BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. REDWOOD COAST REGIONAL CENTER, Service Agency.	OAH No. 2013041069

DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter on June 24-25 and October 30, 2013, in Ukiah, California.

Nancy Ryan and Lauren E. Gardner, Attorneys at Law, represented Redwood Coast Regional Center, the service agency.

James Stoepler and Timothy Poe, Attorneys at Law, and Annie Breuer, Assistant Clients' Rights Advocate, Disability Rights California, represented claimant, who was not present.

The record was held open to allow the parties to submit written closing argument, which was timely filed. Claimant's Closing Brief was marked Exhibit I, the service agency's Closing Brief was marked Exhibit 46, and claimant's Reply Brief was marked Exhibit J.

The record closed and the matter was deemed submitted on December 31, 2013, the date claimant's Reply Brief was filed.

ISSUE PRESENTED

Whether claimant is eligible for regional center services due to autism.

FACTUAL FINDINGS

Background

1. Claimant is a 20-year-old, substantially disabled young man. He has been obese since he was a toddler, and is reported to now weigh over 500 pounds. Between the ages of four and five, claimant was sexually abused by his mother's boyfriend for about a year. Since then, he has been examined and treated by numerous mental health practitioners and given multiple diagnoses, including post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, pervasive developmental disorder, not otherwise specified (PDD/NOS), Asperger's syndrome, anxiety and enuresis. For most of his life, claimant has received mental health services from Lake County. Until 2012, when claimant was 18 years old, no one diagnosed him with autism.

2. On December 14, 2012, claimant applied to the Redwood Coast Regional Center (RCRC) for services under the Lanterman Developmental Disabilities Services Act,[1] based on autism. He had applied for services before based on mental retardation and autism, and RCRC had found him not to be eligible in 2002, 2007, 2010 and 2011. When claimant applied again in 2012, RCRC concluded that an assessment was necessary, and arranged for him to be evaluated by a psychiatrist. Claimant refused to submit to an evaluation. In a letter dated March 22, 2013, RCRC informed claimant of its determination that he was not eligible for regional center services based on his medical records and his refusal to submit to evaluation. On the same day, RCRC issued a Notice of Proposed Action, informing claimant that he was not eligible for services under the Act because he "does not have a developmental disability as defined by the State of California." Claimant filed a timely appeal, and this hearing followed.

Essential features of autism

3. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), applies to this case. It states that the essential features of autistic disorder are "the presence of markedly abnormal or impaired development of social interaction and communication and a markedly restricted repertoire of activity and interests." Autistic disorder is a developmental disability. By definition, the onset of the disorder must be before three years of age.

Claimant's developmental history

4. Claimant was born one month premature on December 27, 1993. The pregnancy was complicated by maternal toxemia. Claimant's family history is positive for substance abuse (his mother used alcohol and methamphetamine before pregnancy), and

[1] The Lanterman Developmental Disabilities Services Act (Act) is found at Welfare and Institutions Code section 4500 et seq. All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

mental illness. At the time of his birth, claimant's mother was 27 years old and his father, whom he has never met, was 14 years old. Since he was born, claimant has lived with his mother or his maternal grandparents, and sometimes with both. It appears that, at this time, claimant is living with his mother.

5. At two years and nine months, claimant came to medical attention for severe obesity. Claimant's mother and grandmother took him to see a pediatric endocrinologist, Gregory Goodwin, M.D., at Children's Hospital Oakland on October 1, 1996. Dr. Goodwin's report of the same date notes that claimant is "very active," and that his "parents" (presumably his mother and grandmother) report that he "never stops moving." Claimant was able to combine words. He was beginning to ride a bicycle with training wheels. Dr. Goodwin's impression was "severe obesity and tall stature. He may be developmentally delayed as well." Dr. Goodwin recommended that claimant be tested for Prader-Willi, a genetic disorder that leads to overeating. Claimant was tested for that syndrome, and also for Fragile X syndrome. Both tests were normal.

