

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ASCHER M.,

Claimant,

and

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

OAH Case No. 2011060430

DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Simi Valley, California, on September 16 and 23, and November 21 and 22, 2011.

Donald R. Wood, Attorney at Law, represented Tri-Counties Regional Center (Regional Center or Service Agency).

Valerie Vanaman, Attorney at Law, represented Ascher M.¹ (Claimant).

Oral and documentary evidence was received at the hearing. The record was left open for the submission of written closing argument. Initial closing argument was received on January 23, 2012, and reply argument was received on February 1, 2012, from Claimant, and on February 2, 2012, from Service Agency. The documents have been marked for identification as Service Agency Exhibits T and U and Claimant's Exhibits 20 and 21, respectively. The matter was submitted for decision on February 2, 2012.

¹ Initials have been used in lieu of Claimant's and his parents' surnames in order to protect their privacy.

ISSUE

Is Claimant eligible for Service Agency services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act)?

FINDINGS OF FACT

1. Claimant was born on April 14, 2008, and was 3.5 years of age at the start of the hearing. He resides with his parents and his older sister.

2. Claimant's mother first became concerned about a possible developmental disability when Claimant was nine or ten months old. Claimant did not respond to his mother like his sister had. He did not want to be held. He started speaking later than his sister had. His mother raised her concerns with her pediatrician, and was advised to wait for further development.

3. a. At the recommendation of her pediatrician, Claimant's mother contacted Service Agency for evaluation due to his expressive language deficits. On January 11, 2010, Danielle Garhan, M.A., O.T.R./L. (Garhan), an occupational therapist with the Simi Valley Hospital Child Development Center (CDC), conducted an assessment to determine if Claimant was eligible to receive services under the State of California's Early Start program (Early Start). She administered the Revised Gesell Developmental Schedules, observed Claimant, and interviewed his mother. Claimant was 20 months old at the time.

b. Garhan observed that Claimant demonstrated good eye contact and that he was able to request help by reaching toward an adult and vocalizing or pulling the adult. He presented with expressive communication delays. She concluded that Claimant presented with age-appropriate skills in all areas except for personal-social. Garhan declined to recommend Early Start services, but made suggestions for the family to provide increased opportunities for Claimant to improve his personal-social skills.

4. On January 12, 2010, Katheryn Urquico, M.S., C.C.C.-S.L.P. (Urquico), a speech and language pathologist with CDC, conducted a speech and language assessment. Urquico administered the Rossetti Infant-Toddler Scale, observed Claimant, and interviewed his mother. Urquico concluded that Claimant demonstrated moderately to significant delays in receptive and expressive language skills with limited speech production. Based on these delays, Claimant was made eligible for Early Start services. Urquico recommended speech and language services one or two times per week. CDC provided the services from January 2010 until April 2011.

5. a. On March 25, 2010, Penny Erickson, M.S., O.T.R./L. (Erickson), an occupational therapist with CDC, conducted an initial occupational therapy evaluation. Erikson administered the Sensory Processing Disorder Checklist and the Infant-Toddler

Sensory Profile, observed Claimant at home, and interviewed his mother.

b. Erickson noted the following pertinent items from the Sensory Processing Disorder Checklist, based on information reported by Claimant's mother. In the area of tactile processing, Claimant becomes fearful or anxious when unexpectedly touched; he appears fearful and avoids close proximity to peers; he is distressed by having his hair brushed, washed or cut; he dislikes having his nails cut or his face washed; he dislikes having his teeth brushed and is fearful of the dentist; he dislikes kisses, and backs away from them; he prefers hugs by certain people; he avoids messy play, but is okay with PlayDoh; he is distressed by dirty hands and wants to wipe and wash them; and he may refuse to walk barefoot on grass or sand. The vestibular checklist yielded the following information: Claimant dislikes swings; he prefers sedentary tasks; he disliked being on his tummy as an infant; he loses balance easily and may appear clumsy; he has poor body awareness; he has poor fine motor skills; he is unable to lick an ice cream cone, and sucks it. In the proprioceptive area, Claimant likes to crash into the ottoman with his entire body and loves pushing and pulling objects. Claimant is sensitive to bright lights and is easily distracted by other visual stimuli in the room. With respect to the category of social-emotional play/self-regulation, Erickson noted: Claimant does not play with peers; he prefers to play by himself with objects or toys rather than people; he does not interact reciprocally with peers or adults; when frustrated, he will hit his mother, his sister, and others; he has difficulty interpreting his own cues, needs, and emotions; he gets frustrated easily; he functions best individually; he can change moods quickly; he sometimes avoids eye contact; and he participates in repetitive play for hours with toys and cars. At the hearing, Claimant's mother confirmed that most of the foregoing sensory issues are still present.

c. In the clinical observations section of her assessment, Erickson wrote that Claimant was fully engaged with his auto garage set with cars. For over one hour he played repeatedly with the cars, moving them up and down the ramp. Claimant declined Erickson's offer for a snack to continue playing with the cars. Erickson attempted to engage Claimant by playing with him and received brief eye contact during her attempt. After one hour, Claimant finally agreed to eat fruit and crackers, and Erickson was able to make observations about his preferences and reaction to food.

d. Erickson concluded that Claimant demonstrated difficulty processing sensory information, particularly in the areas of tactile, vestibular, proprioceptive, and oral-motor. The sensory deficits were affecting his functional performance and his ability to advance in the areas of social-emotional and play development. Erickson recommended occupational therapy two times per week.

6. Service Agency partially approved Erickson's recommendation, and started providing one hour per week of occupational therapy, starting April 2010. On April 29, 2010, Service Agency physician Robert E. Nopar, M.D. (Nopar) met with Claimant and his mother to determine whether a second hour per week was appropriate. Dr. Nopar, after discussing the matter with Erickson, approved the recommendation for three weeks with reevaluation after that. Claimant continued to receive two hours per week until April 2011.

