

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012060572

EDWARD H.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on August 13, 2012, in Santa Ana, California.

Edward H. (Claimant) was represented by his mother, Milica H.¹ Sara R., a family friend attended a portion of the hearing. Claimant did not attend the hearing.

Paula Noden (Noden), Manager, Fair Hearings and Vendor appeals, represented the Regional Center of Orange County (Service Agency or RCOC).

¹ Claimant, his mother and mother's friend are identified by first name and last initial 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 (Lanterman Act) (Welf. & Inst. Code section 4500 et seq.)?²

Jurisdictional Facts

1. Claimant is a five year, nine month old boy who lives with mother and maternal grandparents. Mother believes that Claimant is eligible for Service Agency services on the basis of autism.³ Mother further believes that Claimant is substantially disabled in three or more major life activities. (§ 4512; Cal. Code Regs., tit. 17, § 54001, subd. (b).)⁴

2. By letter dated May 9, 2012, Service Agency gave notice of its proposed action (NPA) denying Claimant's request for eligibility for services under the Lanterman Act, having concluded that although Claimant has a diagnosis of autism, Claimant is not substantially disabled in three or more major life activities. (Exhibit 3.)

3. Claimant's mother submitted a fair hearing request (FHR) on May 29, 2012, appealing the Service Agency's denial of eligibility. The basis for mother's request was an IEE,⁵ which she believes supports Claimant's eligibility for services. (Exhibit 1.)

4. In response to the FHR, Service Agency convened an informal meeting with mother on July 3, 2012. (Exhibit 2.) Noden and Lisa Lawton (Lawton), Claimant's Intake and Assessment Service Coordinator, attended the informal meeting. During the meeting, mother disclosed that Claimant had been psychologically evaluated by B.J. Freeman, Ph.D. Mother declined to release the results of the evaluation to Service Agency. Instead mother said she would produce the evaluation five days before the hearing on this matter.

5. By letter dated July 5, 2012, Service Agency proposed a Transdisciplinary Assessment (TDA) be conducted by Service Agency physician and psychologist to assist in the determination of eligibility for Service Agency services. Service Agency proposed that Claimant

² All further references to the Welfare and Institutions Code are cited by section number.

³ Claimant does not assert that he is eligible on the basis of mental retardation, cerebral palsy or a seizure disorder or the "fifth category."

⁴ All further references to the California Code of Regulations, title 17, are cited as CCR.

⁵ The term IEE is commonly used in special education settings when requesting an Independent Educational Evaluation (IEE) at public expense pursuant to Education Code §56329(b) and 34 C.F.R. Section 300.502. Presumably this is the type of document mother referred to in the fair hearing request.

withdraw his FHR to allow time to complete the TDA. Mother declined to allow Claimant to participate in the TDA and declined to withdraw the FHR. This hearing ensued.

Records Considered by Service Agency in Determining Claimant's Eligible for Services

6. The Service Agency Eligibility Review Team (ERT) comprised of Lawton; Rachel Khorana (Khorana), Intake Area Supervisor; Shirley Brinson, R.N.; Peter Himer, M.D.; and Kyle Pontius, PhD., reviewed claimants request for eligibility. (Exhibit 4.) Lawton and Drs. Himer and Pontius testified at the hearing. Mary Parpal, Ph.D., Service Agency Clinical Supervisor and staff psychologist, also testified at the hearing as to her review of an April 4, 2012 psychological evaluation prepared by B.J. Freeman, Ph.D.

7. In determining Claimant's eligibility for services, Service Agency considered information obtained from Claimant's mother as well as records provided by Claimant's mother and service providers. These records included reports prepared by Robin Steinberg-Epstein, M.D., at 4OCKIDS Neurodevelopmental Center (4OCKIDS) in September 2011 (September 2011 Steinberg-Epstein Report, Exhibit 6), and December 2011 (December 2011 Steinberg-Epstein Report, Exhibit 7.) Service Agency also considered a November 2, 2011 Newport Language and Speech Centers evaluation (2011 Newport Speech and Language Evaluation, Exhibit 9.) Neither Dr. Steinberg-Epstein nor Ms. Davidson testified at the hearing. An occupational therapy evaluation completed by Irene Winkler is also referenced in the NPA but was not offered as evidence. (Exhibit 3.)

8. Claimant was evaluated by the Fullerton School District (District) for eligibility for special education services in 2010 and 2011. District records were also considered by Service Agency. These include a November 9, 2010 assessment report prepared by Vicki White (White), assessment team teacher (District 2010 Assessment Report, Exhibit 12); a November 9 and 30, 2010 Placement Summary Statement and Psychological Evaluation prepared by Vicki Duffy (Duffy), school psychologist (District 2010 Psychological Evaluation, Exhibit 13); a November 30, 2010 speech and language evaluation prepared by Cynthia Acaba-McCoy, M.S., CCC-SLP⁶ (McCoy) (District 2010 Speech and Language Evaluation, Exhibit 11); an October 18, 2011 Special Services Report prepared by Duffy (District 2011 Special Services Report, Exhibit 10); and a January 31, 2012 Preschool Assessment prepared by White (District 2012 Preschool Assessment.)⁷ None of the District evaluators testified at the hearing.

9. Finally, because Service Agency received Dr. Freeman's Psychological Evaluation (Claimant's Exhibit 1) five days prior to the hearing on this matter, Dr. Freeman's report was not part of its eligibility determination. Nonetheless, Service Agency had an opportunity to review and consider this report prior to the hearing. Dr. Freeman did not testify at the hearing on this matter.

⁶ Certificate of Clinical Competency, Speech and Language Pathologist.

⁷ In addition to the aforementioned exhibits, Service Agency exhibits include Drs. Pontius, Himer and Parpal's Curriculum Vitae, a copy of Section 4512 and CCR section 54001 and Service Agency Consumer Transaction Notes dated February 2, 2012 through August 6, 2012. Service Agency's Exhibits 1 through 18 and Claimant's Exhibit 1 were admitted into evidence.

