

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

In the Matter of:

OAH No. L 2008060115

A. M.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings (OAH), in Torrance, California, on September 24 and October 10, 2008.

Steven Roberts, Manager of Resource Development, and Gigi Thompson, Manager of Rights Assurance, represented Harbor Regional Center (Service Agency).

A M.¹ (Claimant), who was not present, was represented by Carmen Carley, Advocate, and Claimant's father and mother.

Claimant seeks a determination that: (a) he is eligible for services under the Lanterman Developmental Disabilities Services Act (the Act) based on a diagnosis of autism; and (b) the Service Agency must fund a one-to-one (1:1) applied behavioral analysis (ABA) intervention program.² Claimant's parents also seek reimbursement for privately-funded ABA services provided since February 2008, and for a privately-funded neuropsychological assessment conducted by Mary Large, Ph.D. (Dr. Large), in early

¹ Claimant's parents requested that he be referred to by his initials or as "Claimant" to protect his privacy. His parents are referenced by their family titles.

² ABA direct behavior intervention services have been shown to improve cognitive and adaptive functioning in some children with autism. ABA interventions must be intensive and must be implemented for a substantial number of hours per week over a long duration to produce the desired outcome. Outcomes are better when interventions begin at the earliest possible age.

2008. The Service Agency denied eligibility, contending that Claimant's condition was not autism, but that if it were autism, it was not a substantial disability for him and, therefore, he was not eligible for any services under the Act. Claimant appeals these determinations.

The parties presented oral and documentary evidence.³ The record was left open until October 24, 2008, for receiving Claimant's additional documents and each party's written closing briefs. Both parties submitted their briefs, which were marked for identification as CL-X and SA-EE. Claimant submitted additional financial records, which were marked as CL-W, and admitted in evidence. On October 24, 2008, the record was closed and the matter was submitted for decision.

ISSUES

1. Does Claimant have a developmental disability, i.e., autism, which makes him eligible for services provided by the Service Agency under the Act, which is found at Welfare and Institutions Code⁴ section 4500 et seq.?
2. Should the Service Agency be required to fund a 1:1 ABA program that provides services of up to 20 hours per week?
3. Should the Service Agency be required to reimburse Claimant's parents for privately-funded ABA services provided at the rate of 10 hours per week for the period from February 1, 2008, to the effective date of the decision in this matter?
4. Should the Service Agency be required to reimburse Claimant's parents for the privately-funded neuropsychological assessment by Dr. Large?

FACTUAL FINDINGS

1. Claimant is a three-and-one-half-year-old boy who lives with his parents and two older siblings. He was born on May 19, 2005. At age 15 months, because Claimant still was not walking, his pediatrician referred him to the Service Agency for an evaluation for delays in gross motor development. The Service Agency found Claimant eligible for services under the "Early Start" program in September 2006 (Cal. Code of Regs., tit. 17 (CCR), § 52022, subd. (c)(1)), and he began receiving at least weekly physical therapy services funded by the Service Agency. He was walking within one

³ Both parties used letters to designate their exhibits. During the hearing, the exhibits were identified, and will be referred to herein, with "SA" for the Service Agency's exhibits, and "CL" for Claimant's (e.g., CL-Y; SA-D).

⁴ All further references are to the Welfare and Institutions Code, unless specified otherwise.

month, and within six months, his services were reduced to a biannual evaluation by an occupational therapist to monitor his developmental progress.

2 In a developmental evaluation conducted on March 23, 2007, by Marcie Rhee, DPT, PCS (Rhee), no areas of established delay were identified, but it was noted Claimant was difficult to engage in non-preferred tasks and he showed no interest in completing puzzle boards or towering blocks. His mother had reported his significant interest in anything related to cars and trucks and a propensity to like to spin wheels. No concerns regarding socialization were noted.

3a. Rhee conducted a follow-up evaluation on June 22, 2007, during which Claimant “made eye contact with the therapist at the start of the testing session and frequently throughout.” He socially referenced his mom when faced with something unfamiliar. He enjoyed praise of others. He laughed if his sisters were doing “something funny.” He turned his head when his name was called and smiled in response to another person who was smiling. He looked at something either his mom or dad was looking at. Rhee reported that Claimant did not make unusual finger movements near his face, rock his body back and forth, or engage in any other self-stimulatory behaviors.