7. In August 2010, at the recommendation of CDC staff, Service Agency funded a weekly social group and play class at My Little Gym in order to address Claimant's social and emotional deficits.

8. a. During Claimant's participation in the Early Start Program, Service Agency referred Claimant to Support and Treatment for Autism and Related Disorders (STAR) for assessment and treatment recommendations. On December 16, 2010, Lindsee Porter (Porter), M.S., B.C.B.A., conducted the assessment. Porter obtained information from Claimant's mother, administered tests, the Vineland Adaptive Behavior Scales (VABS) and the Developmental Profile 3, and observed Claimant. Claimant was 2.8 years of age at the time.

b. Testing showed delays in communication, social skills, and self-help/daily living skills. As scored through the VABS, receptive communication skills were moderately delayed, while those in expressive communication were adequate. The most pronounced deficits were in social skills, in which measurements of interpersonal relationships, and play and leisure were low, or an age-equivalent 8 months, whereas coping skills were moderately low, or an age-equivalent 1.1 years. Self-help and daily living skills were moderately low.

c. Porter made the following behavioral observations of Claimant. Claimant was able to follow most one-step directions, such as come here, sit down, give it to me, without prompting. He was able to identify several body parts and colors. He was able to identify several objects when asked where a particular object was. Claimant initiated conversations with Porter, such as when he stated "let's go outside." He commented sporadically on activities in which he was engaged, such as that he liked TV. He engaged in simple conversation with his parents. In what Porter characterized as verbal stereotypy, Claimant asked the same question more than once, and when he did not receive the desired answer, he did not appear to understand. For example, when Porter was trying to end the meeting by stating that she had to go, Claimant kept repeating that it was time to play outside and ignored the statement regarding the time to leave.

In Porter's opinion, Claimant displayed "fleeting eye contact." He made eye contact on occasion, and often when prompted by his mother. In two attempts to engage Claimant in "joint attention," observing the same object as the therapist, Claimant declined to look at the object Porter called to his attention. Claimant engaged in functional play, or using toys or objects for the intended purpose, but in a rigid and structured manner. For example, when playing with a train set, if one car had to be cleaned all had to be cleaned.

Claimant engaged in minimal challenging behaviors during the period of assessment. He did not occupy himself in appropriate ways without prompting. At one point, Claimant threw the toys around the room for no apparent reason. In another, he jumped on the couch. When his father said he was not able to play, Claimant whined and kept asking to go outside to play.

d. Porter recommended a ten-hour-per-week Applied Behavior Analysis (ABA) therapy program blending direct instruction, pivotal response treatment, incidental teaching, positive behavior supports, social skills training, and parental education. She developed goals in behavior, communication, social skills, and daily living skills/safety, as well as parental goals to support the therapy.

e. STAR started providing ABA services to Claimant in late December 2010 or early January 2011, under Porter's supervision. Porter has spent, on average, between one to two hours per week with Claimant since that time. Her reports and additional opinions are discussed below.

9. a. On January 19, 2011, Steven M. Graff, Ph.D., (Graff), Director of Clinical Services and Staff Psychologist, and Monica Quinonez Mora, Psy.D., Staff Psychologist, conducted an evaluation to determine whether Claimant was eligible to receive Service Agency services under the Lanterman Act after he turned three years of age. Dr. Graff received his Doctor of Philosophy Degree in Counseling Psychology in 1988 from the University of Southern California, in Los Angeles, California. He has been employed by Service Agency since 1996, and has extensive experience performing assessments. Dr. Mora received her doctorate in June 2007 from the John F. Kennedy University in Orinda, California, and has been employed by Service Agency since August 2009.

b. Drs. Graff and Mora met with Claimant and his mother for approximately two hours. Neither clinician observed problems with eye-to-eye gaze or gestures to regulate social interaction. Claimant expressed a desire to seek out and share enjoyment and interests, such as asking his mother to look at a toy snake and showing the evaluators other things of interest. Nor did they observe stereotyped or repetitive use of language. Because Claimant's mother reported a history of social and emotional reciprocity problems, repetitive behavior, continuing sensory issues, and lack of social and imitative play, Dr. Graff recommended a complete psychoeducational evaluation and further observation by Dr. Mora in Claimant's home setting or in another setting where he had the opportunity to interact with peers.

10. In a January 13, 2011, letter to Service Agency, written at Claimant's mother's request, occupational therapist Kathy Anderson and speech and language therapist Nadia Araujo, the CDC employees responsible for providing early start services in their respective areas, provided a progress report. The therapists note that Claimant has made progress in areas of sensory processing. He was tolerating messy and noisy activities better. He had made improvement with feeding and tolerating motor stimulation. Behaviors involving repetitive and perseverative play, including as picking of his nose and spinning, reported to occur in the home, were not typically seen in the clinic.

Claimant demonstrated solid improvement in his ability to effectively communicate his wants and needs with adults, but required moderate auditory prompts to engage in peer interactions. His vocabulary was improving, and was able to have spontaneous speech with

three- to four-word phases. He continued to require prompts to identify action words in pictures. Reported repetition of phrases had only been observed once in the clinic. On occasion, Claimant had difficulties with transition, requiring redirection to avoid tantrums.

The therapists were still concerned about Claimant's need for constant movement, which they viewed as a sensory regulation issue, poor safety awareness, short attention span, and delayed social skills. Claimant showed interest in peers, but lacked the skills to take the next step to begin interacting with them.

11. In or about April 7, 2011, Anderson and Araujo submitted their final report to Service Agency. They wrote that Claimant's improved expressive and receptive language skills were now age appropriate. He had shown progress in regulating behavior, including handling transitions. However, he continued to show delayed social skills with his peers. Although showing improvement when playing with sensory tactile activities, Claimant continued to display mild sensory defensiveness. Self-stimulatory behaviors reported in the home were not observed at the clinic. They recommended continued parent education, monitoring of speech and language as needed, and occupational therapy to facilitate improved sensory regulation while working on social skills with peers.