Service Agency Reasons for Determining Claimant Was Not Eligible for Services

10. Members of the ERT filled out a “Lanterman Eligibility Review” form as part of the eligibility determination. (Exhibit 4.) Dr. Himber recommended that Claimant not be made eligible for services: “Despite a diagnosis of autism, there are not 3 or more areas of substantial disability required for Lanterman services.” (Exhibit 4 at p. 3.) Dr. Pontius recommended Claimant not be made eligible for services. Dr. Pontius stated: “Despite a diagnosis of autism, [Claimant] demonstrates low to average skills in most areas of major life activity. He demonstrates poor interpersonal boundaries and other symptoms of qualitative impairments in social interaction characteristic of autism. Nevertheless, he is not substantially disabled by his condition. [Claimant] is not eligible for RCOC Lanterman services.” (Exhibit 4 at p. 3) Ms. Brinson noted that Claimant was not eligible on the basis of cerebral palsy or seizures. Lawton and Khorana each indicated they believed Claimant was not eligible. Khorana summarized the ERT findings as follows: “Based on review of all available information by RCOC’s nurse, psychologist, and physician; despite having a diagnosis of autism, [Claimant] does not meet RCOC eligibility criteria for Lanterman services at this time; no mr, cp, epilepsy, or other substantially handicapping condition similar to mr with 3 areas of substantial disability (WIC 4512).” (Exhibit 4 at p. 2.)

Claimant’s Background

11. Claimant did not have any medical problems at birth. He sat and crawled at seven months, stood and walked alone at 10 months, fed himself with a spoon at 12 months, expressed his first words at 10 months, started using two word combinations at 16 to 18 months, complete sentences at 36 months, and was toilet trained at 38 months. His physician became concerned about Claimant’s development at three years of age, due to speech and language delays.

12. Mother described Claimant as substantially disabled in self-care, self-direction and language. She described Claimant as requiring constant direction. According to mother, Claimant’s needs always come first. Mother describes Claimant as having no fear of strangers, talking to them as if he has known them all of his life. Mother described Claimant’s arousal level as high. He engages in self-stimulatory behavior, runs and darts around, and runs laps. Claimant has trouble sustaining attention.

13. Mother described some loss of language when Claimant was 18 to 24 months old. When Claimant speaks, he is usually understandable, but he uses the wrong syntax or the wrong word. Strangers have a harder time understanding Claimant’s speech. Rather than express himself with words, Claimant becomes angry and has tantrums.

14. Claimant requires constant care and supervision. His first reaction when told not to do something is to hit the person. According to mother he can become aggressive with adults and children. Claimant wants to control everything when he is with other children. Mother said most children avoid Claimant.

Claimant’s Educational History

15. Claimant attended Topaz Head Start (Head Start) preschool program from August through December 2010. Mother withdrew Claimant from Head Start because he was very stressful for the teachers. He was not listening to teachers and was having conflicts with other children. Claimant was injured at Head Start. It is not clear whether the injury occurred as a result of playing on the playground or because a staff member injured him. Head Start referred Claimant to the District for a special education assessment when he was three years, nine months old. (Exhibit 6.) According to one report, Head Start was concerned about Claimant's delayed speech. It thought that Claimant may have autism. He was not following directions, isolating himself, hand flapping, and walking away in mid-play.

16. Claimant attended a preschool on the campus of Fullerton College between August and December 2011. Claimant had the same behavior problems that he had at Head Start. According to mother, Claimant also attended "many other" preschools with similar problems. Claimant's grandmother is currently caring for Claimant while mother attends college.

17. Claimant was assessed by the District in 2010 for eligibility for special education services. He was found eligible as a student with speech and language impairment. In 2011, Mother asked the District to re-evaluate him. District found Claimant eligible for special education based on autistic-like behavior as well as speech and language impairment.

18. Claimant has received six months of one hour per week speech and language services through the District. He also received six months of one hour per week of speech and language services funded by Claimant's CalOptima insurance at the Newport Language and Speech Centers.

District's 2010 Assessment of Claimant's Eligibility for Special Education Services

District's 2010 Speech and Language Evaluation

19. Claimant was evaluated for special education speech and language eligibility by Cynthia Acaba-McCoy. (Exhibit 11.) According to McCoy's November 30, 2010 report, mother's primary concern was Claimant's activity level and listening skills. McCoy reviewed Claimant's developmental background and vision and hearing screenings. On the Developmental Profile (PD-3), Communication Subtest, Claimant obtained a standard score of 88, placing him in the 21st percentile and the low average range. This subtest measures, expressive and receptive communication skills with both verbal and nonverbal language. On the Preschool Language Scale (PLS-4), Claimant obtained a standard score of 93 on the Auditory Comprehension section (32nd percentile) in the average range, and a standard score of 83 on the Expressive Communication section (13th percentile) in the low average range. His total test standard score was 87 (19th percentile) in the low average range.

20. The Comprehensive Assessment of Spoken Language (CASL) is a test of comprehensive oral language skills. Such skills are needed for a student to become literate and succeed in school. Claimant's voice and fluency were observed to be within normal limits. On the test of pragmatic judgment, Claimant obtained a standard score of 72 (3rd percentile) in the low range.

21. McCoy observed Claimant in his preschool classroom and provided a detailed description of that observation. He was able to answer some questions about classroom activities and fellow students. Claimant required frequent breaks and redirection to tasks. He is easily distracted. Claimant's receptive skills were in the average range and his expressive language skills were in the low average range. Claimant's pragmatic language skills was measured and observed to be in the below average range. His articulation was his strength and he was completely understandable. McCoy observed Claimant to put forth fair effort, motivation, and attention. He required frequent breaks and redirection to tasks. He slowly attained rapport with the examiner. His response time varied from delayed, to fast, to impulsive. He was easily distracted during the evaluation and in the classroom.

22. Education Code section 56333 provided the basis for determining whether a child is eligible for special education services as a student with a speech and language impairment.⁸ McCoy determined that Claimant met the criteria for eligibility for special education based on speech and language impairment.