3b. Rhee administered the Bayley Scales of Infant and Toddler Development – Third Edition. Claimant’s composite summary scores were as follows:

Scale	Raw Score	Scaled Score	Composite Score	95% Confidence Score	Percentile Rank	Developmental Age Equivalent
Cognitive	60	8	90	83-99	25	22 months

Claimant’s scores indicated performance that was at the lower limit of the normal range compared to other children his age. Rhee commented that Claimant continued to be difficult to engaging non-preferred tasks. He did not attempt several of the activities that were presented to him and, therefore, was not given credit for any of the refused items. This limited his score on this test.

3c. During this follow-up evaluation, his mother reported that Claimant did not take an interest in other children, except to interact with a toy the other child had. He did not “really play with his sisters.” He was sometimes overly sensitive to noise. He did not like to have any strings hanging off of his clothing, to have his hands messy, or to play in wet or dry sand. He was interested in anything that had spinning wheels. “He has recently started to lie on his side on the floor as he pushes a toy car back and forth in front of his face” with his gaze directed toward the wheels of the toy. He liked to flip lights switches on/off repeatedly. His vocabulary related to his preferred topic, cars and trucks, was excessive for his age.

3d. Rhee administered the Modified Checklist for Autism in Toddlers. The results -- three critical and four total failed responses -- indicated Claimant should have a

follow-up evaluation by a psychologist. The main areas of concern were a decreased willingness to engage in non-preferred tasks, repetitive play behaviors, and an excessive interest in and vocabulary related to cars and trucks. Rhee also recommended infant stimulation services.

4. In July 2007, the Service Agency began funding infant stimulation services at the rate of two visits per week. The Service Agency agreed to fund an occupational therapy (OT) evaluation and an evaluation by a psychologist. The psychological evaluation was scheduled for August 31, 2007. On August 10, 2007, Claimant was evaluated by Paula Waldrop, M.S., OTR/L, who noted that Claimant's "sensory processing and modulation issues are having an impact on his functional abilities, behavior and play skills." Waldrop recommended OT two times per week for improvement of fine motor skills, as well as sensory integration therapy. She also recommended he be evaluated by a pediatric neurologist.

5. On August 14, 2007, Hyun Park, M.D., a pediatrician in the Stramski Child Developmental Center of Miller Children's Hospital, assessed Claimant during a 90-minute clinic visit. This visit was funded by Claimant's parents. Dr. Park observed that Claimant was a happy child who verbalized a lot and spoke in full sentences. Claimant had inconsistent eye contact and at times did not respond to his name. He lay on the floor with the side of his face to the ground watching as he pushed his toy cars. He was obsessed watching through the window to see the oil-pumping machine. He frequently did not respond to his mother's questions or comments, and would not respond to Dr. Park's multiple attempts to engage him in social interaction. Dr. Park concluded that, based on the "history of motor delay, atypical social and communication development . . . [and] stereotypic and restricted interest in wheels, oil pumping machine, and lights . . . [Claimant] has autism spectrum disorder."⁵ Dr. Park recommended that, in addition to the infant stimulation, sensory integration program, and fine motor therapy recommended by his other evaluators, Claimant should receive an ABA-type behavior modification program to teach him to "transition from activities as well as appropriate behavior intervention at home." (CL-C.)

6. On August 17, 2007, Claimant was evaluated by Nancy Niparko, M.D., a pediatric neurologist, who diagnosed Claimant with "AUTISM by DSM-4 criteria, including social differences, LANGUAGE DELAY, OBSESSIONS, COMPULSIONS, and SENSORY DISTURBANCES, however, with amazingly normal affect." (Emphasis in the original.) Claimant's parents funded this evaluation. Dr. Niparko recommended

⁵ Autism spectrum disorder (ASD) refers to a pattern of behaviors involving three central features -- impairments in socialization, verbal and nonverbal communication and restricted and stereotyped actions -- that can vary widely in terms of symptom expression, degree of impairment, and developmental onset. ASD is not a formal diagnostic category like Autistic Disorder under the Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision 2000) (hereinafter, DSM-IV-TR).

20 hours per week for six months of an ABA program, speech and language therapy, OT, and attendance in a preschool through Pediatric Therapy Network (PTN). (CL-D.)

7. On August 16, 2007, Claimant's mother requested Service Agency funding for ABA therapy. She later submitted Drs. Park's and Niparko's reports to Veronica Collier (Collier), the Service Agency service coordinator working with Claimant's family. The Service Agency reviewed these reports, but it did not accept them as a basis for funding ABA services because the two doctors had not administered the standard evaluation procedures to support their autism diagnoses.