12. a. In February and March 2011, Stacy Cohen-Maitre, Ph.D., (Cohen-Maitre) conducted the psychological evaluation recommended by Drs. Graff and Mora. Dr. Cohen-Maitre received a Master's Degree in June 2000 and a Doctor of Philosophy Degree in 2002, both in clinical psychology, from Loma Linda University Graduate School. Her practice consists of performing assessments, and she has been doing so for Service Agency for approximately five years. Dr. Cohen-Maitre observed Claimant in Service Agency's office on February 15, 2011, and in his play class (My Little Gym) on March 7, 2011, interviewed his parents, reviewed pertinent records, consulted other professionals involved in Claimant's Early Start program (Porter, Joan Schumacher, and Nadia Araujo), and administered the Mullen Scales of Early Learning – AGS Edition (Mullen), the ADOS – Module 1, and the Adaptive Behavior Scales – Second Edition, parent version (ABS-2).

b. Dr. Cohen-Maitre assessed Claimant's skills through the Mullen. In the visual reception domain of the test, which assesses visual processing and reasoning skills such as completing puzzles and matching, Claimant demonstrated skills at the 50-month-old level, which placed him in the 99th percentile. His fine motor abilities were in the average range. His receptive language abilities were also in the average range, as he was able to identify a variety of colors, to demonstrate his understanding of "smaller," to follow two unrelated commands, and to identify objects based on their function. Expressive language skills were also measured in the average range, as Claimant was deemed to have age-appropriate language skills such as the ability to follow commands and receptively identify objects and actions. His Early Learning Composite score, reflecting overall developmental functioning, placed Claimant in the average range of functioning.

c. Adaptive behavior functioning was measured through the ABS-2, based on his mother's report. In this test, the conceptual composite, which measures

communication, functional academics, and self-direction skills was in the average range, close to the low average (25th percentile). However, the skills in this domain showed significant variability, with functional pre-academic skills in the high average range, the communications skills in the low average range, and the self-direction skills in the borderline range. Areas of deficit were Claimant's inability to laugh when another laughs, listen closely for one minute when others talk, or follow simple household rules.

The social composite domain results indicated impaired functioning (second percentile). He is not able to play simple games like "peek-a-boo" or roll a ball to others, play with other children when asked, laugh when happy, relax his body when held, imitate the actions of adults, or greet other children.

The practical composite results, which measures community use, school living, health and safety, and self-care skills, indicated functioning in the borderline range (fourth percentile). Claimant is able to recognize his home in his immediate neighborhood. For example, he is sometimes able to walk on the sidewalk rather than the street, tell his parents when someone is at the door, assist others in putting away toys, do a simple errand when asked, offer to help his parents with tasks, put things in their place after using them, sleep through the night without waking, and sit in the toilet without being held. He is not able to refrain from hitting or kicking furniture, show concern when he spills something, show or point to tell another person about a minor injury, swallow liquid medicines needed for an illness, brush his teeth with little fussing when asked, and wipe his face when given a cloth.

The motor domain indicates gross and fine functioning in the low average range (16th percentile). For example, Claimant is able to run and kick a ball without falling and to stand on his toes to reach objects. He is sometimes able to blow out candles, throw a ball overhand, catch a ball tossed from five feet away, draw a line across a piece of paper, and use scissors to cut paper. He is unable to walk up and down stairs without help.

d. Dr. Cohen-Maitre conducted a direct observation of Claimant in connection with her administration of the ADOS. The ADOS consists of four modules, each designed for individuals at a particular developmental and language level, ranging from no language to verbally fluent adults. Each module contains various activities that allow the examiner to observe social and communicative behaviors related to the diagnosis of autism spectrum disorders. These activities are intended to provide interesting, standard contexts in which the interactions occur. Scores are reported in terms of classifications, either autism, autism spectrum, or no classification.

Dr. Cohen-Maitre opted to use Module 1 because she believed Claimant to have limited verbal ability, which belief was based in part on his mother's report and concerns. Once she started the test, Dr. Cohen-Maitre realized that Claimant was more verbal than anticipated. She opted not to switch to Module 2 because she concluded that her clinical observations would supplement the information obtained through the specific exercises.

In terms of verbal communication, Claimant spoke in a variety of sentences with appropriate use of nouns, pronouns, and verbs. Dr. Cohen-Maitre cited the following examples during the administration of the ADOS: “Mommy, can you help me?” and “I like these cars. Can I have this car?” His eye contact appeared to be less than expected for a child his age. At times it was well integrated with verbalizations and pointing and at other times it was not. He used some nonverbal gesturing to augment verbal communication, such as when describing something “big” as he gestured and pointed to the object.

In the area of social interaction, Dr. Cohen-Maitre concluded that Claimant was able to make social references to her and to his mother to share his experiences. He was observed to show and to give objects to Dr. Cohen-Maitre and his mother to share his interests. He was socially engaging with both adults. The example given was one that occurred during the bubble blowing activity in the ADOS. Claimant understood what to do when Dr. Cohen-Maitre stated “ready, set,” as he waited for the word “go,” before starting to blow a balloon; Claimant asked Dr. Cohen-Maitre “how about a really big bubble” and “how, about again.” At one point he asked to blow the bubbles and asked “let me try.” Claimant displayed happy affect with a congruent mood during the exercise.

With respect to the areas involving play, Claimant was observed to play with a baby doll in a symbolic manner by feeding it some of the PlayDoh “cake.” However, he did not use the doll as an agent of action. He imitated all of the step play actions as modeled by Dr. Cohen-Maitre during another activity, the “Functional and Symbolic Imitation,” and did so by adding descriptive, relevant sounds. During the “Free Play” activity, Claimant’s play appeared to be functional and purposeful.