District's 2010 Assessment Report

23. On November 9, 2010, Vicki White, District assessment team teacher, conducted an assessment to determine Claimant's functional levels. (Exhibit 12.) White administered the Brigance-Yellow Comprehensive Inventory of Basic Skills II (Brigance IED II) and provided a detailed description of Claimant's functioning. The results of White's evaluation are reported in the 2010 Psychological Evaluation. In addition to testing Claimant, White observed Claimant at his Head Start preschool. White describes Claimant's self-help skills. He attempts to wipe his nose with a Kleenex. He is independent washing his hands with soap and water and drying them, although he does not like to have his face and hands washed. Claimant is completely potty trained.

⁸ For purposes of determining whether a pupil has a language or speech disorder as defined in Education Code section 56333, the following criteria apply:

(4) Language Disorder. The pupil has an expressive or receptive language disorder when he or she meets one of the following criteria:

(A) The pupil scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics . . . or [t]he pupil scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in one of the areas listed in subsection (A) and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances. . . . (Ed. Code, § 56333, subd. (c).)

He attempts to remove articles of clothing. Mother bathes claimant. During her observation of Claimant, he required redirection and verbal prompts during a variety of activities. He was able to sit quietly and cooperatively when White interviewed mother regarding Claimant's developmental history.

District's 2010 Psychological Evaluation

24. Claimant was evaluated by Vicki Duffy, school psychologist, on November 9 and 30, 2010. (Exhibit 13.) Claimant was three years, 11 months old (47 months) at the time of the evaluation. Duffy administered the following tests: Mullen Scales of Early Learning (Mullen), Developmental Assessment of Young Children (DAYC), Adaptive Behavior Assessment System II, parent and teacher reports (ABAS-II), Developmental Profile-3, Preschool and Kindergarten Behavior Scales (PKBS), Early Childhood Inventory-4, parent and teacher checklist (ECI-4), Autism Spectrum Rating Scales 2-5 Years, parent and teacher rating scales (ASRS), and the Developmental Profile-3 (DP-3). Duffy also considered the results of the Brigance IED II administered by White.

25. Duffy evaluated Claimant's cognitive and basic school skills. Cognitive skills include attention, memory, purposeful planning, decision making, and discrimination. Basic school skills include pre-academic skills that form the basis for reading, writing, and mathematics. On the Mullen, Claimant scored in the 50 month range; on the DAYC, Claimant obtained a standard score of 73, at the 33 month level; on the ABAS-II as rated by parent Claimant scored in the 39-41 month level and as rated by teacher Claimant scored at the 36 to 38 month level; and on the DP-3, Claimant obtained a standard score of 84, at the 34 month level in the low average range. Overall, Claimant scored in the 33 to 50 month range. This placed him in the low to average range in reasoning skills, visual organization and discrimination and basic school skills.

26. Self-help skills involve adaptive skills needed for day to day activities necessary to take care of oneself, to get along with others, and to cope with the demands of the environment. Duffy evaluated Claimant using the DAYC, where Claimant obtained a standard score of 80, placing him in the low average range; the ABAS-II, as rated by parent report, where Claimant scored in the 24 to 36 month level and as rated by teacher, Claimant scored at the 36 to 38 month level; the Brigance IED II where Claimant obtained a standard score of 87 placing him at the 43 month level, in the low average range; and the DP-3 where Claimant obtained a standard score of 103 placing him at the 43 month level, in the high average range. Overall Claimant is reported to be functioning in the low to high average range on adaptive and self-help skills. Daily living skills were in the low to average range.

27. In terms of daily living skills, Claimant was able to drink from a cup or glass with spillage and use a fork and spoon without assistance. He can independently use the toilet with occasional accidents. He bathes himself with assistance. He can button his own clothing and dress independently except for needing help with difficult fasteners.

28. Claimant's motor skills were measured using the Mullen, DAYC, ABAS-II, DP-3, and Brigance IED II. Motor skills involve fine and gross motor ability, posture, coordination, and

general body perception. Duffy concluded that Claimant was functioning at the 26-45 months level in fine and gross motor skills placing him in the low to average range.

29. Claimant's socialization skills were measured using the DAYC, DP-3, ABAS-II, and the PKBS. Socialization includes interpersonal abilities, emotional needs, and how the child relates to friends, relatives, and various adults. On the DAYC, Claimant obtained a standard score of 68, placing him at 22 months in the extremely low level. On the DP-3, Claimant obtained a standard score of 86, placing him at 33 months in the low average range. On the ABAS-II, by parent report, Claimant obtained a scaled score of 7, placing him at 30-32 months in the low average range. On the ABAS-II, by teacher report, Claimant obtained a scaled score of 5, placing him at below 24 months in the low average range.

30. Overall, Claimant scored in the 22 to 32 month range on standardized measures of socialization. Duffy placed Claimant in the low to average range in socialization. On the PKBS, a measure of social skills and problem solving, teacher rated Claimant in the moderate to high risk range on all but one skill. Mother rated Claimant in the moderate risk range most frequently, with some areas rated no concern or high risk. Mother and teacher both rated Claimant in the high risk range on social independence and attention problems/overactive. Mother and teacher identified no concern with respect to Claimant exhibiting antisocial/aggressive behaviors.

31. On the Early Childhood Inventory 4, mother rated Claimant in the high range in inattention, combined attention deficit disorder, separation anxiety, autism and Asperger's syndrome and in the moderate range in the areas of oppositional/defiant disorder and hyperactivity/impulsivity. Teacher rated Claimant in the high range in the areas of inattention, oppositional/defiant disorder, autism and Asperger's syndrome and in the moderate range on hyperactivity/impulsivity and combined attention deficit disorder.

32. The ASRS is used to quantify observations of a child that are associated with autism spectrum disorders. Results in the ASRS are not intended to be used alone and must be confirmed by a professional before a decision is made that a problem exists. Both teacher and mother scored Claimant in the "very elevated" range, indicating that Claimant "has symptoms directly related to the [Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)]⁹ diagnostic criteria, and is exhibiting many of the associated features characteristic of the Autism Spectrum Disorders." (Exhibit 13 at p. 14.)

Claimant's 2010 Individual Education Program

⁹ Official notice is taken that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV), published by the American Psychiatric Association, a generally accepted tool for diagnosing mental and developmental disorders.

