

(Exhibit 10.)

8(g). The Summary and Conclusions in the evaluation noted:

[Claimant's] cognitive / intellectual abilities lie within the average range of development compared to his peers, suggesting he should be able to achieve reasonable academic success at a level comparable to the average, or typical student of age 5, at grade kindergarten. There are odd behaviors that support the presence of autistic-like behavior related to communication, social interaction, and stereotypical behavior.

(Exhibit 10.)

8(h). The evaluators found that Claimant "demonstrates an educationally disabling condition" in the area of "Autistic-like behavior." (Exhibit 10.)

8(i). The school district's conclusion that Claimant qualified for special education due to "autistic-like behaviors" did not constitute a formal diagnosis of Autistic Disorder under the criteria of the DSM-IV-TR. (Testimony of Dr. Ballmaier; Exhibit 10.)

9. On June 13, 2011, the NLACRC eligibility committee determined that Claimant is not eligible for regional center services. They recommended that he be reevaluated in two years and to follow-up on ADHD management. (Exhibit 11.)

10. On June 16, 2011, Claimant's school district conducted a Speech and Language Assessment of Claimant. The results of the assessment indicated that Claimant's language skills "are significantly below the average range" specifically in the area of "social language." Although Claimant did not meet the eligibility criteria for special education services as a student with a speech and language impairment, the evaluators recommended that Claimant's Individualized Education Program (IEP) team consider speech therapy services nonetheless. (Exhibit 12.)

11. Claimant's June and September 2011 IEPs documented Claimant's continued behavioral issues, including disruptive and uncooperative behavior, vulgar language, odd communication skills, and enjoyment of hurting others. (Exhibits 13 and 15.)

12. On June 22, 2011, NLACRC sent a letter and a Notice of Action to Claimant's father, informing him that they had determined Claimant was not eligible for regional center services. On September 14, 2011, Claimant's father requested a fair hearing. (Exhibit 1.)

13. On October 13, 2011, NLACRC Contract Officer, Rhonda Campbell, met with Claimant's father to discuss Claimant's appeal of NLACRC's denial of eligibility. The parties agreed that a school observation and teacher interview would be conducted by a regional center vendored psychologist. (Exhibit 16.)

14(a). On December 16, 2011, clinical psychologist, Ann L. Walker, Ph.D., arrived at Claimant's school to conduct the agreed-upon school observation and teacher interview. She was not able to conduct the school observation because she was informed by Claimant's teacher that Claimant had been suspended the previous day when he came to school with a butcher knife in his backpack. Claimant had informed the school that he brought the knife and that he intended to use it to threaten another specifically-identified student. Due to the incident and the suspension, Claimant was to be transferred to another school. (Exhibit 17.)

14(b). Claimant's teacher completed the Autism Diagnostic Interview – Revised (ADI-R). It yielded answers which demonstrated Claimant's reciprocal social interaction, communication and patterns of interest in the non-autistic range. The observations Claimant's teacher reported to Dr. Walker included:

[Claimant's] teacher reported that [Claimant] maintained good eye contact with his teacher.

She reported that [Claimant] does show some development of peer relationships in that he initiates interaction with other children. He wants to play with children. She reported that he shows no interactive,

imitative or imaginary play at school because none of the other children will play with him. She reported that he does not play with other children because he only wants to talk about one subject. For a long time, he was interested in talking about [z]ombies and drinking blood. Now, he is only interested in talking about gangsters. [Claimant's] teacher reported that none of the other students are interested in these topics and for this reason no one will play with [Claimant]. She reported that she has not observed [Claimant] playing with another student for even a minute.

[Claimant's] teacher reported that [Claimant] does share interests, enjoyment and achievement. She reported that he loves to receive positive reinforcement for proper behavior and is eager for his teacher [to] notice when he behaves appropriately.

[Claimant's] teacher reported that he does not show emotional reciprocity and does not notice how others feel.

[Claimant's] teacher reported no jargoning or echolalia and reported that [Claimant] is able to engage in reciprocal conversation with his teacher when he is given time with his teacher one on one. She reported that she tries to make one on one available to [Claimant] because he is eager to talk to his teacher and has lots to tell her.