In scoring one of the social interaction items, Dr. Cohen-Maitre awarded a .5 value despite the test calling for values of 0, 1, 2, or 3. Higher numbers are more consistent with autism. The item was “Integration of Gaze and Other Behaviors During Social Overtures,” and Dr. Cohen-Maitre awarded the fractional score because she felt Claimant’s eye contact fell between the given choices (“Uses eye contact effectively with words or vocalizations or gestures to communicate social intention,” the “zero” value, and “Uses eye contact and vocalization independently of each other to communicate social intention (i.e., uses both eye contact and other strategies at different times, but does not coordinate with each other.),” the “one” value. She also used a lower score than permitted in another item, B.1. (“Unusual Eye Contact”), in which a value of “1” was awarded instead of the choices of “0” or “2.”

e. On March 7, 2011, Dr. Cohen-Maitre observed Claimant at My Little Gym for approximately one hour. Claimant primarily played in a solitary manner. He did not follow instructions given to the group, but occasionally partially followed instructions from his mother or his teacher. As an example of his limited participation, during the opening activity, circle time, he did not sit down but was willing to provide his name, from afar, in response to his teacher’s question about his name. Claimant did not respond to his mother’s attempts for him to participate in the second group activity of the class, but on another occasion modeled his mother’s somersault on the mat. While his teacher engaged with some of the other children, Claimant ran about but on approximately five times he stopped to

whisper something unintelligible in Dr. Cohen-Maitre's ear. At one point, Claimant turned in a circle and side glanced while doing so.

f. Dr. Cohen-Maitre diagnosed Claimant with Pervasive Developmental Disorder, Not Otherwise Specified, Provisional. While Claimant displayed "autistic tendencies," Dr. Cohen-Maitre did not think that those were sufficiently marked or sustained to meet the autism diagnostic criteria. She did find that Claimant had a qualitative impairment in social interaction as manifested by his failure to develop peer relationships appropriate to developmental level. She observed some impairment in Claimant's use of nonverbal behaviors, such as eye-to-eye gaze, to regulate social interaction, and some deficits in emotional reciprocity, but not sufficiently significant. Dr. Cohen-Maitre opined that Claimant had appropriate spoken language. She did not observe repetitive or stereotyped behavior, interests, or activities. She reviewed videotape in which Claimant appeared to play with cars in a manner that Dr. Cohen-Maitre agreed could be evidence of stereotypical behavior, but did not know how pervasive such activity was.

Dr. Cohen-Maitre also opined that Claimant's condition did not present a substantial disability. She only found one problem area, self-direction. While he is able to engage in activity, Claimant follows his own agenda, which may present problems. Otherwise, Claimant's receptive and expressive language, while initially delayed, was adequate. He is able to learn, and has above-average intellect. His ability to care for himself was only in the borderline range, as measured through the ABS-2. Claimant has no mobility limitations.

13. On February 14, 2011, Porter observed Claimant at My Little Gym. Porter noted that Claimant ignored the other students and went to a corner by himself. For most of the time, he did not engage in any functional play. At times, he just sat and stared at the group. If another child joined Claimant in the corner, Claimant moved away. Efforts by his mother, the teacher, and even Porter to have Claimant join the group proved fruitless, and led to tantrum behavior on one occasion. Porter used a timer strategy in an attempt to have Claimant join the group. She gave him some "alone time," until the timer went off. On one occasion, Claimant joined the group, but left after one minute. On two other occasions, Claimant refused to join the group after the alarm marking the end of alone time went off.

14. In her report of March 29, 2011, Porter reported significant progress. Challenging behaviors, such as tantrums, verbal stereotypy, and aggression had decreased. His use of appropriate replacement behaviors had increased. He was eating a greater variety of foods. This progress had been made primarily in the therapeutic setting, and Porter thereafter increased the number of therapy hours spent in the community. When such increase took place, Claimant's misbehaviors also increased. Porter concluded that Claimant was not generalizing what he was learning in the home sessions to behavior in the community.

15. On April 14, 2011, Drs. Mora and Nopar observed Claimant in Dr. Nopar's office. The office contains an array of toys, and both clinicians sought to engage Claimant in play activities. They prepared a joint report, and both testified about their observations.

Neither clinician saw any unusual behavior or communication. Claimant answered both clinicians' questions. Claimant engaged in appropriate imaginative play, such as using a toy rocket and using Dr. Nopar's hand as a tunnel for his car. Claimant did prefer cars and trucks, but was redirected without tantrums. Claimant grabbed a stethoscope and put it to Dr. Nopar's head, saying "I am pretending." He made appropriate eye contact and gestures during their meeting.

16. Dr. Graff was part of the Service Agency team that made a decision regarding Claimant's eligibility, and provided opinions based on his own observations and his review of records. In Dr. Graff's opinion, Claimant does not meet the autism eligibility criteria. Claimant demonstrated good eye contact, interacted appropriately with Drs. Graff and Mora during their meeting, shared his interests, was able to communicate appropriately, engaged in make believe play, and did not engage in any repetitive use of language or other stereotyped behavior. Dr. Graff opined that for stereotyped or repetitive use of language or restricted repetitive and stereotyped patterns to meet the diagnostic requirement of qualitative impairment, such would have to recur at regular intervals, something he would have noticed in the time he spent with Claimant.

17. On or about April 25, 2011, Service Agency notified Claimant's parents that it was denying eligibility. Claimant's parents disagreed with Service Agency's determination, and on April 18, 2011, they filed a fair hearing request.

