

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

In the Matter of:

SETH F.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. L 2007070267

DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge of the Office of Administrative Hearings (OAH), in Torrance, California, on July 18, and August 29 and 30, 2007.

Audrey Clurfeld, Program Manager, represented Harbor Regional Center (Service Agency).

Seth L. (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. The Service Agency contends Claimant has a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), not autism, and believes Claimant's disorder is not a substantial disability for him, and therefore, he is not eligible for services under the Act. In a very close case, Claimant has met his burden to establish that he meets six of the qualifying criteria for Autistic Disorder under the Diagnostic and Statistical Manual of Mental Disorders (4th edition, Text Revision 2000) (DSM-IV-TR). Further, his condition is a substantial disability for him and, therefore, he does have an eligible condition that would entitle him to services.

The parties presented oral and documentary evidence.¹ On August 30, 2007, 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 Code² section 4500 et seq.?

2. Should the Service Agency be required to fund an ABA program for 13 hours per week to meet Claimant's needs?

FACTUAL FINDINGS

1. Claimant is a three-year-old boy who lives with his parents. He was born on June 1, 2004, after 25-weeks gestation. He weighed only two pounds, four ounces, at birth. He was in an intensive care unit for the first month of his life and had to be intubated, with a mechanical ventilator, for three months. Before his discharge from the hospital, he was referred to the Service Agency. As a child with a high risk for a developmental disability, he was deemed eligible for services under the "Early Start" program in September 2004. (Cal. Code of Regs., tit. 17 (CCR), § 52022, subd. (c)(1).) The Service Agency began funding an occupational therapist to visit Claimant in his home one time per month to monitor his developmental progress.

2. In an evaluation in April 2005, occupational therapist Laura Lauten, MA, OTR-L (Lauten), reported that Claimant's scores on the Bayley Scales of Infant Development II were within normal limits. He did not display heightened or prolonged episodes of negative affect, he displayed positive affect by smiling and making eye contact, and there were no behavioral concerns. Lauten did not recommend any additional services.

3. In October 2005, Lauten reevaluated Claimant when he was 16 months chronological age, and 13 months adjusted age. Claimant's scores were again within normal limits; however, Lauten reported that Claimant made minimal eye contact, had little social interaction, and appeared to have minimal interest in test materials. At times, he did not respond to his name. Claimant's mother had reported that he "spins the wheels on any object/toy." Claimant displayed one to two heightened episodes of negative

¹ Both parties used letters to designate their exhibits. The exhibits will be identified herein with "SA" for the Service Agency's exhibits, and "CL" for Claimant's (e.g., CL-Y; SA-D).

² All further references are to the Welfare and Institutions Code, unless specified otherwise.

affect, did not “display any positive affect in relationship to the activities” or Lauten, and “appeared to lack persistence and attention to complete the tasks.” In her written report, under “Summary and Recommendations,” Lauten stated that Claimant appeared to have some behavioral concerns that interfere with social interaction and purposeful play. She recommended an infant stimulation program one time per week, and for the Service Agency “to determine if a psychological evaluation is beneficial at this time and/or ongoing OT.” (SA-R.)

4. Carole S. Hovda, MS (Hovda), a service coordinator employed by the Service Agency and working with Claimant’s family, included much of Lauten’s report in Claimant’s October 5, 2005 individualized family service plan (IFSP),³ but Hovda did not note that Lauten had suggested a psychological evaluation. The Service Agency’s plan for supports was limited to an infant stimulation program one time per week in the home, and occupational therapy one time per month.

5. In October 2005, an early intervention specialist (specialist) from Niños del Cielo (NDC) began providing infant stimulation one time per week, funded by the Service Agency. In March 2006, the specialist wrote in a report to the Service Agency that Claimant was using about 10 words during his sessions (Claimant’s father had reported Claimant had a vocabulary of between 30-40 words) and was able to label some items in a book. This report contains some contradictions, in particular, the statements, “This family seems very concerned with Seth and his development,” and, “Seth’s parents are really not concerned with anything.” (SA-Q.) Furthermore, this report fails to mention that, when NDC began providing services to Claimant, NDC had concerns about possible autism, or attention deficit hyperactivity disorder with a language disorder, but after working with Claimant, the specialist had ruled out autism. This report also fails to mention that NDC had communicated this concern to Hovda. (CL-C.)