33. When a child is evaluated for special education services and found eligible, an Individualized Education Program¹⁰ (IEP) is collaboratively developed by the IEP team members, identifying among other things the legal basis for eligibility for special education services, school placement and related services, and individualized goals and objectives. Documents admitted into evidence in this matter do not include a 2010 IEP. Other information in the record, including mother's testimony, indicates that an IEP was held on December 14, 2010. At that time, Claimant was found eligible for special education services on the basis of a speech and language impairment and District offered one hour of speech and language services per week.

Claimant's 2011 Request for Special Education Services on the Basis of Autistic-Like Behavior

Background

34. In October 2011, at mother's request, Claimant was reevaluated by District to determine whether he qualifies for special education services due to autistic-like behavior.¹¹ In response to mother's request, on October 18, 2011 Duffy prepared a Special Services report. At mother's request White also completed a Preschool Assessment on January 13 and 19, 2012. (Exhibit 8.)

District's 2011 Special Services Report

35. On October 18, 2011, Duffy prepared a Special Services report. (Exhibit 10.) Duffy and District autism specialist Karen Chanin, M.S. (Chanin) and autism supervisor Peter Ellis (Ellis) contributed to the report. Chanin also administered the Autism Diagnostic Observation Scale-

¹⁰ "'Individualized education program' means a written document described in [Education Code] Sections 56345 and 56345.1 for an individual with exceptional needs that is developed, reviewed, and revised in a meeting in accordance with Sections 300.320 to 300.328, inclusive, of Title 34 of the Code of Federal Regulations and this part. . . ." (Ed. Code, § 56032.)

¹¹ "(a) [A] 'pupil with autism' is a pupil who exhibits autistic-like behaviors, including, but not limited to, any of the following behaviors, or any combination thereof:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or of relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects, inappropriate use of objects, or both.
- (5) Extreme resistance to controls.
- (6) A display of peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.

(b) The definition of 'pupil with autism' in subdivision (a) shall not apply for purposes of the determination of eligibility for services pursuant to the Lanterman [Act.]" (Ed. Code, § 56846.2.)

Module 2 (ADOS-2). District also considered District's 2010 IEP documents and Dr. Steinberg-Epstein's September 30, 2011 report.

36. Duffy observed Claimant at his Fullerton College preschool on September 23, 2011. Ellis observed Claimant on October 4, 2011 and October 13, 2011 at his preschool. Ellis also observed Claimant October 5, 2011 while Chanin administered the ADOS-2. Duffy's report contained a detailed description of Claimant's behaviors on each occasion.

37. The ADOS 2 is a semi-structured standardized observation instrument used to assess a child's communication and socialization behavior for possible autism spectrum disorders. It provides scores in three areas: Communication, Social Interaction and a combined Communication-Social Interaction total. A detailed description of Chanin's observations of Claimant was included in Duffy's report. An ADOS 2 autism or autism spectrum classification requires meeting or exceeding each of the three autism thresholds for the Communication, Social Interaction and combined Communication-Social Interaction total. Claimant's scores on the ADOS-2 did not meet the autism or autism spectrum cut off on any of the three domains. Based on Claimant's scores, Claimant does not meet the ADOS 2 classification criteria for autism or autism spectrum disorder.

38. During the administration of the ADOS-2, Claimant was compliant when given high-interest, non-demanding tasks. When given low-interest, demanding tasks, Claimant needed to be motivated. He had difficulty remaining still when sitting at the table or on the floor especially during non-preferred activities. During transitioning activities, Claimant took a toy, ran to the other side of the room looking at the toy and the examiner. He frequently tried to get the examiner's attention. He did not use idiosyncratic or stereotypical language. He was very verbal but had difficulty maintaining reciprocal conversation. He used spontaneous descriptive gestures, such as blowing out a candle. Claimant maintained appropriate eye contact. Claimant showed pleasure in interacting with the examiner but his attempts to socially interact were limited to things of interest to him.

39. During the administration of the ADOS-2, Claimant spontaneously played with a variety of toys in a conventional way. He engaged in pretend and creative play with a doll and a truck. Claimant did not exhibit any stereotyped behaviors, sensory interests, unusual repetitive movements, or self-injurious behaviors during the administration of the test. Claimant threw several temper tantrums, typically when a preferred toy or activity was taken away. During a tantrum, Claimant was observed to look at the examiner to see if she was looking at him. Claimant was easily redirected to a new preferred task.

40. Based on data included in Claimant's 2010 IEP, and data gathered in 2011, Duffy concluded Claimant met the following two autistic-like criteria: an obsession to maintain sameness and extreme resistance to controls. Claimant did not meet the following five criteria: an inability to use oral language for appropriate communications; a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; an extreme preoccupation with objects or inappropriate use of objects or both; displaying peculiar motor mannerisms and motility patterns; and engaging in self-stimulating ritualistic behavior. Duffy opined that Claimant meets the special education eligibility criteria for "autistic-like behaviors." However, Duffy did not make the determination whether Claimant is eligible for special education on this basis. That determination was deferred to the IEP team.

2011 IEP

41. Documents admitted into evidence in this matter do not include a 2011 IEP. Information about what was contained in the 2011 IEP is derived from mother's testimony, Dr. Steinberg-Epstein's December 9, 2011 notes (Exhibit 7) and Lawton's Social Assessment. (Exhibit 5.)

42. At the October 18, 2011 IEP, District found Claimant eligible for special education on the basis of autistic-like behaviors as well as a speech and language impairment. District recommended Claimant participate in a special day class (SDC). Mother visited the class and did not think it was appropriate for Claimant. Mother was concerned that the other students in the class were too low functioning and non-verbal. She was also concerned that the class would not address Claimant's behavioral needs. According to Lawton, mother rescinded her consent to SDC placement.

43. Another IEP team meeting was held on December 15, 2011 to discuss mother's concerns and placement. Mother requested that academic assessments be updated. White completed the updated assessments on January 13 and 19, 2012 and reported the results in the 2012 Preschool Assessment report. (Exhibit 8.)

2012 Preschool Assessment Report

44. On January 13 and 19, 2012, White administered the Test of Early Mathematics Abilities, 3rd edition (TEMA 3);-, the Test of Early Reading Abilities, 3rd edition (TERA 3); and the Woodcock-Johnson III.