18. a. Claimant's parents also sought other opinions about their son's condition. Brandt Chamberlain, Ph.D. (Chamberlain) observed Claimant on May 25 and 31, 2011, and administered the Autism Diagnostic Interview – Revised (ADI-R). Dr. Chamberlain obtained scores using the ADI-R diagnostic algorithm that were consistent with a diagnosis of autism. In each of three domains corresponding to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (2000) (DSM-IV)² diagnostic criteria, qualitative abnormalities in reciprocal social interaction (Domain A), qualitative abnormalities in communication (Domain B), and restricted, repetitive and stereotyped patterns of behavior (Domain C), Claimant scored above the autism cutoff.

b. Dr. Chamberlain wrote in his report: "Asher evidences behaviors that are indicative of autism in all three domains represented in the autism diagnosis. In particular his active avoidance of peers and lack of interest in social interaction with them is very pronounced. Although his current language skills are strong, the overall pattern of his communication development has been unusual, especially in the areas of symbolic play and

² The DSM-IV is a highly respected and generally accepted tool used by professionals to assist in the diagnosis of mental and developmental disorders. DSM-IV-TR allows for a total of five axes to be utilized to characterize a person's disorders, disabilities, health status, environmental factors, and functioning. A diagnosis of Autistic Disorder is an Axis I diagnosis.

repetitive/idiosyncratic speech. In addition, his high level of aggressive behaviors toward both peers and family members, as well as self-injurious behaviors, seem to be related to his being easily overwhelmed by sensory and emotional stimuli. In the final domain, Ascher shows significant distress at the alteration of standard routines, such as the route taken to school, and he also has repetitive self-stimulatory behaviors that cause mild to moderate self-injury (e.g., head-banging, breaking his skin by picking at it.) [¶] . . . [¶] According to the criteria of the Diagnostic and Statistical Manual IV-Revised (DSM-IV-R), Ascher's elevated scores in these three domains support an Axis I diagnosis of Autism (299.00)."

19. a. In May 2011, Claimant's family also sought an independent assessment from Diagnostic and Counseling Center, Inc. The agency's two principals, Bahareh Talei, Psy.D. (Talei) and Lara Itule, MFT (Itule), conducted a team assessment and presented testimony about their findings. Dr. Talei obtained her doctorate in 2005 and was in charge of assessments during her three-year tenure at the Center for Autism and Related Disorders (CARD). Dr. Talei has been certified to administer and to train others in the administration of the ADOS. Itule, who obtained her marriage and family therapist license in October 2009, holds a Master's Degree in clinical psychology. She completed 3,000 hours of clinical work at CARD, and was responsible for conducting assessments.

b. On May 17, 2011, Dr. Talei spent between one and one-and-one-half hours with Claimant's mother conducting the initial intake interview. On May 27, 2011, she reviewed the following records: the March 2011 evaluation conducted by the Conejo Valley Unified School District (Aeschelman, Feinberg, and Kreitman); Dr. Cohen-Maitre's evaluation; Dr. Chamberlain's evaluation; and videotape of Claimant taken on January 26 and 29, and February 14 and 16, 2011, three of which were taken at home and one of which was taken at the My Little Gym early intervention program. On May 28, 2011, Itule conducted two observations, one at home and one at a local Target store. On June 23, 2011, Dr. Talei and Itule met with Claimant and his mother for approximately three hours and administered the following tests: ADOS, Module 2; Bayley Scales of Infant and Toddler Development – Third Edition (BSID-III); the Behavior Rating Inventory of Executive Function Preschool Version (BRIEF-P); the Vineland Adaptive Behavior Scales, Second Edition (Vineland); and the WPPSI-III.

c. Itule spent approximately four hours interacting and observing Claimant. She conducted observations at home and at a local Target store. She was also part of the three-hour clinical assessment with Dr. Talei. Itule met Claimant at home on May 28, 2011. Claimant greeted Itule with smiles and made eye contact for about two seconds. He did not consistently make eye contact after that. He modeled a lot of his sister's behavior, such as playing hide-and-seek, as she interacted with Itule. On several instances, Claimant engaged in what Itule described as sensory-seeking behaviors, such as repetitive jumping, running in circles around the house, and tensing his body. On one occasion, Claimant reached down and squeezed his genital area and on another he picked at a scab in his nose. He also engaged in what was described as verbal stereotypy, namely, repeating the word "huggies" several times. His receptive language appeared intact, but Itule had difficulty understanding Claimant.

Itule was in the vehicle with Claimant, his sister, and their parents as they drove to Target. While exiting the car, Claimant again repeated the word “huggies” several times. Claimant was prompted several times to stay close to the car and wait. In the store, Claimant appeared distracted, and required prompts to stay close to the family. He did not always watch where he was going, and was hit by a shopping cart. On several occasions, he verbally counted and pointed at items and grabbed his genital area. He insisted on getting merchandise from the movie “Cars,” but was eventually redirected from repeated requests for the items without engaging in tantrums. On one occasion, Claimant held a “Cars” toy while shrugging up his shoulders to his neck with his arms at the sides and his fists clutched tight, which body positioning Itule described as “body tensing.”

Itule did not see Claimant engage in any spontaneous reciprocal play during any of her observations. During the in-home observation, some time after modeling his sister’s hide-and-seek game, Claimant asked Itule if she wanted to play hide-and-seek. Significantly, in Itule’s opinion, Claimant did not follow-up his request with actual play.

d. Dr. Talei and Itule jointly observed Claimant during the evaluation on June 23, 2011. Claimant greeted Itule and Dr. Talei and was generally compliant during the testing. Toward the end of one of the tests administered, the BSID-III, and during the ADOS, Claimant displayed what the evaluators described as sensory issues that interfered with his ability to concentrate, such as fidgeting and turning around to squeeze the examiner’s legs and hugging her. Short breaks were taken to allow Claimant to satisfy his sensory-seeking behaviors, such as stopping the testing to allow the squeezing to take place.

e. Dr. Talei used two measures of cognitive ability and obtained similar results in both. In the BSID-III, a play-based developmental test, Claimant scored in the superior range, in the 95th percentile. He did well and seemed to enjoy tasks that involved puzzles and identifying matching pictures. In the more standardized “gold standard” WPPSI-III, Claimant’s full scale intelligence quotient (IQ) composite score was 112, in the high average range. Verbal ability was an area of relative strength, as Claimant attained scores of 118, in the high average range, in the verbal IQ and in general language scales, versus a score of 102, in the average range, in non-verbal or performance scale.

f. Dr. Talei and Itule employed two measures of adaptive functioning, the Vineland and the BRIEF-P, both based on parental report. Dr. Talei deemed the results valid as they correlated with her own clinical observations. The Vineland is based on a mean value of 100 and a standard deviation of 15, Claimant scored 85 in the communication domain (moderately low range), 81 in the daily living skills domain (moderately low), 70 in the socialization domain (low), and 91 in the motor skills domain (adequate), for an adaptive composite of 78 (moderately low). In the communication subdomains, expressive and written communication were in the adequate range while receptive communication was in the moderately low range. Claimant struggles to follow instructions with two or more steps and is inconsistent when it comes to listening to instructions.