6. In an April 2006 report, Lauten stated she had observed improvement in social interaction, but Claimant showed a delay in receptive communication and continuing behavioral concerns. The composite score for general adaptive functioning was 71, in the borderline range. Lauten’s report was inconsistent with NDC’s report in some details. For example, NDC’s goals for Claimant for the six-month period between March and October 2006 included teaching Claimant to identify three body parts -- nose, eyes and mouth. But Lauten stated that Claimant “points to at least three named body

³ 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.)

parts.” Lauten recommended continuing in-home infant stimulation services, and thought that a preschool program may be beneficial for Complainant.

7. In September 2006, NDC acknowledged that Claimant was displaying tantrum behaviors more frequently and making unintelligible sounds throughout his sessions, but NDC did not recommend a behavioral assessment; instead, it recommended that in-home infant stimulation services continue, even after Claimant had begun preschool three days per week. NDC’s services were provided until Claimant began going to preschool five days per week in October 2006.

8. In September 2006, Claimant started attending preschool part-time. Within weeks, his teachers reported that he required a great deal of monitoring with a 1:1 aide, and had difficulty with structured and group activities. They also identified some concerns with his limited peer interaction, poor eye contact, toe walking, hand-flapping and other unusual physical mannerism. During a birthday party for another child, in which the children sang “Happy Birthday” and there were candles and a cake, Claimant was terrified and inconsolable. The teachers recommended that his parents seek a referral from the Service Agency for a psychological evaluation for autism. Claimant’s father called Hovda with these concerns, as well as concerns regarding Claimant’s speech delays. The Service Agency referred Claimant for psychological, and speech and language, evaluations.

9. The Service Agency referred Claimant to Dana Briggeman, MS, CCC-SLP. On October 2, 2006, Briggeman used the Rossetti Infant-Toddler Language Scales, a checklist of skills based on parents’ observations, to evaluate claimant’s skills. She identified Claimant as having a 33 percent delay in receptive language and a 50 percent delay in expressive language skills. This established a significant difference between Claimant’s level of functioning and the expected level of development for his age. Upon Briggeman’s recommendation, the Service Agency provided speech and language therapy one time per week between October 2006 and January 2007. Therapy was increased to two sessions per week in January 2007, until the school district assumed responsibility for providing these services in mid-2007. Claimant demonstrated progress in both receptive and expressive language over this seven-month period. When Briggeman reevaluated Claimant’s language skills in May 2007, he continued to register below normal limits in comparison to his peers. He rarely verbalized spontaneously during preschool, he required prompts by adults to use words to communicate wants and needs (as he relied on other means such as pointing, gesturing, or using facial expressions to communicate) and, unless prompted to use expanded utterances, he used only one-word spontaneous utterances. Briggeman recommended “continued individual speech and language therapy in order to continue to improve functional language skills, follow multi-step directions, increase length of utterance, and improve speech intelligibility.” (CL-K.)

10. The Service Agency funded a psychological evaluation by Thompson Kelly, Ph.D., a licensed clinical psychologist, which Dr. Kelly conducted over two days

in mid- to late-October 2006. Dr. Kelly performed clinical observations, both in his office and at Claimant's school. He interviewed Claimant's father and teacher regarding behaviors, and administered the Mullen Scales of Early Learning (Mullen) and the Vineland Adaptive Behavior Scales – Second Edition (VABS-II), with Claimant's father as reporter. On the Mullen, Claimant obtained an Early Learning Composite score within the borderline range of abilities (SS = 74). The Mullen scores were lowered, Dr. Kelly believed, because Claimant had difficulties transitioning from one item to another. Although he observed Claimant to exhibit some manifestations and characteristics of autism, such as difficulties with sustained focus and attention, preoccupation with parts of objects (wheels), and "preoccupation with putting objects into and taking them out of containers," he offered a diagnosis of PDD-NOS, a condition within the autism spectrum, which may be diagnosed where presentations do not meet the criteria for Autistic Disorder, e.g., atypical or subthreshold symptomatology. (DSM-IV-TR, page 84.)