8. The Service Agency referred Claimant to Alejandra Muñoz, Ph.D., a clinical psychologist, who evaluated Claimant in September 2007. Dr. Muñoz attempted to administer a test of Claimant's cognitive function, but Claimant showed no interest in the test items. Dr. Muñoz administered the Vineland Adaptive Behavior Scales, Second Edition (VABS-II), with Claimant's mother providing the responses. Claimant's scores indicated adaptive functioning within the average range of development of communication skills, within the low-average range of development of daily living and motor skills, and within the mildly deficient range of development of socialization skills, as follows:

<u>Domain</u>	<u>Standard Score</u>
Communication	91
Daily Living Skills	83
Socialization	68
Motor Skills	85

Based on observation, Dr. Muñoz found no evidence of any autistic-like characteristics. She administered Module I of the Autism Diagnostic Observation Schedule (ADOS). In both communication and reciprocal social interaction, Claimant received a score one point lower than the cut-off score for "Autism Spectrum." In Dr. Muñoz's opinion, Claimant did not meet the criteria for any diagnosis on the autistic spectrum. She offered the following diagnostic impressions:

Axis I:	312.9	Rule Out Disruptive Behavior Disorder, Not Otherwise Specified (NOS)
Axis II:	v71.09	No diagnosis
Axis III:		History of recurrent ear infections requiring ear-tube placement, and history of reflux.
Axis IV:		No problems at home were reported. Within the last year, [Claimant] has been receiving physical therapy (during the Fall of 2006), and more recently occupational therapy; and he has undergone several evaluations (including the present one).
Axis V:		Global Assessment of Functioning (GAF): 79

Dr. Muñoz recommended that Claimant be placed in a “center-based program for him to be routinely exposed to children his age, as well as to normal developmental activities.” Also, “parents are likely to benefit from training in behavior modification techniques for them to be able to help in diminishing [Claimant’s] temper tantrums, opposition, and other maladaptive behaviors. It is recommended that they be encouraged to participate in a behavior modification training group.” (SA-U.)

9. In Claimant’s September 17, 2007 Individualized Family Service Plan (IFSP),⁶ Collier included only Rhee’s reports to describe Claimant’s level of development, but in the light of Dr. Muñoz’s recommendation, the Service Agency agreed to provide a center based program, “a required service,” at a rate of 45 hours per month, through PTN’s program called Leaps and Bounds. This program included OT, PT, and speech therapy to address all of Claimant’s needs. (CL-K.)

10. Claimant began attending PTN’s Leaps and Bounds program in October 2007. To address Claimant’s behavior concerns, the Service Agency offered to fund behavioral intervention services through Family Behavioral Services, Inc. (FBS). Although FBS ostensibly provides of range of ABA services, the general intent of the FBS sessions is to teach parents how to employ behavior management techniques with their child. On November 12, 2007, Claimant’s mother again requested funding for an ABA therapy program, and informed the Service Agency that, if it denied the request, Claimant’s parents would pay for ABA therapy and seek reimbursement. On November 19, 2007, Claimant’s mother requested funding for an assessment by an ABA provider. On November 28, 2007, Collier notified Claimant’s parents that the offer of FBS services satisfied the service recommendations of Drs. Muñoz, Park and Niparko.

11. In December 2007, Elizabeth McCurdy, M.S. (McCurdy), a case supervisor for Autism Behavior Consultants (ABC), conducted an intake assessment, reviewing past and recent evaluations, interviewing mother and father, and conducting two separate observations of Claimant at home. Based on this assessment, McCurdy created an “instructional plan,” including goals, strategies, and timelines, to improve Claimant’s functioning, and recommended a total of 10 hours per week of home-based, 1:1 “intensive behavioral intervention and intensive parent training.” On January 11, 2008, Claimant’s parents notified the Service Agency that they would commence the ABA therapy program proposed by ABC within two weeks and obtain an “independent

⁶ An IFSP is a detailed written plan for providing early intervention services to consumers, which contains a statement of the consumer’s present levels of development, a statement of the consumer’s or family’s needs pursuant to assessment, a statement of expected developmental outcomes based on assessments, and a statement of the specific early intervention services necessary to meet the unique needs of the consumer and his family to achieve the outcomes. An IFSP is developed through a collaborative process of parents, a service coordinator, and persons who provide services to the consumer, and is required under state and federal law to be reviewed every six months or more frequently if a service change is necessary or if the parent requests a review. (CCR, § 52102 et seq.)

evaluation” from Dr. Large on January 17, 2008. They said they would seek reimbursement for both the ABA services and Dr. Large’s assessment. (SA-M.)