6. Claimant's mother, stepfather, and grandmother brought claimant back to Children's Hospital Oakland on July 15, 1998, for a medical genetics consultation due to his weight and height. Claimant was four and one-half years old. Edward Lammer, M.D., and Genetic Counselor Catherine J. Klumpp, M.S., prepared a report of the visit, which is also dated July 15, 1998. Claimant's mother reported that claimant was "slightly delayed in his development," but could not remember specific milestones. Claimant's mother also reported that claimant had no obsessive compulsive or aggressive behavior, that he interacted appropriately with other children, and that he understood ordinary social cues. The examiners noted that claimant answered questions easily, that he was cooperative, and that he had good gross motor skills.

7. In 1999, when claimant was five years old, his ophthalmologist found that he had "classic Duane's syndrome" in the left eye, a muscular condition that leaves him unable to move the eye outwards. Duane's syndrome is not diagnostic of autism; some individuals with autism have it and others do not.

8. When claimant was in kindergarten, Lake County officials discovered that his mother's boyfriend had sexually abused him for about a year, when he was four and five years old. The Lake County Office of Education referred claimant to the county Mental Health Service for a mental health assessment (the "AB 3632" assessment). Nancy G. Olson, LCSW, a Senior Health Specialist for the county, performed the assessment and wrote a report dated May 23, 2000.

According to Olson, claimant presented as an obese, depressed six-year-old. She found claimant to be a victim of sexual abuse, and that the trauma manifested itself by "nightmares, obesity, lack of boundaries and a need to be in physical contact with others." Among claimant's symptoms, Olson found anxiety, enuresis, poor social skills, sexually inappropriate behavior, lack of boundaries, easy distractability, angry outbursts and threatening comments. Among claimant's strengths, Olson found that claimant was

intelligent, articulate, and inquisitive, and that he had good communication skills. Her diagnoses were PTSD (moderate), sexual abuse of child, enuresis, and obesity. Olson concluded that claimant was a child with an emotional disturbance, and that the emotional disturbance was impacting his ability to be successful in a regular classroom environment.

9. Claimant was made eligible for special education services when he was in kindergarten, due to emotional disturbance.

10. Claimant remained in public school until he was a high school senior. It appears that he stopped attending school in 2011 and was disenrolled, at his own request, in April 2012. Claimant's Individualized Education Plans (IEP's) between the years 2000 and 2012 contain a detailed analysis of claimant's educational performance in various areas, and a description of how his condition affected his educational progress.

The IEP's identify challenges and needs in many areas, including adaptive skills, behavior and health.

That was not the case, however, with respect to communication. Claimant's June 7, 2000 IEP, written when he was in kindergarten, states that claimant's receptive and expressive language skills "are an area of strength." Later IEP's consistently state that claimant's receptive and expressive language are "not identified areas of concern."

11. Claimant's behavior, weight and hygiene have been concerns since he was in kindergarten. In 2002, when claimant was in the second grade, he weighed 189 pounds. Claimant's April 8, 2003 IEP notes that he was impulsive and disruptive in class. In 2005, when claimant was in the fifth grade, his mother's chief concerns were his behavior, hygiene, weight and attitude; at that time, claimant weighed 280 pounds. In 2010, the school district formulated a behavior support plan that described claimant's problem behaviors:

> Claimant has been exhibiting disruptive and aggressive behaviors towards his teachers and peers. These behaviors are displayed when he consistently walks around the classroom throughout the class periods, interrupts the teachers, disturbs his classmates, inappropriate name-calling, verbal and sometimes physical harassment to his peers, and refuses to do any work. He has a history of bathing and sanitary issues, as well as sleeping issues, which also contributes to his behaviors. He has recently been suspended due to behaviors escalating from verbal threats to physical aggression towards his teachers and peers. He often refuses to leave the classroom when directed at such times and the Principal, the Director of Special Education, and the sheriff have been called to remove him from the situation.