11. According to Dr. Kelly, the VABS-II revealed low average skills in the communication and socialization domains, and average abilities in the daily living and motor skills domains. Dr. Kelly concluded that Claimant presented with "several autistic spectrum characteristics including some perseverative play routines, difficulties with transitions and sustained attention as well as with deficits in his language and socialization." (CL-E.) On the other hand, Dr. Kelly noted that Claimant could be easily engaged by others, that he displayed good joint attention on a variety of tasks, showed an interest in peers and adults in his environment, exhibited a broad range of gestures and facial expressions, and was noted to share his interests with others. With the exception of some head shaking, Dr. Kelly did not observe stereotyped and repetitive motor mannerisms, which had been reported by others, such as finger clicking, hand-flapping, or repeating sounds (echolalia). In sum, Dr. Kelly believed that neither the extent nor severity of Claimant's symptoms would satisfy the criteria for a diagnosis of Autistic Disorder. While Dr. Kelly found impairments in socialization and communication, he did not find a lot of evidence of "positive signs of classic autism." Dr. Kelly recommended a variety of services that would benefit Claimant, including a behavioral consultation "to assist the family in implementing and developing a program within the household to stress more appropriate means of communication." (SA-H.) He also recommended speech and language therapy, occupational therapy, and referrals to the family resource center for Claimant's parents to gain more information about autistic spectrum disorders. Dr. Kelly's written evaluation report was not submitted to the Service Agency until December 5, 2006.

12. In the meantime, Claimant's parents sought to learn all they could about treatment for autism spectrum disorder (ASD).⁴ They steeped themselves in the literature

⁴ 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 or PDD-NOS. (CL-S.)

concerning behavioral intervention techniques, and came to believe that ABA was the best modality to address Claimant's skill deficits and behavioral issues. ABA direct 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. The scientific evidence suggests that ABA can also benefit a person diagnosed with PDD-NOS.

13. Claimant's parents attempted to implement some ABA techniques on their own. In the fall of 2006, they learned about FirstSteps for Kids (FirstSteps), a Service Agency-contracted provider of ABA services, which was working with another child at Claimant's preschool. The preschool teachers also had requested a shadow aide for Claimant, as his needs required more 1:1 time than they could provide. Claimant's parents requested ABA services from the Service Agency on December 12, 2006, after receiving Dr. Kelly's report. The Service Agency denied their request. Instead, the Service Agency offered to pay for classes to train Claimant's parents in behavioral management techniques and to send an NDC specialist into the preschool to provide preschool inclusion support services. Claimant's parents believed that parent training was an inadequate means to address Claimant's needs. They also were informed by their son's preschool teacher that NDC's specialist, who merely observed Claimant for a few hours in January 2007, was providing little benefit for their son in the preschool.

14. The Service Agency did not offer a behavioral consultation. The Service Agency requested that Claimant undergo a second evaluation, to be conducted by its in-house psychologist, Dr. Ito, before it would consider an ABA program. The Service Agency's request for additional assessment appears to have been motivated, in part, because Dr. Kelly had not used the Autistic Diagnostic Observation Schedule-Module One (ADOS-1), a structured behavioral measure used to elicit examples of communication, socialization and play skills. Claimant's parents were not willing to allow the Service Agency to perform a second evaluation only three months after the first evaluation, because they had come to believe their son had autism, not PDD-NOS, and they believed that the Service Agency's in-house psychologist would not be willing to confirm their belief because of institutional bias. In January 2007, they informed Hovda that they intended to have Claimant assessed for ABA services by FirstSteps, and that they would seek reimbursement from the Service Agency for the cost of the ABA assessment and any subsequent services.

15. In mid-January 2007, the Service Agency began funding occupational therapy intervention for Claimant for two hours per week. In evaluation reports of May 1 and 19, 2007, Nancy Wuller, OTR/L, found Claimant generally made appropriate progress. He had reciprocal play skills in a one-on-one setting. He shared, traded, and accommodated to "new rules" within the context of the chosen game. His typical verbal responses during sessions were spontaneous, fairly age appropriate and generally suited to the play setting. Wuller stated, "However, during the past month he has seemed less spontaneous with regard to his language" and had begun displaying "echoed responses." Claimant's sensory

processing issues were significant. He withdrew and required much coaxing to attempt certain tasks, especially if they were novel or included distasteful sensory demand. He lacked motivation to perform, had difficulty following verbal instructions or demonstrations, and had difficulty with social interactions. Wuller concluded that, in contrast to typically developing peers who learn through imitation and interaction with others, Claimant's learning opportunities were limited. (CL-K.)