45. The TEMA 3 is norm-referenced to children three years to eight years, 11 months old. Claimant obtained a Math Ability standard score of 85, (16th percentile) in the low average range. The TERA 3 is a norm-referenced test to measure the reading ability of children 3 years, 0 months old to 7 years, 11 months old. On the TERA 3, Claimant received a standard score of 83 (13th percentile), in the low average range.

46. The Woodcock-Johnson III is a norm-based assessment tool for ages 2 years to 90 plus years. It measures across cognitive and achievement areas. Claimant received an age equivalent of 5 years, 6 months on the Letter-Word Identification portion of the test; an age equivalent of 4 years, 6 months on the Spelling portion of the test; and an age equivalent of 4 years, 6 months on the Applied Problem Solving subtest. The Spelling and Applied Problem Solving subtests were terminated due to Claimant's frustration level. No score was given on Reading Fluency and Calculations sections because Claimant was not able to give responses needed to establish a basal.¹²

¹² Official notice is taken that according to the Glossary of Testing, Measurement, and Statistical Terms, basal means "[f]or individually administered tests, the point on test, associated with a given level of functioning or skill, for which an examiner is confident, that all items prior to that item would be answered correctly (considered too easy). The items below this point, although

47. White concluded that Claimant scored in the low average range in all academic areas. She noted these results should be viewed with caution because Claimant's attention was poor. She also observed his response time was poor and his effort and motivation ranged from fair to poor. Claimant needed frequent repetition and prompts.

2012 IEP

48. Lawton's Social Assessment indicated that a further IEP was scheduled for January 31, 2012 to discuss the academic assessment, but that mother did not attend the meeting. Mother verbally asked the District to provide a comprehensive psycho-educational assessment of Claimant. Service Agency Consumer Notes indicate that a further IEP was held on February 28, 2012. It appears this IEP meeting was scheduled to discuss mother's request for additional assessment, however mother did not attend this meeting and District told Lawton that mother was unsure whether she wanted an additional assessment. The Consumer Notes indicate Lawton requested a copy of the February 28, 2012 IEP, but there is no indication whether it was received. A copy of the February 28, 2012 IEP was not offered into evidence. Mother testified that she since has reconsidered her earlier educational decision and plans to request an IEP to discuss enrolling Claimant in school for the fall semester.

Dr. Steinberg-Epstein, M.D., September 2011 Evaluation

49. On September 30, 2011, Dr. Steinberg-Epstein completed a comprehensive medical and developmental consultation of Claimant at 4OCKIDS Neurodevelopmental Center. (Exhibit 6.) Claimant was 4 years, 9 months old. Mother and maternal grandmother accompanied Claimant to the evaluation. Mother was concerned whether Claimant has autism or attention deficit hyperactivity disorder.

50. Dr. Steinberg-Epstein described her observations of Claimant. (Exhibit 6 at p. 2.) He flapped his hands frequently. In play, Claimant tells others what to do and how to play. He engages in some pretend play. He looks at parts of things, turns things over and looks at them and how they work. He was unable to answer simple questions. For instance, when asked his age, he gave his name. Claimant is very concrete. He has difficulty with jokes. He displayed poor eye contact. He usually changes activity rather than persist in problem solving. Generally he was described as having somewhat chaotic play, a short attention span, as being very active.

51. Dr. Steinberg-Epstein diagnosed Claimant with Autistic Disorder and noted "a significant component of hyperactivity and dysregulation . . ." ¹³ Dr. Steinberg-Epstein

not administered to the individual student, are afforded full credit."
(<http://www.riversidepublishing.com>.)

¹³ Official notice is taken that emotional dysregulation is defined as, "A maladaptive pattern of regulating emotions that may involve a failure of regulation or interference in adaptive functioning." (www.waisman.wisc.edu.)

recommended Claimant be involved in a “multimodal treatment program, like a SDC class . . .” At the time, Claimant was attending preschool at Fullerton College. Dr. Steinberg-Epstein recommended that Claimant not continue in his Fullerton College preschool placement even with additional support. (Exhibit 6 at p. 2.)

November 2011 Newport Language and Speech Evaluation

52. Claimant was evaluated on November 2, 2011 by Mary Jane Davison at the Newport Language and Speech Centers. (Exhibit 9.) That evaluation was funded by Claimant’s CalOptima insurance at the recommendation of Dr. Steinberg-Epstein. Ms. Davidson attempted to assess Claimant using the CASL and PLS-4. Efforts to administer both tests were abandoned because Claimant was not compliant and required constant reinforcement to sit and respond to testing materials. Ms. Davidson used the District 2010 speech and language assessment as the basis for her evaluation. Based on the District evaluation, Ms. Davidson concluded that Claimant had mild impairment in his receptive language, moderate to severe expressive and pragmatic language impairment and mild impairment in language comprehension. Claimant was 100% intelligible to a trained but unfamiliar adult. She noted that Claimant is not able to get his needs met effectively because his behavior interferes with his pragmatic language skills. Functionally, Claimant is not able to follow two-step directions. He requires multiple prompts to comply with adult requests. He was unable to complete standardized testing because of his limited attention span. Claimant’s tantrums interfere with his ability to utilize adult modeling and cues to comply with requests in the home, classroom, and community setting.

Dr. Freeman’s 2012 Psychological Evaluation

General Information

53. Dr. Freeman Psychological Evaluation was received into evidence. The report indicates Claimant was seen on February 23 and April 4, 2012.¹⁴ (Claimant’s Exhibit 1.)

54. Dr. Freeman administered the Wechsler Preschool and Primary Scales of Intelligence-3rd Edition (WPPSI-III) (partial); the Vineland-II Adaptive Behavior Scale, parent form (Vineland-II), the Gilliam Autism Rating Scale-Second Revision, parent form (GARS-2), the Autism Diagnostic Observation Schedule-Modules 2 and 3 (ADOS 2-3); Social Responsive Scale (SRS); and the Behavior Rating Inventory of Executive Functioning-Preschool, parent form (BRIEF-P).

55. Dr. Freeman interviewed Claimant and his mother. Mother’s report of Claimant’s medical and developmental history, language and social development, and diagnostic and intervention history as reported by Dr. Freeman is generally consistent with information provided to other evaluators and Service Agency.