[¶] . . . [¶]

[Claimant's] teacher reported the [Claimant] does show restricted areas of interest in that he was very interested in zombies and is now very interested in gangsters.

[Claimant's] teacher reported that he is upset by change in routine.

She reported a repetitive motor mannerism in that [Claimant] spins.

She reported an unusual sensory sensitivity in that [Claimant] eats pencils.

(Exhibit 17.)

14(c). Based on her records review and Claimant's teacher's responses on the ADI-R, Dr. Walker opined that Claimant does not meet diagnostic criteria for a DSM-IV-TR diagnosis of Autistic Disorder. (Exhibit 17.)

15. On January 10, 2012, NLACRC sent Claimant's father a letter, informing him that, following Dr. Walker's attempted school observation, the eligibility committee

determined that Claimant does not have a developmental disability entitling him to regional center services. (Exhibit 18.)

16. At the fair hearing, Dr. Ballmaier testified credibly on behalf of the Service Agency. According to Dr. Ballmaier, Claimant does not meet the criteria for a diagnosis of Autistic Disorder. She opined that Claimant's behaviors which the school district categorized as "autistic-like" were more likely related to his ADHD and/or Oppositional Defiant Disorder. Dr. Ballmaier further opined that Claimant does not have a condition similar to mental retardation or requiring treatment similar to persons with mental retardation. (Testimony of Heike Ballmaier, Psy.D.)

17. The evidence presented at the fair hearing failed to establish that Claimant suffers from Autistic Disorder.

18. The evidence presented at the fair hearing did not establish that Claimant suffers from a condition similar to mental retardation or requiring treatment similar to persons with mental retardation.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability entitling him to Regional Center services. (Factual Findings 1 through 13.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

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

[A] disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial

disability.” In assessing what constitutes a “substantial disability” within the meaning of section 4512, the following provisions are helpful:

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.

In California Code of Regulations, title 17, section 54002, the term “cognitive” is defined as:

[T]he ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience.

5(a). In addition to proving a “substantial disability,” a claimant must show that his 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: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility is listed as “Disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512.) This category is not further defined by statute or regulation.

5(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them.

5(c). While the Legislature did not define the fifth category, it did require that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512.) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive and/or adaptive deficits which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of whether the effect on his/her performance renders him/her like a person with mental retardation. Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition *requires* such treatment.

6. In order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled with either a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination), and who does *not* have a developmental disability would not be eligible.

7. Although Claimant maintains that he is eligible for regional center services, he currently does not have any of the qualifying diagnoses.

8. The DSM-IV-TR discusses autism in the section entitled “Pervasive Developmental Disorders.” (DSM-IV-TR, pp. 69 - 84.) The five “Pervasive Developmental Disorders” identified in the DSM-IV-TR are Autistic Disorder, Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and PDD-NOS. The DSM-IV- TR, section 299.00 states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and

interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as *early infantile autism*, *childhood autism*, or *Kanner's autism*. (Emphasis in original.)

(*Id.* at p. 70.)

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

A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):

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

- (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
 - (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals.
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - (d) persistent preoccupation with parts of objects
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in communication, or (3) symbolic or imaginative play.
- C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

(*Id.* at p. 75.)

10. In this case, Claimant alleges that he should be eligible for regional center services under the qualifying disability of autism. However, he has not been diagnosed with Autistic Disorder. According to the DSM-IV-TR, specific clinical criteria must be evident to diagnose Autistic Disorder. While Claimant does manifest some impairment in his social skills, no psychologist specifically found that he satisfied the required number of elements within the criteria of the DSM-IV-TR to diagnose him with Autistic Disorder. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of autism.

11. Although Claimant does demonstrate some mild deficits in adaptive functioning (including social skills), the evidence did not demonstrate that he presents as a person suffering from a condition similar to Mental Retardation. Moreover, the evidence did not establish that Claimant requires treatment similar to that required for mentally retarded individuals.

Based on the foregoing, Claimant has not met his burden of proof that he falls under the fifth category of eligibility.

12. The weight of the evidence did not support a finding that Claimant is eligible to receive regional center services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal of the Service Agency's determination that he is not eligible for regional center services is denied.

DATED: March 22, 2012

JULIE CABOS-OWEN
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.