16. On February 1, 2007, FirstSteps' director, Jennifer Harris, Ph.D., a licensed marriage and family counselor specializing in ASD, performed an assessment of Claimant's functioning. She found Claimant presented with "many strengths across all areas of development," including "relative strengths in the development of social behavior;" however, Claimant did not demonstrate skill in the areas of symbolic play, his social skills appeared to be somewhat delayed, his language skills were delayed, and he exhibited "stereotypical behaviors that interfere with learning, appropriate play, and socialization." (CL-N.) Dr. Harris recommended that Claimant receive 30 hours per week of 1:1 behavioral therapy due to his delays in the area of play skills, social behavior and verbal behavior. She recommended eight hours per month of supervision by a qualified ABA consultant, with an emphasis on parent training. Claimant's parents retained FirstSteps and Claimant began receiving between 12 or 14 hours per week of direct ABA intervention services in the preschool setting based upon his school schedule. FirstSteps' program included a behavior management plan to reduce Claimant's maladaptive behaviors, such as non-compliance, self-stimulatory behavior, tantrumming, and aggression.

17. Claimant's pediatrician referred his parents to Dr. Kenneth R. Huff, chief of pediatric neurology at Harbor-UCLA Medical Center. Dr. Huff examined Claimant on February 21, 2007, and concluded that Claimant had autism. He recommended a form of 1:1 ABA treatment, of 30-40 hours per week. On March 8, 2007, Claimant's parents submitted Dr. Huff's diagnosis and recommendation to the Service Agency, and again requested funding, this time for 35 hours of 1:1 ABA therapy, along with eight hours per month of supervision.

18. The Service Agency questioned whether Dr. Huff had used any standardized testing as part of his assessment, and again proposed that Claimant be reassessed by a Service Agency psychologist or provider. Claimant's parents proposed, because of the discrepancy in diagnoses, that an "independent evaluation" be performed by Dr. Robin Morris, Psy.D., to be paid for by the Service Agency. The parties reached an impasse, and the Service Agency refused to consider providing ABA services until it had performed its own assessment, and would not rely on the existing assessments or agree to accept Dr. Morris's conclusions. The Service Agency informed Claimant's parents that "Harbor Regional Center does not reimburse for services that have not been previously mutually agreed upon through the Individual Service Plan Process." (SA-E.) On April 11, 2007, Claimant's parents submitted a fair hearing request, stating their disagreement with the service Agency's decision not to fund either ABA services or a psychological evaluation by Dr. Morris. (SA-A.) These issues have been resolved by a separate Decision issued under the "Early Start" program.

19. At Claimant's April 24, 2007 IFSP meeting, the Service Agency included in the IFSP document many of the identified needs and goals set forth in the initial FirstSteps evaluation. (CL-H.)

20. On April 30, 2007, Dr. Morris conducted an evaluation and diagnosed Claimant with Autistic Disorder. She believed Claimant's symptoms met all criteria under the DSM-IV-TR. Dr. Morris interviewed Claimant's parents, his preschool teacher and two ABA therapists from FirstSteps who worked with him during his school day. She observed Claimant at school while he was without the assistance of his 1:1 aide, and in his home. She administered various standardized tests, including the Wechsler Preschool and Primary Scale of Intelligence, 3rd Edition, on which Claimant obtained a composite score indicating a full scale IQ of 102, in the average range of intellectual functioning. On the Bracken School Readiness Assessment, he scored in the "very advanced" range. On the Communication subtest of the Developmental Assessment of Young Children, Claimant scored in the delayed range, receiving an age equivalent score of 20 months.

21. Dr. Morris utilized The Autism Diagnostic Interview – Revised, a semi-structured interview for caregivers of persons with ASD. It contains 93 items that highlight behaviors on the ASD range, focusing on the three domains of functioning -- language/communication, reciprocal social interactions, and restricted, repetitive, and stereotyped behaviors and interests -- that are specified in the DSM-IV-TR. Claimant's parents completed this interview. Claimant's parents reported, among other things, that Claimant was not developing typically at around seven months of age when he stopped responding to their voices. They observed that he used odd phrases and engaged in echolalia. He was hard to understand and did not use gestures when making requests. He seldom pointed to things around him. He showed no reaction when his parents entered the room. He did not engage in any pretend play and showed no interest in any toys or action figures, with the exception of a teddy bear. His teddy bear, solar system books, and "Cosmic" videos made him happy. When among a group of children, he separated himself and played alone. He had no friends. He liked to spin the wheels of trucks, line up blocks and Legos, and "revolve" things around him, including toys, pots and pans, and Tupperware. He had a good memory for things that interested him, including shapes, the spelling of the planets in the solar system, and colors.