12. Dr. Large conducted a “neuropsychological assessment” over the course of three days in January 2008. She administered the Woodcock Johnson Tests of Achievement, Third Edition, which indicated Claimant’s capacities for pre-academic achievement were largely developing within expected limits. Dr. Large also found that, from a neurocognitive perspective, “foundational capacities are developing within normal limits.” Dr. Large administered the Weschsler Preschool and Primary Scales of Intelligence, Third Edition, during which Claimant obtained the following scores:

Verbal	116	(86th percentile)
Performance	105	(63d percentile)
Full	112	(79th percentile)
General Language	118	(88th percentile)

Basic receptive and language skills were at or above the level typical for a child his age; however, based on Claimant’s problems with pragmatic or spontaneous speech, failure to develop peer relationships, limited social reciprocity, lack of play skills, hyperactivity, lack of attention, withdrawal, and a relatively restricted range of interests, Dr. Large concluded that he met “all of the requisite criteria for an Autistic Disorder.” (CL-B.)

13. In late January or early February 2008, the Service Agency notified Claimant’s parents that it considered that the PTN preschool program and the offer of FBS parent training in behavior management were appropriate to meet Claimant’s needs, and that it would not reimburse Claimant’s parents for additional services that were paid for by the parents, such as the services provided by ABC or Dr. Large. In February 2008, Claimant began receiving privately-funded, in-home ABA therapy services provided by ABC. Claimant’s parents filed a due process and mediation request under the Early Start program on February 29, 2008, stating their disagreement with Dr. Muñoz’s diagnosis and with the Service Agency’s decision not to fund Claimant’s ABA program. They requested reimbursement for both the ABA services and for Dr. Large’s assessment.

14. Since Claimant was coming up on his third birthday, the Service Agency recommended another evaluation be conducted by one of its psychologists to assist them to determine whether Claimant was eligible for services under the Act. Claimant’s parents did not agree with this recommendation and the evaluation was never performed. On March 14, 2008, the parties held an IFSP meeting. They also met with a psychologist employed by the Long Beach Unified School District (LBUSD) to discuss the process for transitioning from Early Start to special education services. Claimant’s parents continued to express concerns regarding Claimant’s behaviors: not tolerating textures; having difficulties with routine or when things did not happen as he wanted them to; and his inability to initiate interactions with peers and form friendships. The IFSP again lifted directly from Rhee’s June 2007 report to describe Claimant’s current developmental skills, with no citation to Dr. Munoz’s report or findings. At the transition meeting, the

LBUSD provided Claimant's parents with the dates for LBUSD's assessments and an Individualized Education Program (IEP) meeting, which would be used to determine Claimant's eligibility for special education. Claimant's parents were encouraged to complete the transition process before Claimant's third birthday.

15. In May 2008, the Service Agency's clinical team reviewed Claimant's records and "determined that he does not have a substantially disabling developmental disability according to California rules and regulations." (SA-CC.) The Service Agency sent a letter to Claimant's parents on May 29, 2008, informing them of its determination. The letter further stated that Claimant was not eligible for services under the Act and his services (the PTN preschool) would terminate effective June 30, 2008. Claimant's parents filed a fair hearing request on June 3, 2008, seeking a determination that Claimant was eligible for services under the Act.

16a. Elaine Ito, Ph.D. (Ito), is employed as a licensed psychologist by the Service Agency. Among other things, she assists in making eligibility determinations. She has performed testing of approximately 1000 children to determine whether autism is present. Dr. Ito testified that a variety of assessment procedures should be used to make a diagnosis of autism. She reviewed the reports of Drs. Muñoz, Large, and others, before the Service Agency deemed Claimant ineligible for services. Dr. Ito believes that Claimant has neither a qualifying condition (i.e., autism) nor a disability that is substantially disabling for him.⁷

⁷ California Code of Regulations, title 17, section 54001, in relevant part states:

(a) "Substantial Disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

16b. Dr. Ito cited Claimant’s standard scores on the VABS-II (administered during Dr. Muñoz’s assessment) as a stable and reliable indicator of his adaptive functioning. These scores indicated Claimant had many skills within the average range relative to his same-age peers. In all domains except for socialization, Claimant’s standard scores exceeded 70 (a score of 70 is two standard deviations below the norm). A substantial disability under the Act means a clinically significant impairment in daily functioning in three or more areas of major life activity. Dr. Ito opined that standard scores that are two standard deviations below the norm on the VABS-II demonstrate the existence of a significant impairment in adaptive function in the same manner that a full scale standard score of 70 or below on formal cognitive measures demonstrates a significant deficit in cognitive ability relative to peers, a so-called threshold criterion for the diagnosis of mental retardation. Dr. Ito also relied on Dr. Large’s findings that Claimant was in the average range on the majority of measures of pre-academic and academic skills, and that he was reported to be in the above average range on some other skill measures. Based on these different measures, Dr. Ito has concluded that Claimant does not have significant functional limitations in receptive and expressive language, learning, or self-care. Dr. Ito believes Claimant has failed to establish his is a “substantial disability.”

16c. With regard to whether Claimant has autism, Dr. Ito cited Dr. Muñoz’s report, including her scoring of the ADOS tool, a play-based assessment in which the evaluator observes a child interacting with toys. This tool has been standardized among multiple children and is able to differentiate children exhibiting autistic-like behaviors and those who are not. Based on her scoring on the ADOS and other observations, Dr. Muñoz concluded that Claimant did not have autistic-like characteristics. Dr. Ito considered Dr. Muñoz’s diagnostic impressions to be accurate in ruling out the presence of autism.

17a. In May 2008, the LBUSD concluded that Claimant was not eligible for special education services, but it agreed to fund another “independent” psychological assessment for diagnostic clarification. During two dates in early July 2008, B.J. Freeman, Ph.D., a licensed clinical psychologist, made observations and administered tests, including the VABS-II, on which Dr. Freeman reported the following:

Domain	Standard Score (v-Scale Score)	Percentile Rank	Age Equivalent
Communication	89	23d	
Receptive	(12)		1 year 10 months
Expressive	(16)		3 years 5 months
Written	(12)		2 years 5 months
Daily Living Skills	92	27th	
Personal	(13)		2 years 9 months
Domestic	(14)		2 years 8 months
Community	(14)		2 years 10 months

Socialization	85	16th	
Interpersonal Relationships	(13)		2 years 2 months
Play and Leisure Time	(9)		1 year 10 months
Coping Skills	(15)		2 years 11 months
Motor Skills	91	27th	
Gross Motor	(15)		3 years 0 months
Fine Motor	(12)		2 years 4 months
Adaptive Behavior Composite	86	18th	

In her report, Dr. Freeman stated that many people with Autistic Disorder do not present with a consistent scoring profile. Social Skills was the biggest problem area for Claimant, evidenced by inconsistency, difficulties with transitions, and extremely limited play skills which tend to be repetitive in nature. Claimant’s parents also completed the Social Skills Rating System questionnaire, which measures Claimant’s performance in the areas of social skills and problem behaviors at home. Based on their report, Claimant obtained a social skills score of 62 (<2d percentile) and a problem behaviors score of 120 (91st percentile).

17b. Claimant was administered the ADOS, Module 2, based on his age and verbal ability (“at least phrased speech”). In Dr. Freeman’s report, she criticized Dr. Muñoz’s use of Module 1: “In reviewing [Dr. Muñoz’s] evaluation report, it would not be possible to accurately determine the presence or absence of an autism diagnosis because she did not administer the correct module of the [ADOS],” because at the time of the evaluation, Claimant had phrased speech. (CL-T.) Dr. Freeman’s report also stated that Dr. Muñoz had not “completed testing” or concluded “a definitive diagnosis.” In Dr. Freeman’s observations, she did not find echolalia or stereotypic or idiosyncratic use of words. She found Claimant’s conversation was extremely limited and there was no reciprocal conversation. He used some spontaneous descriptive gestures, but only to make his wants known. He did not coordinate pointing gestures with his speaking.