¹⁴ Although the evaluation appears to have been completed on April 4, 2012, it does not appear that mother informed Service Agency of its existence until July 5, 2012. (Exhibit 2.) Mother declined to give Service Agency a copy of the report until five days prior to the hearing on this matter.

56. Dr. Freeman comments that her “[r]eview of prior assessments indicate . . . that testing tools used to evaluate [Claimant] were not appropriate.” (Claimant’s Exhibit 1 at p. 3) Dr. Freeman does not specify what assessments she is referring to, but in context it appears she is referring to District reports. Because Dr. Freeman’s does not specify what assessments she is referring to, her opinion regarding other assessments is given little weight.

57. Dr. Freeman administered the WPPSI-3 which measures cognitive functioning in the Verbal, Performance and Processing Speed domains. A General Language Composite may also be obtained to estimate ability in expressive and receptive language. Claimant’s Performance IQ was 125 (95th percentile.) A Verbal IQ and General Language Composite score was not obtained. On the five subtests administered, Claimant scored in the low average to superior range.

58. The Vineland II measures current adaptive functioning in four domains: Communication, Daily Living Skills, Socialization, and Motor Skills. Claimant received a standard score of 69 in Communication (2nd percentile); a standard score of 71 in Daily Living Skills (3rd percentile); a standard score of 66 in Socialization (1st^t percentile); and a standard score of 75 in motor skills (5th percentile). His Adaptive Behavior Composite standard score was 67 (2nd percentile). Dr. Freeman noted that individuals with Autism Disorder do not typically have a consistent scoring profile.

59. The GARS-2 is a screening instrument designed to identify autism in children and young adults. Mother completed the rating scale. Items are grouped into Stereotyped Behaviors, Communication, and Social Interaction. Based on mother’s rating, Claimant received an Autism Index of 111, indicating a very likely diagnosis of autism.

60. The ADOS 2-3 is a measure of social communication and social behavior. Dr. Freeman did not report Claimant’s scores on the ADOS 2-3, or whether he scored above or below the cut-off for autism or autism spectrum disorder, but concluded “taken in the context of a complete psychological evaluation results . . . from this measure are conclusive for a diagnoses of Autism Disorder.” (Claimant’s Exhibit 1 at p. 9.)

61. The SRS was completed by mother. The SRS is a quantitative measure of impairment across a range of severity. Claimant received a total score of 89, with a Behavior Rating of severe. The results indicate “deficits in reciprocal social behavior resulting in moderate to severe interference in Claimant’s everyday social interactions.” (Claimant’s Exhibit 1 at p. 10.)

62. Dr. Freeman also considered the results of the BRIEF-P. The rating form was completed by mother. The BRIEF-P measures executive functioning, that is, mental processes that direct thought, action and emotion, particularly during active problem solving. The BRIEF-P measures five fundamental aspects of executive functioning (Inhibit, Shift, Emotional Control, Working Memory and Plan/Organize) across three domains. On the BRIEF-P, the higher the T-Score, the more impaired the child’s executive functioning is. On the Inhibitory Self-Control Index, Claimant obtained a T-Score of 91 placing him in or above the 99th percentile. On the Flexibility Index, Claimant obtained a T-Score of 83 placing him in or above the 99th percentile. On the Emergent Metacognition Index, Claimant obtained a T-Score of 95 placing him in or above the 99th

percentile. On the Global Executive Composite, Claimant obtained a T-Score of 95, placing in or above the 99th percentile.

63. Dr. Freeman concluded that Claimant's developmental history, behavioral observations, cognitive evaluation, adaptive level of functioning, and parent report indicates a diagnosis of Autistic Disorder. Dr. Freeman does not indicate whether she took the observation of Claimant made by the District and preschool teachers and the District's testing results into consideration. She did not reconcile the conclusions she reached with the observations, test results, and conclusions reached by the District. Unlike the District, Dr. Freeman did not observe Claimant in a preschool setting or other environment. Moreover, mother was the only individual to rate Claimant on the various rating instruments considered by Dr. Freeman's in arriving at her conclusions. For these reasons, Dr. Freeman's opinion regarding Claimant's eligibility for Lanterman Act services is given little weight.

Dr. Freeman's Opinion Regarding Claimant's Eligibility for Service Agency Services.

64. Dr. Freeman opined that Claimant is substantially disabled as that term is used in CCR, title 17, section 54001. Specifically, she concluded that Claimant is substantially disabled in receptive and expressive language, learning, self-care, and self-direction. (Claimant's Exhibit 1 at pp.16-17.)

Receptive and Expressive Language

65. Dr. Freeman opined Claimant is substantially disabled in his receptive and expressive language. She notes Claimant has developed language but "he exhibits delays and deficits in communication skills that continue to impede his access to the environment." (Claimant's Exhibit 1 at p. 13.) She acknowledged that he is typically able to get his needs met. However, his refusal to respond and frustration in making his needs known leads to negative behavior. He has problems carrying on a conversation and using nonverbal means of communication.

Learning

66. Dr. Freeman opined that Claimant is substantially disabled in the major life activity of learning. Dr. Freeman concluded that Claimant's cognitive abilities are underestimated due to behavioral issues. She acknowledges Claimant has the potential for learning and developing skills. His inattentive, overactive behavior and frustration, and fear of making a mistake lead to negative or aggressive behavior.

Self-Care

67. Dr. Freeman opined Claimant is substantially disabled in the area of self-care. In support of her opinion, Dr. Freeman notes Claimant is toilet trained for day and night but needs assistance with cleaning after a bowel movement. She also cites his inability to dress, bathe or brush his teeth.

Self-Direction

68. Finally, Dr. Freeman opined that Claimant exhibits significant limitations in the area of self-direction. Claimant exhibits behaviors consistent with impairment in this area, including inattentiveness, frustration, tantruming, and difficulty managing emotions. He requires prompts and reminders to complete tasks. He does not engage in imaginative play and has a limited range of preferred activities for a child his age.