22. Dr. Morris used the VABS, with Claimant's parents as reporters. Claimant's parents "endorsed all items" on the VABS. The scores that resulted for receptive language were in the low range, for expressive language in the below average range, and for social abilities in the low to below average range. These scores were lower than the scores reported by Dr. Kelly in October 2006.⁵ In her report of May 2, 2007 (SA-M), Dr. Morris

⁵ Dr. Cone, the Service Agency's expert consultant, believes these scores, and other scores obtained through standardized measurements of Claimant's functioning relative to his peers, have established that Claimant does not have significant functional limitations in three areas of major life activities, as required by section 4512, subdivision (l). Dr. Cone

recommended 35 hours per week of 1:1 ABA behavioral intervention therapy, to take place both at Claimant's current school placement and in the home. She recommended an additional three hours per week of parent training.

23. At a mediation held on May 1, 2007, the parties were unable to resolve their dispute with regard to ABA services and Dr. Morris's evaluation, but Claimant's parents did agree to allow Dr. Kelly to make additional observations, which occurred on May 4, 2007. Dr. Kelly observed Claimant in his home using the ADOS-1. In his "Psychological Addendum," dated May 4, 2007 (CL-E), Dr. Kelly recited many of his observations, noting that Claimant played with various items, including a toy telephone, truck and airplane. When Dr. Kelly showed Claimant different items, he observed Claimant reference these items as they were pointed out to him. Claimant watched Dr. Kelly demonstrate how to make the airplane roll across the table, and Claimant attempted to copy this action. Dr. Kelly tried to engage Claimant in interactive play by suggesting and demonstrating placing some human figures inside of the toy trucks as if they were driving. While he was "easily engaged" by Dr. Kelly, Claimant would not engage in joint play. He also did not show interest in the human figures. Dr. Kelly observed that Claimant "appeared to be having difficulty sharing in this and other interactions," as he would take the items away from Dr. Kelly's reach so that he could play with them on his own. The following additional observations are made in Dr. Kelly's report (CL-E; also SA-H):

24. Claimant labeled some items ("truck" and "plane") and used single words such as "Hello." He engaged in a great deal of jargon and unintelligible sounds. His language did not appear directed towards others. While Claimant was playing, Dr. Kelly asked Claimant's father to call his name. Claimant's father called Claimant's name three times and raised his voice the third time before Claimant turned and referenced him.

25. Claimant displayed brief joint attention when Dr. Kelly attempted to read a book to him. He appropriately labeled a "cup" in one illustration. Next, when Dr. Kelly began blowing bubbles, Claimant "smiled broadly." After much effort, Claimant was able to blow bubbles on his own and appeared to enjoy this activity. When Dr. Kelly introduced the "Itsy Bitsy Spider" song, Claimant appeared very excited and hugged Dr. Kelly while smiling and laughing and clapping his hands. Although he appeared to enjoy the song, he was unable to imitate any of the hand gestures, even though he was familiar with the routine. Similarly, he was unable to copy any of the gestures accompanying "Twinkle, Twinkle, Little Star." (See factual finding number 30, *post*.)

26. Dr. Kelly believes Claimant was making good eye contact during these interactions. Dr. Kelly took out several cups, plates, forks and spoons and laid them out

appears to prefer direct and formal measurements over other components, such as caregiver interview and clinical judgment. Dr. Cone also advocates a threshold requirement of two standard deviations below the norm in each particular domain to establish the existence of a significant functional limitation, but this argument has not been adopted as a legal standard.

for Claimant. He demonstrated pretending to drink from a cup, which Claimant imitated. Claimant picked up a fork as if to eat with it. Examples of atypical behavior included lining up the plates in a row and stacking the cups one on top of another. When Dr. Kelly attempted to move one of the cups, Claimant became upset and wanted to move it back.

27. Dr. Kelly then suggested that they have a “birthday party” for the “baby” indicating a doll. Dr. Kelly took out Play Doh and began putting candles into it. Claimant began to sing “Happy D’day” and attempting to blow out the candles. Dr. Kelly suggested that they finish making the “cake” and then they could sing. Dr. Kelly “cut the cake,” placed several slices on the plates, and pretended to “feed the baby,” asking Claimant for assistance. Claimant attempted to “feed the baby.”