12. Claimant found it difficult to make friends, not because he did not want to, but because of his hygiene and his behaviors. In 2002, for example, claimant's grandfather told

psychologist Albert J. Kastl, Ph.D., that claimant was "desperate" to make friends, but did not have friends because his peers teased him about his weight and his behavior. The special education director at claimant's high school, John Leonard, reported the same thing to RCRC in 2013. Leonard reported that claimant had asked to be disenrolled from high school because he had gained so much weight that it was difficult for him to maneuver around school, and he was embarrassed. (In 2011, claimant weighed 480 pounds.) Leonard told RCRC that claimant wanted to stay in school to see his friends, but did not want to do the schoolwork.

13. Claimant's behavior, hygiene and weight are still issues today: he can be belligerent, profane, uncooperative and threatening; he will not bathe regularly; he is not concerned about where he urinates; and he seeks food. Because of his weight, claimant's mobility is poor. He rarely leaves his home. While they do not agree on the cause of his disability, the parties stipulated that claimant would meet at least three of the criteria for "substantial disability" under section 4512, subdivision (l).

14. Over the course of his lifetime, claimant has received treatment from various mental health professionals, and has been prescribed various medication regimens aimed at his mental health problems.

Psychological evaluations prior to 2012

15. Between May 2000, when the AB 3632 mental health assessment was performed, and 2012, claimant was evaluated by numerous mental health professionals.

At some time prior to February 2002, claimant applied for regional center services. He was evaluated by Dr. Kastl on February 14, 2002, who wrote a report bearing the same date. At that time, claimant was just over eight years old. In addition to examining claimant, reviewing his records and administering various tests, Dr. Kastl took a developmental history from claimant's grandfather. Dr. Kastl diagnosed claimant with ADHD, PTSD, and generalized anxiety disorder. In Dr. Kastl's opinion, claimant did not have autism. Claimant was found not to be eligible for regional center services on the strength of Dr. Kastl's evaluation.

School Psychologist Marsha Thibodeaux, a licensed educational psychologist, performed a psychoeducational evaluation of claimant in 2003. He was nine years old. The purpose of Thibodeaux's report was to assess claimant's "present developmental levels and to verify the appropriateness of his placement . . . ." Thibodeaux's April 3, 2003 report does not offer any psychological diagnoses.

In 2006, Janet S. Cain, Ph.D., evaluated claimant in connection with his eligibility for social security disability benefits. In her report dated July 24, 2006, Dr. Cain diagnosed claimant with Asperger's syndrome and borderline intellectual functioning. Under DSM-IV-TR, Asperger's syndrome is a distinct diagnosis from autistic disorder.

In 2010, psychologist Julia Boehme prepared a psychoeducational report as part of the IEP process. Claimant was just over 16 years old. In her report, Boehme states that claimant was found eligible for special education with a primary eligibility of "emotionally disturbed" and a secondary eligibility of autism. How the school district came to assign a secondary eligibility based on autism was not established. No psychologist's report diagnosed claimant with autism, and Boehme's report does not offer any psychological diagnoses.

Also in 2010, claimant was evaluated by psychologist Ubaldo F. Sanchez, Ph.D. This evaluation, performed at the request of RCRC, was done in connection with claimant's July 2010 application for regional center services. Dr. Sanchez interviewed claimant at his high school, reviewed claimant's records and administered various tests. Dr. Sanchez's evaluation led him to assign diagnoses of PTSD; oppositional defiant disorder; learning disorder, not otherwise specified; and PDD/NOS. Dr. Sanchez did not find that claimant had autism. Under DSM-IV-TR, the diagnosis of PDD/NOS is distinct from the diagnosis of autistic disorder. Based on Dr. Sanchez's evaluation, claimant was found not to be eligible for regional center services.

In a letter dated August 25, 2011, Jeri E. Owens, M.D., of the Lake County Mental Health Service, informed RCRC that she is treating claimant for mood disorder and ADHD. Dr. Owens states that she has diagnosed claimant with PDD/NOS, mild mental retardation, intermittent explosive disorder, and oppositional defiant disorder.

In a letter dated August 29, 2011, Marlene Quilala, M.D., F.A.A.P., of Mendocino Community Health Clinic, Inc., states that claimant is her patient and that he has been diagnosed with "OSA [presumably obstructive sleep apnea], ADHD, Anxiety, Enuresis, Asthma and Asperger's Syndrome."