Maladaptive behaviors, both internalizing and externalizing ones, were all measured at clinically significant levels. Claimant was reported to have a significant number of internalizing behaviors, such as having poor eye contact, preferring to be alone, and avoiding social interaction. In terms of externalizing behaviors, Claimant was reported to be impulsive, to have temper tantrums, and to be aggressive at times. Other reported misbehaviors included occasional tics, difficult time paying attention, grinding of teeth, consistent preference for objects over people, use of bizarre speech, and behaviors that may cause injury to himself, such as hitting himself in the genital area,

In Dr. Talei's opinion, these results were consistent with the presence of autism. Particularly significant, especially in light of Claimant's cognitive ability, were the low scores in the socialization domain and the maladaptive behaviors measures. Daily living and communication domains scores were also relatively low, considering Claimant's potential.

g. The BRIEF-P measures the range of executive functioning, or higher order brain functions, in preschool aged children. The test measures a child's ability to demonstrate inhibitory control (inhibit scale), to move freely from one situation, activity, or aspect to another (shift scale), to modulate or control emotional responses (emotional control scale), to hold information in mind for the purpose of encoding information (working memory scale), and to anticipate future events, set goals, and develop appropriate sequential steps ahead of time to carry them out as well as the ability to bring order to information and to appreciate main ideas or key concepts when learning or communicating (plan/organize scale). Some of these scales are combined to form the inhibitory self-control index (inhibit and emotional control scales), the flexibility index (shift and emotional control scales), the emergent metacognition index (working memory and plan/organize scales), and the global executive composite (all five scales). In this test, the higher the score the greater the deficit. Claimant scored in the "significantly elevated range" (96th percentile or higher) in all scales and indexes, except for the emotional control scale, where he scored in the "mildly elevated range" (88th percentile). In Dr. Talei's opinion, these results indicate that Claimant has significant deficits in executive functioning, consistent with the presence of autism.

h. Dr. Talei decided to administer module 2 of the ADOS because Claimant presented with fluent speech. Module 1 was designed for children who are non-verbal or who speak in single words, and its use in children with greater speech ability overstates or inflates the results. Module 3 was not appropriate as it is designed for those at a higher development level than Claimant's. Itule actually administered the ADOS, Dr. Talei kept notes, and both scored the results.

Claimant met the autism classification cut-off due to his scores in communication and reciprocal social interaction. In terms of communication, Dr. Talei and Itule concluded that Claimant demonstrated delays in social overtures, as evidenced by limited attempts to maintain or direct the examiners' attention. His speech included some spontaneous elaboration of his own responses, but the number of responses was fewer than expected for his expressive language level and was limited in flexibility. With regard to nonverbal communication, Claimant was able to use pointing as a reference to objects to express

interest, but without sufficient flexibility to coordinate gaze and/or vocalization with pointing.

In terms of reciprocal social interaction, Claimant responded to joint attention, but struggled with initiating social interaction. He did not coordinate eye contact with gestures or vocalizations. Claimant's overtures were limited to his own interests and demands, with minimal attempts to involve the examiner. Although Claimant showed responsiveness to some social situations, the quality of social responses was deemed to be limited and socially awkward. Claimant also demonstrated limited ability in reciprocal conversation; although capable of offering information and to follow his own train of thought, he was unable to participate in an interchange with the examiner.

Claimant's functional play was observed to be typical. However, he demonstrated slight stereotypical play skills when playing with vehicular toys by stacking them on top of each other. Claimant engaged in imaginative play, but could not maintain the exchange without the use of examiner prompts.

Dr. Talei and Itule observed what they characterized as stereotyped behaviors. Claimant was observed to become restless, and to scrunch up his shoulders and tense his body. He repeatedly squeezed the examiner, and responded favorably to sensory feedback, such as the squeezing of arms, hands, fingers, and head.

Dr. Talei testified that the results of the ADOS, Module 2, were consistent with her other clinical observations made by her and by Itule, including their observations of videotape.

i. Dr. Talei diagnosed Claimant with autism pursuant to criteria contained in the DSM-IV. Dr. Talei concluded that the observed behaviors, the assessment results, and the information provided by his mother were all consistent with the diagnosis.

Dr. Talei concluded that Claimant met the requisite number of criteria to warrant a diagnosis. Claimant's qualitative impairment in social interaction was manifested by three separate criteria, one more than necessary. Thus, Claimant has sufficient impairment in the use of nonverbal behaviors to regulate social interaction. Claimant did not use eye contact or other nonverbal behavior to regulate social interaction. Videotapes, parental report, and the observations of Dr. Cohen-Maitre showed that Claimant failed to develop peer relationships appropriate to his developmental level. For instance, in the video of My Little Gym, and as reported by Dr. Cohen-Maitre in her observation of the same setting, Claimant played by himself and refused to engage peers in a place he had been attending for more than one year. Claimant lacked social reciprocity, as observed in the ADOS balloon simulation, in which he enjoyed the play, but did not share his enjoyment with the examiner.