17c. In the area of reciprocal social interaction, Claimant did not use eye contact to initiate or regulate social interactions with the examiner. He displayed a limited range of facial expressions directed toward the examiner. There was no expressed pleasure in interactions, no consistent response to joint attention, and no spontaneous initiation of joint attention. The overall quality of his social overtures was restricted simply to his own demands. The quality of his social responses was inconsistent or generally negative, and there was little to no social communication. In terms of play behavior, he did not play with any of the toys that would require using imagination. Play was stereotypic at times, and his limited creative play was engaged in repetitively. Unusual sensory interests were noted with spinning and stereotypic behaviors. Dr. Freeman stated: “Taken in the context of a complete psychological evaluation, results from this measure are conclusive for a diagnosis of Autistic Disorder.”

18. Per records produced by Claimant at the hearing, between February 1, and August 31, 2008, ABC charged Claimant's parents in the amount of \$17,437.50 for providing 1:1 ABA services. This amount included, on average 35 hours per month of direct services (when the therapist works directly with Claimant), as well as additional hours of supervision, planning and evaluation services. The average cost per month over these seven months was \$2,500. Claimant's fair hearing request was amended, without objection by the Service Agency, to include a request for reimbursement of the costs incurred both before and after Claimant's third birthday. The average cost of the ABA services provided after Claimant's third birthday in May 2008 is \$8,334.

LEGAL CONCLUSIONS

1. The Act provides for the needs of developmentally disabled individuals over the age of three. Under the Act, regional centers perform evaluations of persons to determine eligibility for services, and are responsible for developing and implementing an individual program plan (IPP) to determine which services and supports are necessary for each eligible individual.

2. Claimant has established by a preponderance of the evidence that he has Autistic Disorder, an eligible condition under section 4512, subdivision (a). Nearly every person qualified to evaluate Claimant for the presence of autism has made conclusions that support this diagnosis. The Service Agency relied primarily on Dr. Muñoz's evaluation to find that Claimant does not have autism. Dr. Freeman's critique of Dr. Muñoz's evaluation -- that it was incomplete, that Dr. Muñoz used the wrong module to administer the ADOS, and that her diagnostic impression was inconclusive -- is persuasive. Since Dr. Muñoz's evaluation is given little weight, the weight of the opinions of the other evaluators must prevail.

3. Claimant has established that his autism has resulted in significant functional limitations in the areas of pragmatic language, reciprocal social interaction, play skills, attending, and behavioral and sensory issues. Claimant's impairments significantly impact his abilities in communication, socialization, self-direction, and learning. The Act does not require proof that his current level of adaptive functioning is equivalent to persons with mild mental retardation. In sum, Claimant's condition is a significant disability for him. (Cal. Code Regs., tit 17, § 54001.)

4. Section 4512, subdivision (a), states:

(a) "Developmental disability" means 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.

5. Section 4512, subdivision (*I*), in relevant part states:

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

6. The DSM-IV-TR sets forth diagnostic criteria for autistic disorder as follows:

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

(1) qualitative impairment in social interactions, 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 mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
- (d) persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

(DSM-IV-TR, page 75.)

7. The record here establishes that Claimant has qualitative impairments in his socialization and use of language. During the evaluation by Dr. Freeman, Claimant did not spontaneously initiate joint attention or express any pleasure in social interactions. He is inconsistent in his use of non-verbal communication and does not coordinate it with his verbal communication. He has not developed relationships with peers. He has unusual sensory interests in spinning and stereotypic behavior. He has a preoccupation with anything to do with cars and trucks. He has difficulty transitioning. Although he is learning through his ABA program, and has made progress with attending to class activities and following directions, he is inconsistent in his responses, and his parents continue to report behavioral concerns.

8. Claimant's problem areas and behaviors have a substantial impact on his ability to communicate and to engage in reciprocal social interaction. His impairments are the result of his autistic disorder and are substantially limiting his current functioning. Claimant's needs require "interdisciplinary planning and coordination of special or generic services to assist [Claimant] in achieving [his] maximum potential." Claimant's average cognitive and academic abilities suggest that, if he receives the necessary supports and services over time, his prognosis is good. Nevertheless, at this time, his condition is causing substantial impairment of his functioning in the following three areas of major life activity: language, learning, and self-direction.

9. Claimant has established that ABA treatment is necessary and appropriate to meet his unique developmental needs. Section 4512, subdivision (b), defines the services and supports that may be funded, and the process through which such are identified, namely, the IPP process, a collaborative process involving consumer and service agency representatives. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by IPP participants, the effectiveness of each option in meeting the goals in the IPP, and the cost-effectiveness of each option.