Claimant's current application

16. In late November 2012, claimant's attorney sent RCRC a copy of a report by psychologist Pegeen Cronin, Ph.D. (The report was prepared in 2012, but is not dated.) Psychologist Gerald Drucker, Ph.D., a consultant to RCRC who serves on the regional center's eligibility team, requested permission from claimant's attorney to speak with Dr. Cronin about her evaluation; in particular, Dr. Drucker questioned why the report did not include any scores from the Autism Diagnostic Observation Schedule (ADOS) that Dr. Cronin administered. Claimant subsequently signed a release to allow RCRC to speak with Dr. Cronin.

17. On December 26, 2012, before Dr. Drucker spoke with Dr. Cronin, claimant revoked his release.

18. RCRC does not retain in-house staff to conduct psychological evaluations. Unable to speak with Dr. Cronin to resolve Dr. Drucker's questions about her report, RCRC

decided to have claimant assessed, and arranged for claimant to be evaluated by psychiatrist Richard Goldwasser, M.D.

19. Claimant refused to submit to assessment by RCRC. On February 26, 2013, claimant's attorney wrote to RCRC and stated, "After much deliberation, we decided to forego [claimant's] evaluation by Dr. Goldwasser." No reason was offered. RCRC had informed claimant that it would provide transportation to and from Dr. Goldwasser's office in Mill Valley. Mill Valley is over 200 miles closer to claimant's home than San Luis Obispo, where claimant was evaluated by Dr. Cronin.

20. RCRC convened an eligibility team meeting to review claimant's application. Dr. Drucker prepared the team's Eligibility Determination:

> Dr. Sanchez saw [claimant] and ruled out Autistic Disorder (12/6/10). Dr. Cronin saw [claimant] in 4/12 & 7/12 and diagnosed Autistic Disorder. This team wished to speak to Dr. Cronin given that many professionals have seen [claimant] over the years, including Dr. Kastl, and did not diagnose Autistic Disorder. However, we were refused a release to speak to Dr. Cronin. To resolve this diagnostic question we wanted Dr. Goldwasser to see [claimant] but were refused this referral as well. Given that Autistic Disorder was not identified in childhood and that the preponderance of evaluators have ruled out Autistic Disorder, save for the recent evaluation by Dr. Cronin, to whom we were refused access and additional evaluation was refused as well, this team rules out Autistic Disorder as well.

Dr. Cronin's opinion

21. As Dr. Cronin alone has diagnosed claimant with autism, claimant's eligibility rests entirely on her opinion.

22. Dr. Cronin received her doctorate in psychology in 1995. From 1995 to 2012, she was associated with the Autism Evaluation Clinic in the Department of Child Psychology at the UCLA Semel Institute for Neuroscience & Human Behavior. She was the clinical director from 2004 to 2012. Since then, Dr. Cronin has pursued her own private practice in autism assessment.

23. Dr. Cronin examined claimant in 2012 at the request of claimant's attorney. She interviewed claimant at an office in San Luis Obispo on April 30, 2012, and interviewed claimant's mother and grandmother by telephone on July 13, 2012. Among other tests, Dr. Cronin administered the ADOS module 3 to claimant, and used the Autism Diagnostic Interview – Revised (ADI-R) to conduct a structured interview of claimant's mother and grandmother. Dr. Cronin reviewed claimant's educational records, mental health records, and

regional center records, and consulted with a staff member at Redwood Coast Children's Services and claimant's "skills coach." Dr. Cronin concludes that claimant has autistic disorder.[2]

24. In her report, Dr. Cronin writes that ADOS is "used as a diagnostic indicator for autism spectrum disorders. Items presented in the schedule provide a variety of opportunities for the individual to engage in typical social interactions of exchange. Scores are derived to determine whether they are diagnostic indicators for Autism Spectrum Disorders including Autistic Disorder." Dr. Cronin's report states that her administration of the ADOS "indicates" a diagnosis of Autistic Disorder, but the report does not state the scores she derived.