28. Claimant engaged in some atypical play, taking the candles out of the cake and placing one of them on each of the plates in a row. He also engaged in brief sensory play by taking several plates and rubbing each one of them through his hair. Claimant received a small snack of dry cereal. Although he appeared to enjoy the snack, he did not ask for any more cereal and was content with the little given. Claimant at one point was pulling the pretend telephone around on the floor with a string. The string became tangled in the toy’s wheel. Claimant brought the telephone to Dr. Kelly; rather than asking for help, he merely stated, “I have a telephone,” while pointing his finger at the wheel where the string was tangled.

29. Based on these observations and formal scoring, Dr. Kelly concluded that, in the communication and reciprocal social interaction domains, Claimant’s scores “were above the cut off for determining the presence of an autistic spectrum disorder but not above the cut off for identifying a formal diagnosis of an Autistic Disorder.” In particular, Dr. Kelly found that Claimant engaged in good eye contact, had a good social gaze, was easily engaged, was able to visually reference a number of different items, could imitate the examiner, and engaged in simple symbolic play. On the other hand, he engaged in some atypical play characteristics, displayed a limited use of language, had difficulty participating in any actual interactive play, and did not initiate any play or interactions with Dr. Kelly or Claimant’s father. (SA-H.)

30. Claimant’s father was present during Dr. Kelly’s observations and testing. He disagreed with various statements in Dr. Kelly’s “Psychological Addendum” dated May 4, 2007. In general, he believed Dr. Kelly had misinterpreted Claimant’s behavior during the session in several ways, and had misreported the few examples of his son “playing” with toys or imitating Dr. Kelly’s actions. He emphasized that very little of Claimant’s imitative play was spontaneous, but would require numerous prompts. He also believed Claimant had protested against, rather than enjoyed, the singing of songs by Dr. Kelly, in part because these songs were not sung or performed in the manner in which Claimant was accustomed. Claimant’s ability to participate in the pretend “birthday party” was a consequence of intensive training that specifically targeted this routine, and was provided by his parents, and later in his ABA program, following his emotional outburst at preschool in September 2006 (see factual finding number 8, *ante*). Claimant’s

father disagreed with Dr. Kelly's observation that: "He was observed to play with a toy airplane that he held up in the air to pretend that it was flying." Instead, Claimant removed the airplane from Dr. Kelly and held on to it, "as he frequently holds onto many toys and for no apparent purpose." (CL-E.)

31. Dr. Kelly believes Claimant satisfies the following three diagnostic criteria from the DSM-IV-TR: failure to develop peer relationships appropriate to developmental level (A.1.b); delay in the development of spoken language (A.2.a); and lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level (A.2.d). Dr. Kelly believes that Claimant's range of nonverbal behaviors is not what one would expect ("very muted"), but nonetheless, he believes that Claimant's basic expression and range of affect is "okay" (A.1.a). Dr. Kelly did not observe echolalia (A.2.c), and believes Claimant shares (A.1.c). He did not see examples of encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus (A.3.a), and believes it is arguable whether Claimant has stereotyped and repetitive motor mannerisms (e.g., head shaking) (A.3.c). Finally, he did not see any "great" examples of persistent preoccupation with parts of objects ("the examples are brief") (A.3.d). He believes Claimant has some autistic-like characteristics, but their "extent and severity" are not enough to diagnose Autistic Disorder. In his testimony at the administrative hearing, Dr. Kelly appeared sincere when expressing these conclusions. Also, he conceded that ABA treatment could be beneficial for Claimant.

32. At his Individual Education Plan (IEP) meeting on June 1, 2007, Claimant was deemed eligible for special education by the Hermosa Beach Unified School District based on Dr. Morris's diagnosis of autism. The school district has been providing, in addition to his preschool placement, a 1:1 ABA aide for 22 hours per week, plus six hours per week of ABA supervision services, speech and language therapy for 80 minutes per week, and occupational therapy twice per week.

33. FirstSteps reported on Claimant's progress with his ABA program on June 1, 2007, in connection with developing goals for his IEP. (CL-K.) The report found that Claimant had made good progress. He was imitating sounds and words, spontaneously requesting preferred people, items, and activities he could see, beginning to label items, and improving in his use of eye contact. He had a wide variety of preferred activities that functioned as reinforcers, thereby making motivation relatively simple to capture. He demonstrated a good ability to learn. Noted delays were receptive language, including his failure to respond to functional verbal instruction without visual cues. He also had a tendency to escape nonpreferred activities. FirstSteps recommended continuing to provide direct ABA services of 30 hours per week, and that his parents receive 10 hours of initial parent training. As of May 25, 2007, Claimant's parents had paid \$5,920.74 to FirstSteps for the February assessment and subsequent treatment.