69. Dr. Freeman opined that Claimant is eligible for Service Agency services.

Service Agency Contentions

General Contentions

70. Service Agency's NPA acknowledges that Claimant has been diagnosed with autism. While Agency did not exclude this issue from consideration in the hearing on this matter, Service Agency did not present substantial evidence that the diagnosis is incorrect.

71. Service Agency's principle contention is that Claimant is not substantially disabled in three major life activities. Service Agency also contends that to the extent Claimant may be substantially disabled in one or more areas of major life activities, the evidence does not show that Claimant's disability is likely to continue indefinitely.

Testimony of Peter Himber, M.D.

72. Dr. Himber, a member of the ERT, did not examine Claimant. Dr. Himber's review of the records led him to the conclusion that claimant was not substantially disabled. Dr. Himber does not dispute Claimant has significant behavioral challenges and is substantially disabled in self-direction. In Dr. Himber's opinion, the problems Claimant has in other areas of major life activity are the result of problems in self-direction. For example, Dr. Himber opined that Claimant's problems in learning are not because he cannot or does not learn, but are the results of his impairment in the area of self-direction including inattention and hyperactivity. Dr. Himber also found nothing indicating that Claimant's disabilities can be expected to last a lifetime. He indicated Claimant's behaviors may improve with behavior intervention, maturation, and medication. Dr. Himber pointed to the 2011 Newport Language and Speech report indicating the prognosis for improvement in speech and language skills is good. Dr. Himber testified nothing in Dr. Freeman's report changed his opinion. Nonetheless, he felt Dr. Freeman's evaluation prompted Service Agency to propose a Transdisciplinary Assessment of Claimant. Dr. Humber was concerned with Dr. Freeman's results because they contradicted results obtained by the District. Dr. Himber thought the discrepancy could be explained by Claimant's behaviors, including inattention and motivation.

Testimony of Kyle Pontius, PhD

73. Dr. Pontius was also a member of the ERT. He testified it was his opinion Claimant does not have a substantial disability as defined in CCR section 54001. Dr. Pontius opined a disability must be significant, very low, "something more than just not normal," to qualify as a substantial disability.

74. Regarding Claimant's expressive and expressive language, Dr. Pontius considered Newport's estimation that Claimant's receptive language was in the low average range and

expressive language in the moderate to severely impaired range. Dr. Pontius found Newport's report combined both expressive language and pragmatic language skills. Because pragmatic language is a reflection of self-direction, he felt problems with self-direction were affecting Claimant's expressive language functioning as reported by Newport. Dr. Pontius also noted Dr. Freeman found Claimant's receptive vocabulary in the average range and Newport's finding that Claimant was able to use seven word sentences.

75. With respect to learning, Dr. Pontius considered Claimant's performance on the WPPSI-III, noting Claimant scored at the 7 years, 2 months level on problem solving, placing him in the superior range for this skill. Problem solving is a good measure of an individual's non-verbal intelligence. Dr. Pontius also considered Claimant's performance on Woodcock-Johnson III, the TERA 3 and the TEMA 3. Achievements tests are an indication of what an individual does with his intelligence, not his potential. Dr. Pontius found that Claimant is learning in the areas of writing, language arts, and mathematics, although he is not performing up to his intellectual potential. Claimant's problems with learning are not sufficient to render him substantially disabled in learning.

76. Dr. Pontius also reviewed Claimant's self-care skills and found they are less than what would be expected for his age, but not in the substantially disabled range. Dr. Pontius noted that Claimant received low scores on the Vineland II when rated by mother. The Vineland II is a measure of whether a person actually performs a skill, not whether they are able to perform the skills. Dr. Pontius found the deficits identified by Dr. Freeman (assistance with toileting, bathing and dressing) were not uncommon given Claimant's age. Dr. Pontius also found no evidence Claimant has any problems in the area of mobility.

77. Dr. Pontius opined Claimant was substantially disabled in self-direction. Dr. Pontius described self-direction as the ability to monitor and control one's own behavior and emotions at an age appropriate level. Self-direction involves the ability to organize oneself, to pull together skills from other areas like learning and language, and perform those skills.

78. Dr. Pontius disagreed with Dr. Freeman that Claimant is substantially disabled in receptive and expressive language, self-care, and learning. In his opinion, Dr. Freeman correctly found substantial impairment in self-direction, but incorrectly concluded that because impairments in self-direction affect claimant's language, learning and self-care, Claimant is also substantially disabled those areas of major life activity.

79. Dr. Pontius agreed with Dr. Freeman and Dr. Steinberg-Epstein that claimant has autism. He does not agree that Claimant is substantially disabled as a result of his autism. He noted on the District administered ADOS 2, Claimant's score was below what is required for an ADOS 2 classification of autism or autism spectrum disorder. Dr. Pontius did not think further evaluation by the TDA team would change Service Agency's decision that Claimant is not eligible under the Lanterman Act. He did think it would have been beneficial because a TDA allows for further discussion of a case, and may help a parent to understand a decision, even if that decision does not change. Dr. Pontius did not think Claimant required interdisciplinary planning and coordination of special service, a prerequisite to finding an individual eligible for Lanterman Act services. (CCR § 54001, subd. (a).) The services Claimant requires, such as behavior modification, are available through Claimant's school programs.

Testimony of Mary Parpal, PhD.

80. Dr. Parpal is a staff psychologist and Clinical Administrator at Service Agency. Her duties include reviewing eligibility cases. Dr. Parpal did not participate in the original ERT decision. Her input to the case was requested by Dr. Himber after Service Agency received Dr. Freeman's opinion. Because Dr. Freeman opined that other assessments used to evaluate Claimant were inappropriate, Dr. Parpal reviewed the tests and rating scales used by the District. Dr. Parpal found nothing inappropriate with the assessments used by the District. She found the District conducted multiple assessments and observations across different environments.

81. With respect to the tests administered by Dr. Freeman, Dr. Parpal testified she was surprised to see the WPPSI-III used. According to Dr. Parpal, the WPPSI-III is never used for a child with suspected significant language impairments. Nonetheless, Dr. Parpal noted when administered the WPPSI-III Claimant obtained a Performance IQ of 125, placing him in the superior range. Her review of the records indicated Claimant has good receptive and expressive language. To the extent that Claimant has problems with language, it is a function of his unwillingness to perform an act he is capable of performing. Dr. Parpal also identified differences in how mother reports Claimant's skills versus how they are observed in the classroom. She noted a parent may perceive a child's behaviors differently from a teacher, and a child may behave differently in different settings due to things like resistance, choice, and dependence.