Claimant displayed qualitative impairment in communication as manifested by his marked impairment in his ability to initiate or sustain conversation with others. In this regard, while Claimant had adequate speech, he did not have reciprocity in the use of language

required to sustain conversations, primarily because he lacks pragmatic and social components of language, namely, the ability to look at others and obtain cues from facial language; he is too literal. His impairment was also manifested in stereotyped and repetitive use of language, such as his repetitive use of “huggies” unrelated to context. Claimant also lacked varied, spontaneous make-believe play or social imitative play appropriate to developmental level. While Claimant was able play with objects in a functional way, e.g. rolling a car, he was not able to engage in varied or spontaneous make-believe play, tending toward “scripted play,” where he repeated learned routines in functional ways, such as repeating the movement of cars or copying what he saw.

In terms of restricted repetitive and stereotyped patterns of behavior, interests and activities, Claimant has a restrictive interest in cars. Stereotyped and repetitive motor mannerisms deemed to meet the diagnostic criteria were the squeezing behavior observed by Dr. Talei and Itule and reported by his mother; the twirling reported by Dr. Cohen-Maitre; and the jumping and genital grabbing reported by his mother. Dr. Cohen-Maitre also reported “side glancing” during the twirling, which Dr. Talei described as a visual self-stimulatory behavior in which the vision is even with an object as he glances at the speaker.

Dr. Talei further opined that Claimant had delays in social interaction, language as used in social communication, and symbolic or imaginative play, all of which manifested themselves before age three, and were not better accounted by Rett’s Disorder or Childhood Disintegrative Disorder. Social interactions are significantly delayed, as manifested by a failure to develop peer relationships appropriate to his developmental level. Claimant exhibits a lack of social and emotional reciprocity and a delay in the use of multiple nonverbal behaviors, such as eye-contact, body postures, and gesturing to regulate social interaction. Although Claimant possesses an adequate vocabulary, his ability to initiate or sustain age-appropriate conversation with others is impaired.

Dr. Talei opined that Claimant was high functioning and that his sensory-seeking behaviors are at the root of his diagnosis. Because of his sensory issues, Claimant demonstrates rigid and stereotyped behaviors. Once his sensory-seeking behaviors are addressed, other symptoms will likely improve. Dr. Talei made treatment recommendations consistent with her diagnosis, including occupational therapy and sensory-based stimuli to address motor stereotypy and self-injurious behavior, and behavior therapy provided by therapists trained in applied behavior analysis methods.

20. a. Claimant has continued to receive STAR’s services to the present. Service Agency stopped funding the service after Claimant reached age three, but his parents have continued to pay for it, and STAR’s most recent report, dated July 21, 2011, was received in evidence. Porter reported that Claimant has continued to make progress. Progress was noted in behavior management, communication, social skills, and self-help in the therapeutic and community settings. For instance, Claimant was able to use the restroom with minimal assistance during therapy and in the school setting. He is starting to acknowledge peers and to engage in parallel play. However, Claimant continues to have deficits in managing challenging behaviors across settings when he is with his parents. For

example, Claimant hit his head on several occasions during a community outing. He still prefers to play alone and avoids peers. He is not consistently aware of his environment or dangerous situations or items. For example, he had to be stopped several times from riding his bicycle over the edge of the stairs. Because of the continuing needs, Porter recommended additional ABA therapy.

21. Based on her observations and interactions with Claimant up to the time of the hearing, Porter concluded that he has made progress but that deficits remain. Claimant has difficulty with pragmatic language. He does initiate conversations, but his ability to sustain conversations is delayed. He is able to use language to express his needs, but does not use language to regulate social interaction. Claimant lacks social reciprocity. He is unable to identify emotions in himself or in others. After significant therapy, Claimant is able to make eye contact but it is not sustained and comes across as contrived. Claimant continues to be preoccupied with certain objects, although the subject of his preoccupation can change.

22. Claimant's mother provided testimony about her observations. He does not like kisses and only tolerates kisses from her. He makes eye contact only briefly. Claimant fixates on cars. He spends a lot of time lining them up, with particular attention to the direction in which they point. When he was younger, Claimant would chew on toy cars. It is difficult to have him abandon a preferred activity, such as playing with the cars, or to transition to a new activity.

Claimant picks at his hands, repeats words over and over, hits himself, hits doors and walls, picks at his nose, holds his crotch area, runs back and forth in the hallway, and runs into furniture.

Efforts to redirect his activities at times result in tantrums or self-injurious behavior, such as biting himself. His parents have used the techniques given to them by the therapists that have worked and continue to work with Claimant. One of the techniques is to model playing with toys. Claimant repeats some of the modeled behavior.

Claimant does not independently brush his teeth, wash his hair, or bathe. He needs to be reminded to use the toilet and to clean himself afterwards. He does not always use utensils to eat, and his mother uses a "hand over hand" technique to try to teach him to use them. Claimant does not typically sit still for dental care or for hair cutting. His mother has to sit him on top of her and hold him for the dentist and barber to work on Claimant.

23. The DSM-IV-TR diagnostic criteria for autism disorder are 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 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 manners (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.”

24. There is some agreement between the three experts who performed or participated in the performance of comprehensive evaluations that Claimant meets some of the autism diagnostic criteria. Dr. Cohen-Maitre, Itule, and Dr. Talei, agreed that Claimant had a qualitative impairment in social interaction as manifested by his failure to develop peer relationships appropriate to developmental level, criterion A.(1)(b). While all observed impairment in Claimant's use of nonverbal behaviors, such as eye-to-eye gaze, to regulate social interaction, and deficits in emotional reciprocity, Dr. Cohen-Maitre did not deem them significant enough.

Dr. Cohen-Maitre did not believe that Claimant met additional diagnostic criteria, in part, based on her structured observations in connection with administration of the ADOS. However, her reliance on Module 1 of the test detracts from the weight of her opinion. Dr. Talei's opinion that Module 2 was the most appropriate has been credited, largely because of her greater experience in the administration of the test and her role in training others in the administration of the instrument.