25. Dr. Cronin places great weight on the ADI-R interview of claimant's mother and grandmother. She writes that the "Best Practice Guidelines" of the Department of Developmental Services require use of the ADI-R, and at hearing she described claimant's mother and grandmother as "excellent reporters." In her report, Dr. Cronin concludes that "the interview indicates that [claimant] has demonstrated significant delays in communication, social adaptation, and repetitive behaviors that are diagnostic for Autistic Disorder, consistent with prior impressions."

26. The information Dr. Cronin obtained from the ADI-R interview, however, is inconsistent with claimant's contemporaneous medical and school records:

a. Dr. Cronin writes that "[a]s a baby, [claimant] was quiet and slow and did not move around much." In 1996, however, at two years nine months, claimant's mother and grandmother reported that he was very active and that he "never stops moving."

b. Dr. Cronin writes, "When asked what was observed as not quite right in [claimant's] development, Mother and grandmother indicated his delayed motor skills and lack of play skills as a baby and into early childhood." In July 1998, however, when claimant was four and one-half years old, claimant's mother told medical professionals at Children's Hospital Oakland that claimant interacted appropriately with other children and that he understood ordinary social cues. The examiners at that appointment noted that claimant answered questions easily and that he had good gross motor skills.

c. With respect to the development of social communication and behavioral adaptation, claimant's mother and grandmother felt that claimant was particularly bright so they were "surprised when he started kindergarten and had significant difficulties." The experience, they told Dr. Cronin, was "rough" and he "did not want to go." Dr. Cronin reports that "soon thereafter, claimant was identified for special education services as he could not cut with scissors, write or print."

This description of claimant's experience in kindergarten fails to mention that, for about a year between the ages of four and five, claimant was the victim of sexual abuse by his mother's boyfriend; that, when he was in kindergarten, he was diagnosed as suffering from post-traumatic

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[2] Dr. Cronin also concludes that claimant has "Mild Mental Retardation." The parties stipulated, however, that this application is based only on autism.

stress disorder; and that at that time he was found eligible for special education because of emotional disturbance, not because he could not cut with scissors write or print.

d. Dr. Cronin writes that claimant "always had difficulties with reciprocal exchanges such as chatting or conversation." At the July 1998 medical appointment, however, the pediatrician noted that claimant's speech was clear, that he was easily understood, that he answered questions easily and that he was cooperative. At that same appointment, claimant's mother reported that claimant interacted appropriately with other children and that he understood ordinary social cues. In the AB 3632 assessment in May 2000, LCSW Olson noted that claimant's strengths included good communication skills and that he was inquisitive and cooperative. And claimant's IEP's, from 2000 to 2012, consistently report that his receptive and expressive language were not identified areas of concern.

e. Dr. Cronin writes that "[b]y 10 and 11 years of age, [claimant] was typically the biggest child among others and would not play with other children . . . ." This implies that claimant did not want to develop peer relationships, or that he lacked interest in doing so. That, however, is not true. In 2002, claimant's grandfather reported that claimant was "desperate to make friends," but that he did not have friends "because he is teased about his weight and his behavior." Similarly, in 2013, the special education director of claimant's high school informed RCRC that claimant wanted to stay in high school to see his friends, but did not want to do schoolwork.

27. When she wrote her report, Dr. Cronin knew about claimant's history of sexual abuse. She testified that she did not assign a diagnosis of PTSD to claimant because she did not see any symptoms of that condition in the course of her examination. That may be true. The issue, however, is the accuracy of the developmental history that Dr. Cronin relied on to reach her diagnosis of autism. When claimant's mother and grandmother reported that claimant had social difficulties in kindergarten, Dr. Cronin accepted that history at face value and used it to support her autism diagnosis. Dr. Cronin's analysis does not address the fact that, when he was in kindergarten, claimant was found to have been a recent victim of sexual abuse by a member of his household over a long period of time, and that he was suffering from PTSD.