82. With respect to Claimant's self-care skills, Dr. Parpal noted fluctuations in performance on different tests, but within the average to low average range. Like Dr. Pontius, Dr. Parpal explained the fluctuation in adaptive functions was more likely due to Claimant not being motivated rather than because he is not able to perform the skill.

83. Dr. Parpal completely disagrees with Dr. Freeman's conclusions that Claimant is substantially disabled in receptive and expressive language, self-care, and learning. Dr. Parpal agrees Claimant is substantially disabled in self-direction. Dr. Parpal did not think Claimant requires Service Agency interdisciplinary planning and coordination of service, although he does require a structured classroom. She also concluded Claimant would benefit from school services to address his behavioral problems, but according to Dr. Parpal, this is not the same as needing Lanterman Act services for developmental disabilities that will continue indefinitely.

84. Claimant has autism as that term is defined in the Lanterman Act and the DSM-IV. He has significant impairment in socialization and self-direction. He is overactive, distractible, resistant to direction and change, and rather self-centered and attention seeking. This impacts his daily life. His receptive language is mildly impaired and his expressive language is moderately to severely impaired. His difficulty with pragmatic language, which is an aspect of self-direction, has the effect of bringing his expressive language down. His self-care skills are somewhat below his age level, but still within the low to average range. Claimant's learning is impeded by problems with self-direction, but he is functioning in the low to low average range on academics and school readiness and tested in the superior range on problem solving. Claimant is not impaired in his mobility. Claimant has significant functional impairment in the major life activity of self-direction. Claimant does not have significant functional impairment in the major life activities of learning, receptive and expressive language, self-care, and mobility.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant properly requested a hearing and therefore jurisdiction for this appeal has been established.

2. The burden of proof is on the Claimant to establish eligibility for government benefits or services. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. “[T]he Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals’ determination as to whether an individual is developmentally disabled.” (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant’s expert witnesses’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts that claimant was not eligible. (*Id.* at p. 1137.)

4. Based on Factual Findings 1 through 5 and Legal Conclusions 1 through 3, Claimant has the burden of proving by a preponderance of the evidence that he is eligible for services under the Lanterman Act. Here, Claimant has not met that burden.

5. As defined in the Lanterman Act and its regulations, a developmental disability is a disability that originates before age eighteen, continues or is expected to continue indefinitely and constitutes a “substantial disability” for the individual.

6. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is known as the “fifth category” – a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a); CCR § 54000, subs. (a) and (b).)

7. “Substantial disability” means: “(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and (2) [t]he 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.” (CCR § 54001, subd. (a).)

8. To be eligible for services, it must first be established that an individual has one of five enumerated developmental disabilities (§ 4512, subd. (a); CCR § 54000, subs. (a) and (b).) The only developmental disability Claimant has asserted is autism. Although Service Agency

offered some evidence that the Agency is not entirely sure that Claimant has autism, Service Agency acknowledged Claimant's condition in its NPA denying eligibility, stating: "despite a diagnosis of autism, [Claimant] demonstrates average to low average skills in most areas of major life activities." (Exhibit 3 at p. 1.). During the hearing, Dr. Himber and Noden acknowledged that Claimant was medically diagnosed as autistic by Dr. Steinberg-Epstein. The weight of the evidence supports a finding that Claimant has the developmental disability of autism.

9. The second inquiry is whether Claimant is substantially disabled as that term is defined in CCR section 54001, subd. (a). To be substantially disabled, an individual must have "[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." In Claimant's case, the predominant feature of his autism is impairment in social functioning. While there is evidence Claimant would benefit from services such as behavior modification or applied behavior analysis, there is not sufficient evidence to show that Claimant's impairment "requires interdisciplinary planning and coordination of special or generic services to assist [Claimant] in achieving maximum potential."

10. To prove that he is substantially disabled, Claimant must also demonstrate "[t]he 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." (CCR, § 54001, subd. (a).) Given Claimant's age, capacity for independent living and economic self-sufficiency are not considered when determining impairment in major life activities.

11. In light of Factual Findings 1 through 84 and Legal Conclusions 1 through 10, Service Agency correctly determined that Claimant does not have significant functional limitation in three major life activities. Service Agency does not dispute that Claimant is impaired in self-direction and the evidence supports this conclusion. Claimant does not assert that he is disabled in the area of mobility and this is also supported by the evidence. Claimant has not produced sufficient evidence to show that he has significant functional limitation in learning, self-care, or receptive and expressive language.

12. Claimant obtained a Performance IQ of 125, placing him in the superior range despite problems he has in self-direction. The evidence demonstrates there are areas where Claimant is functioning academically below his abilities, but this is not because he lacks the capacity to learn. Claimant's behaviors interfere with his learning. But this is a problem of self-direction, not learning. And, even with the adverse effects of his deficits in self-direction, Claimant's learning is in the low average to superior range. Claimant has not met his burden of proving he has significant functional limitations in the major life activity of learning.

13. Similarly, with respect to receptive and expressive language, Claimant is functioning in the average to low average range. Claimant's behaviors interfere with his receptive and expressive language. But this is a problem of self-direction, not evidence of significant functional limitations in receptive and expressive language.

14. Finally, Claimant asserts that he has significant functional impairments in self-care. Overall, the evidence established that Claimant's self-care skills are in the low to low average range. The discrepancies between what mother reports Claimant is able to do and what teachers and District staff report he is able to do is most likely attributable to problems of self-direction, including motivation and effort, and not evidence that he has a significant functional impairment in self-care. His problem is one of self-direction rather than a significant functional limitation in the major life activity of self care.

15. Without satisfying each of the elements of subdivision (a)(1) and (a)(2) of CCR section 54001, Claimant has not established that he has a substantial disability. Consequently, Claimant has not established that he is eligible for services under the Lanterman Act.

ORDER

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

Dated: August 27, 2012



DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a 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.