The testimony and other evidence presented by Dr. Talei and that of her colleague, Itule, as corroborated by other record evidence, including Claimant's mother's testimony, Porter's testimony, and Dr. Chamberlain's opinions, establish the presence of other diagnostic criteria. Factual reports from Porter have been deemed more reliable than more abbreviated observations regarding the absence of certain behavior because of her greater opportunity to observe Claimant on a regular basis over a longer period of time. Porter's testimony was particularly significant in corroborating the expert opinions regarding the presence of autism, particularly with respect to the use of eye-to-eye gaze and other body gestures to regulate social interaction, with respect to the presence of restricted and stereotyped patterns of behavior, interests and activities, and with respect to the stereotyped and repetitive use of language.

In addition to meeting criterion A.(1)(b), Claimant has a qualitative impairment in social interaction as manifested by two additional criteria. Claimant has marked impairment in the use of nonverbal behaviors to regulate social interaction, as required by criterion number A.(1)(a). Claimant does not use eye contact or other nonverbal behavior to regulate social interaction. As Porter's testimony shows, even after extensive ABA therapy, Claimant is unable to make appropriate eye contact. Claimant lacks social or emotional reciprocity, as required by criterion A.(1)(d). As Porter and his mother note, Claimant is unable to identify emotions in himself or others. He does not like kisses and only tolerates hugs from his mother. As Dr. Talei clinically confirmed, in the ADOS balloon simulation Claimant enjoyed the play but did not share his enjoyment with the examiner. Dr. Cohen-Maitre and Porter observed Claimant preferring solitary activities at My Little Gym.

Claimant has qualitative impairments in communication as manifested by three separate diagnostic criteria. He has a marked impairment in his ability to initiate or sustain conversation with others (criterion A.(2)(b)). In this regard, while Claimant had adequate speech, he did not have reciprocity in the use of language required to sustain conversations, primarily because he lacks pragmatic and social components of language, namely, the ability

to look at others and obtain cues from facial language. He is too literal. While he does initiate conversations, particularly with adults, such conversations are not sustained. His impairment was also manifested in stereotyped and repetitive use of language, such as his repetitive use of “huggies” unrelated to context. (criterion A.(2)(c)) Claimant also lacked varied, spontaneous make-believe play or social imitative play appropriate to developmental level. (criterion A.(2)(d)) While Claimant was able play with objects in a functional way, e.g. rolling a car, he was not able to engage in varied or spontaneous make-believe play, tending toward “scripted play,” where he repeated learned routines in functional ways, such as repeating the movement of cars or copying what he saw.

It was also established that Claimant has restricted repetitive and stereotyped patterns of behavior, interest, and activities, as required by criterion A.3. He has an encompassing preoccupation with cars which is abnormal in intensity (criterion A.(3)(a)). Claimant also has engaged in stereotyped and repetitive motor mannerisms, such as the squeezing behavior observed by Dr. Talei and Itule and reported by his mother; the twirling and side glancing reported by Dr. Cohen-Maitre; and the jumping and genital grabbing reported by his mother (criterion A.(3)(c)).

Dr. Talei’s opinion, as corroborated by the record evidence, is sufficient to establish that Claimant has had delays in social interaction, language as used in social communication, and symbolic or imaginative play, all of which manifested themselves before age three, and that such delays were not better accounted by Rett’s Disorder or Childhood Disintegrative Disorder.

Accordingly, the evidence establishes that Claimant has autism pursuant to the DSM-IV diagnostic criteria.

LEGAL CONCLUSIONS

1. In order to be eligible to receive services from a regional center, a claimant must have a developmental disability, which is defined 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.” (Welf. & Inst. Code, § 4512, subd. (a).)

2. No argument has been presented, nor has evidence been offered to establish that Claimant suffers from cerebral palsy, epilepsy, mental retardation, a condition related to mental retardation, or a condition that requires treatment similar to that required by individuals with mental retardation. As set forth in factual finding numbers 1 through 24, the

evidence establishes that Claimant has autism, a disability that originated before he attained 18 years of age and that can be expected to continue indefinitely.

3. However, Welfare and Institutions Code also requires that the disability “constitutes a substantial disability for that individual.” Substantial disability has been defined in California Code of Regulations (CCR), title 17, section 54001, subdivision (a) as: “(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.”

Claimant’s condition has resulted in major impairment of social functioning, which has required interdisciplinary planning and coordination of special or generic services to assist the Claimant in achieving his maximum potential. However, Claimant has failed to show the existence of significant functional limitations in three or more of the required areas of major life activity, as appropriate to Claimant’s age. He has significant functional limitations in only two areas: self-care and self-direction. In terms of self-care, he requires assistance or prompting to perform many tasks. In the area of self-direction, he routinely requires prompting to initiate interaction and to perform basic daily living tasks.

Despite delays in acquiring receptive and expressive language, Claimant does not presently have significant functional limitations in this area. By all measurements, Claimant is bright and able to learn. It was not shown that his difficulties with language pragmatics or executive function prevent him from learning at this time. Claimant has no problems with mobility. Although it is argued that Claimant’s lack of safety awareness prevents full mobility, such argument strains the plain meaning of “mobility” in CCR, title 17, section 54001, subsection (2)(D). Claimant’s issues with safety awareness have been considered with respect to self-care and self-direction. The last two areas of substantial disability analysis in CCR, title 17, section 54001, subsection (2), capacity for independent living and economic self-sufficiency, do not apply to a child of Claimant’s age.

By reason of the foregoing, it was not established that Claimant’s autism constitutes a substantial disability for him, as required by CCR, title 17, section 54001.

4. Claimant has not established that he has a developmental disability as defined by the Lanterman Act, by reason of factual finding numbers 1 through 24 and legal conclusion numbers 1 through 3.

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ORDER

Claimant's appeal is denied and Claimant is found not eligible for services under the Lanterman Act.

DATED: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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