10a. An ALJ is empowered by statute to resolve all issues concerning the rights of persons with developmental disabilities to receive services under the Act. (§ 4706, subd. (a).) At least one court has suggested this is more than broad enough to encompass the right to retroactive benefits. In this matter, Claimant has established by the preponderance of the evidence that reimbursement for some ABA services is warranted under the circumstances, specifically those services that were accessed after Claimant's third birthday. Before Claimant turned three years old, it was reasonable for the Service Agency to rely upon its evaluator, Dr. Muñoz, and her recommendations. The Service Agency concluded that Claimant did not have autism, but that he would benefit from a center-based program in particular to develop social skills, which it funded. The Service Agency also offered behavioral intervention services, although not the intensive 1:1 ABA program as requested by Claimant's parents. Under the circumstances, the Service Agency's offer of services was sufficient to meet Claimant's needs based on the evaluations. The denial of 1:1 ABA services at that time was not unreasonable.

10b. On the other hand, by the end of May 2008, Claimant had developed a sufficient body of expert opinion to establish both that he had autism and that he needed intensive behavioral services. At this point, the Service Agency erred by not deeming Claimant eligible under the Act, which failure further resulted in a failure to develop and implement an IPP to meet Claimant's current needs. The evidence in this administrative proceeding has established that ABA is an appropriate modality for addressing Claimant's needs, and that it should continue as needed. The current level of direct services of 1:1 behavior therapy, approximately 35 hours per month, should be continued. Whereas there is no finding of bad faith on the part of the Service Agency, the delay in funding for ABA services was due primarily because of the Service Agency's error. Claimant's parents should not be forced to forgo Claimant's entitlements under the Act simply because they pursued and paid for the services on their own.

10c. The state's responsibility began when the Service Agency knew or should have known that these ABA services were necessary. At this juncture, the Service Agency shall be responsible only for the direct ABA services that have been provided since Claimant's third birthday, May 19, 2008. The amount of reimbursement that Claimant has established on this record is \$8,334, as set forth in factual finding number 18. The Service Agency shall continue to be responsible for the same level and amounts of ABA services, subsequent to August 31, 2008, for which Claimant's parents have

already been funding (at the rate of 35 hours per month). The exact amount of subsequent reimbursements shall be considered during the IPP process. The Service Agency or Claimant also may seek to modify the level and amounts of ABA services through the IPP process.

11. Claimant's parents have not established that they are entitled to reimbursement for the evaluation by Dr. Large. Reimbursement is authorized where a regional center fails to perform its statutory duty (or its performance is inadequate), and the family is required to obtain the appropriate service with the use of private funds. However, there is no established right to an "independent evaluation" under the "Early Start" program or the Lanterman Act. Section 502(b)(4) of Part B of the Individuals with Disabilities Act (IDEA) specifically authorizes an independent educational evaluation to be performed at public expense in a special education case, where parents disagree with a school district's evaluation, unless the school district initiates a due process hearing to show that its evaluation is appropriate. However, there is no similar provision in the statutes or regulations under Part C of IDEA, which governs the Early Start program. The Service Agency offered to fund a second evaluation by a psychologist of its choosing in early 2008, before it had made its eligibility determination in May 2008. This request was not unreasonable, but Claimant's parents' desire to use their own specialist, one who was not a Service Agency employee or vendored provider, to perform the second evaluation, was also not unreasonable. Nevertheless, there is no entitlement to the specialist of one's choice. Therefore, there is no right to reimbursement for purchasing an "independent" evaluation.

ORDER

Claimant's appeal of the Service Agency's determinations is granted in part.

1. Claimant is eligible for services under the Lanterman Act, as set forth more fully in this Decision, and the Service Agency shall convene an IPP meeting within 45 days of the date of this Decision.

2. In addition to any and all other supports and services established through the IPP procedure, the Service Agency shall fund 1:1 direct ABA services of 10 hours per week. Desired changes to or modification of these services, and the related considerations, may be addressed through the IPP process.

3. The Service Agency shall reimburse Claimant's parents for their average cost of providing ABA services during the months of June through August 2008, and for one-third of the month of May 2008, in the amount of \$8,334.00.

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4. The Service Agency is not required to reimburse Claimant's parents for the cost of the evaluation performed by Dr. Large in 2008.

Dated: December 30, 2008

_____/s/_____
MARK E. HARMAN
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.