28. When she wrote her report, Dr. Cronin knew that claimant's IEP's stated that receptive and expressive language were not identified areas of concern for claimant. At hearing she testified that the authors of IEP's "do not like to write negative things," that they "write reports to help [the student's] family support their child and are therefore generous in their comments." Dr. Cronin stated, "I do not think we know enough to conclude that receptive and expressive language is not an identified area of need."

Similarly, in her report, Dr. Cronin dismisses Dr. Owens's diagnosis of PDD/NOS with the comment, "Often a PDD-NOS diagnosis is given when the provider has not completed a thorough evaluation for an autism spectrum diagnosis, and PDD is loosely translated as 'physician didn't decide.'"

Dr. Cronin's explanations for dismissing this evidence are not persuasive.

29. The ultimate issue is the persuasiveness of Dr. Cronin's autism diagnosis. The fact that Dr. Cronin is alone in her diagnosis does not, in itself, mean that her opinion is not persuasive. But autism is a developmental disorder that, by definition, must manifest itself early in an individual's lifetime. All of the other medical professionals saw claimant earlier in his life than Dr. Cronin did, when developmental disorders should have been apparent, and when claimant's developmental history was fresher in the minds of his family. Nevertheless, none of those medical professionals diagnosed claimant with autism. Dr. Cronin, on the other hand, did not see claimant until he was 18 years old. Her conclusions are based on a materially inaccurate developmental history. Dr. Cronin's diagnosis of autism is not persuasive because it fails to take into account a wealth of evidence that is contrary to her formulation.

LEGAL CONCLUSIONS

1. Under the Act, the State of California accepts "a responsibility for persons with developmental disabilities and an obligation to them which it must discharge." (§ 4501.) The Act provides that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (*Ibid*.) Regional centers are required to carry out the state's responsibility to the developmentally disabled. (*Ibid*.) The services and supports that regional centers provide must reflect the cost-effective use of public resources. (§ 4512, subd. (b); § 4646, subd. (a).)

2. The Act defines "developmental disability" as

> a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

(§ 4512, subd. (a).) There is no issue in this case as to substantial disability. The only issue is whether claimant has autism.

3. Neither the Act nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. In this case, claimant contends that he should be found eligible for regional center benefits. Under these circumstances, claimant has the burden of establishing each fact essential to his claim. (Evid. Code, § 500.) As there is no statute that provides otherwise, the standard of proof to be applied is preponderance of the

evidence. (Evid. Code, § 115.) It is claimant's burden, therefore, to establish that he has autism.

4. Dr. Cronin is the only person who has diagnosed claimant with autism. Her opinion is not persuasive, for the reasons set forth in Findings 24 through 29. Claimant has failed to carry his burden of proving that he is eligible for regional center services based on autism.

5. Regardless of the persuasiveness of Dr. Cronin's opinion, claimant's appeal should be dismissed due to his refusal to be assessed by RCRC.

Although individuals with many types of conditions might benefit from regional center services, services under the Act are available only to persons who have an eligible condition. (§ 4512, subd. (a).) Regional centers have the statutory right to assess an applicant to determine whether he or she is eligible services. (§ 4643; Cal. Code Regs., tit. 17, § 54010, subd (a).) Under the regulations of the Department of Developmental Services, eligibility for regional center services "shall be contingent upon the determination, after intake and assessment, that the person has a developmental disability . . . ." (Cal. Code Regs., tit. 17, § 54010, subd. (b).) Without the right to assess applicants, regional centers cannot insure that their scarce public resources are devoted to those persons eligible to receive them.

In this case, RCRC ordered an assessment of claimant to determine his eligibility. Claimant refused to participate in an assessment, and offered no reason for his refusal. An applicant cannot demand regional center services on the one hand, but deprive the regional center of its right to assess him for eligibility on the other.

ORDER

1. Claimant's appeal from the service agency's March 22, 2013 Notice of Proposed Action is denied. Claimant is not eligible for regional center services on the basis of autism.

2. Claimant's appeal from the service agency's March 22, 2013 Notice of Proposed Action is dismissed, for failure to submit to assessment.

DATED: February 4, 2014

_____/s/_____
DAVID L. BENJAMIN
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.