34. On June 8, 2007, the Service Agency notified Claimant's parents that its eligibility review committee had reviewed the reports of Drs. Morris and Kelly, had

agreed with Dr. Kelly's assessment that Claimant does not have Autistic Disorder, and concluded that Claimant did not have an eligible condition, and his condition was not a substantial handicap for him, "which would qualify him eligible for regional center services under the Lanterman Act at age 3." (SA-B.) The notice further provided that, as of June 30, 2007, services would be terminated, and Claimant would no longer be a client of the Service Agency. Claimant's parents disagreed with this decision, and submitted a fair hearing request on June 21, 2007.

LEGAL CONCLUSIONS

1. The Lanterman 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. The evaluations of Drs. Huff and Morris, as well as the reports of his caregivers, therapists and teachers, establish that Claimant's condition qualifies him for services under the Act. Although he scores in the average range in standardized cognitive testing, and has "many strengths across all areas of development" (factual finding number 16), his evaluators generally have assigned much lower scores for his abilities in communication and socialization, which are a significant disability for him.

3. At age three, Claimant uses few, two-word phrases spontaneously (without prompts), babbles, uses a lot of jargon, and utters non sequiturs. He does not initiate play or other interactions with adults or his peers, and it is difficult for him to maintain joint attention for more than brief periods. Dr. Kelly saw a few examples of stereotyped behaviors, but others have reported that he clicks his fingers, lines up round objects such as plates, cups, pots, and pans, perseverates on objects like wheels of toy cars and trucks, and switches lights on and off. He has an unusual interest in the topic of space, to the exclusion of other interests, and can name some planets of the solar system from a picture book. With the help of his ABA program, he has recently begun to respond consistently when his name is called, but he still has difficulty following verbal instructions or demonstrations of unfamiliar activities, does not consistently comply with requests and directions from teachers and parents, and has difficulty transitioning. Although he learns from his instructors and therapists, profits from his experiences, and has made improvements in many areas, his progress is still slow. It is significant that his parents and therapists recently reported behavioral concerns, including less spontaneous speech, echoing environmental sounds, and aggression towards a peer.

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 language, and he further displays self-stimulatory behaviors and repetitive motor mannerisms. His deficits and behaviors significantly impact his ability to learn and to engage in reciprocal social interaction. His therapists state that he does not demonstrate skills in the area of symbolic or imaginative play. Dr. Kelly argues, with sincerity, that Claimant's testing profile is not like a child with autism, and his behaviors are not of an extent or severity to qualify for a diagnosis of autistic disorder. However, the possibility that he is atypical or high functioning does not, at this point, counter the evidence indicating a diagnosis of autism, which makes him eligible for services under the Act. Claimant's above 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 areas of major life activity: language, learning, self-care, and self-direction.

8a. 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 individual plan participants, the effectiveness of each option in meeting the goals in the individual program plan, and the cost- effectiveness of each option.

8b. The scientific literature on autism and 1:1 ABA therapy indicates that treatment must be intensive, consistent, long term, and implemented at the earliest possible time, to achieve the desired outcome. Generally, it must be performed by a trained therapist. Claimant's parents could be trained to be ABA therapists for their son over time, but in these circumstances, the Service Agency's offer of behavior management classes, while beneficial in some ways, is not adequate to meet Claimant's particular needs

8c. Since the Service Agency did not deem Claimant eligible for services under the Act, Claimant's IPP has not been developed or implemented, and at this juncture, there cannot be an exact determination of the services and supports that Claimant needs; however, 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 recommendation by the service provider, FirstSteps, is for direct 1:1 behavior therapy for 30 hours per week, plus eight hours of supervision per month. Since the school district has assumed responsibility for 22 of those hours, and six hours of supervision, the Service Agency is responsible for the remainder: eight hours per week of direct services, and two hours per month of supervision. In addition, the Service Agency shall ensure that Claimant's parents receive 10 hours of initial parent training in ABA techniques.

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.

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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 eight hours per week, plus two hours per month of supervision, and 10 hours of initial parent training, provided by FirstSteps. Desired changes to or modification of these services, and the related considerations, may be addressed through the IPP process.

Dated: _____

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.