BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

J. G.,

Claimant,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2012120776

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on September 3 and 4, 2013, in Gilroy, California.

James Elliott, Fair Hearing Designee, represented San Andreas Regional Center, the service agency.

Rita Defilippis, Attorney at Law, Disability Rights California, represented claimant J.G., who was not present at hearing. J.G.'s mother and father were present throughout the hearing.

The parties submitted closing briefs simultaneously on October 1, 2013, and reply briefs on October 7, 2013. The briefs were timely submitted, considered and marked for identification as follows: Respondent's closing brief was marked as Exhibit L, and his reply brief as Exhibit M. The regional center's closing brief was marked as Exhibit 7 and

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its reply brief as Exhibit 8. The regional center submitted a Spanish to English translation of Exhibits 1A and 1B, which was marked as Exhibit 1C, and received in evidence.

The matter was deemed submitted for decision on October 7, 2013.

ISSUE PRESENTED

Is claimant eligible for services from San Andreas Regional Center under the Lanterman Developmental Disabilities Act?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant applied to San Andreas Regional Center (SARC) for services. By letter dated November 14, 2012, SARC notified claimant that it was denying the request for services on the grounds that he did not meet eligibility criteria under the Lanterman Act.[1] Claimant filed a fair hearing request to appeal SARC's determination of ineligibility, and this hearing followed. Claimant contends he meets the Lanterman Act eligibility criteria on the basis of autism and pursuant to the so-called "fifth category."[2]

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[1] The Lanterman Developmental Disabilities Act (Lanterman Act) is found at Welfare and Institutions Code section 4500 et seq.

[2] Welfare and Institutions Code section 4512, subdivision (a), defines developmental disabilities that qualify an individual for regional center services as: 1) mental retardation; 2) cerebral palsy; 3) epilepsy; 4) autism; and, 5) disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation (referred to herein as the "fifth category")

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2. Claimant, a 15-year-old boy, has been treated by the San Benito County Mental Health Services since 2007; the staff there recommended that claimant apply to SARC for services as a result of autistic-like behavior. Upon application to SARC, a clinical psychologist, Ubaldo F. Sanchez, Ph.D., evaluated claimant at SARC's request. Dr. Sanchez opined that claimant suffers from dysthymic disorder,[3] attention deficit hyperactivity disorder (ADHD), a learning disorder, not otherwise specified, and disruptive behavior disorder, not otherwise specified. Dr. Sanchez concluded that claimant did not meet the diagnostic criteria for autistic disorder. Nancy Krogseng-Adams, Psy.D., a licensed psychologist who consults with SARC on eligibility determinations, reviewed claimant's application, medical and school records, and Dr. Sanchez's evaluation. Dr. Krogseng-Adams concurred with Dr. Sanchez's conclusions and recommended denial of claimant's application.

3. Claimant was later evaluated by licensed clinical psychologist, Pegeen Cronin, Ph.D., who specializes in assessing individuals on the autism spectrum. Dr. Cronin diagnosed claimant with autistic disorder and borderline intellectual functioning and opined that he is substantially disabled as a result. Psychiatrist Herbert Cruz, M.D., who treated claimant from December 23, 2011, until May 25, 2012, reviewed Dr. Cronin's report and agrees with her findings and conclusions. Dr. Krogseng-Adams also reviewed Dr. Cronin's report. Dr. Krogseng-Adams disagrees with Dr. Cronin's conclusions and did not alter her opinions about claimant.

4. As set forth below, the preponderance of the evidence at hearing established that claimant meets the diagnostic criteria for autistic disorder and fifth category eligibility, and his condition is substantially disabling and likely to continue indefinitely. As such, he is eligible for services.

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[3] Dysthymic disorder is defined as a chronic state of depression.

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Family History and Early Development

5. Claimant lives with his parents. He has a brother and sister who are 29 and 31 years of age, respectively. Claimant's parents' primary language is Spanish; claimant is bilingual.

6. Following his birth, claimant was a happy baby. However, at age 13 months, claimant no longer giggled or laughed, and seemed to withdraw "into his own world." He showed delays and abnormal functioning in his social interactions and language use. By two years of age, claimant spoke three words in Spanish; however, at 26 months, claimant stopped speaking; he began to speak again at age five or six. As a young child, claimant rocked while awake, avoided eye contact, resisted physical contact, was unaffectionate, displayed repetitive behaviors and had low tolerance for changes in routine. At three years of age, claimant would bite his hands to a degree that would draw blood.

7. Claimant's older brother and his family live next door to claimant. His brother has children similar in age, but somewhat younger than claimant. Claimant has been unable to develop bonds with his cousins. Claimant's cousins soon passed him up developmentally despite their younger ages. Eventually, his cousins rejected him in play.

8. Claimant's toileting skills were significantly delayed. He stopped having nighttime accidents between ages nine and 10, and daytime accidents between ages 11 and 12. He continues to require assistance from his mother with wiping himself. Claimant resists bathing and requires assistance from his mother in washing and using shampoo.

9. As a child, claimant demonstrated nonfunctional routines such as lining up his toys. Claimant is very routine-oriented. When he returns home after school, he eats, rides his bicycle around the perimeter of the house, then returns and plays video games. Claimant will ride his bicycle around the house even when he is ill or it is raining.

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Claimant has a peer whom he met at 13 years of age who has autism. When they get together, they play parallel video games. At present claimant is not responding to the other child's invitations to get together. Claimant generally shows no interest in other children. Although claimant plays video games, he has not used a computer to access the internet.

10. Claimant does not express joy; rather he exhibits a flat demeanor, unless angry. Claimant has significant behavior issues at home, in public and at school. He has frequent temper tantrums, bangs his head, and destroys property. Claimant rarely sits still; he will rock in his chair or bite his nails; he flaps his arms when angry. Claimant is very rigid about the food he eats and the clothing he wears.

11. Claimant has never slept in his own bed; he insists on sleeping with his mother. Claimant is afraid to be alone at home. He engages in limited conversations but his mother has difficulty understanding his pronunciation. If his mother leaves the home, claimant becomes very agitated. Claimant requires constant supervision.

Educational Assessments and Services

12. Claimant began attending school at age four years and 10 months. He repeated kindergarten.

13. In first grade, at age seven, claimant was referred for a multidisciplinary psychoeducational evaluation as a result of his poor progress in language arts, deficits in oral language and fine and gross motor skills, hyperactivity and inappropriate behavior (barking and whistling) in the classroom. Claimant's parents reported that claimant had a history of tantrums, bedwetting, eating difficulties, frequent illnesses, and speech therapy. His teacher expressed concerns about his inability to learn all of the letters and numbers, the respective sounds of letters, and to write them from dictation. His teacher described claimant as a "nonreader and non-speller." Claimant was described to exhibit

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a "straight face" facial expression, and to demonstrate repetitive behaviors for breaking pencils and crayons and hitting his head against the desk when frustrated.

The school evaluator administered the Wechsler Intelligence Scale of Children-Fourth Edition (WISC-IV). The results of the WISC-IV testing indicated that claimant exhibited high average Perceptual Reading skills and low average Processing Speed skills. Results from the Clinical Evaluation of Language Fundamentals – Third Edition, Spanish version, revealed that claimant's expressive language abilities measured in the borderline range. The evaluator also administered the Behavior Assessment System for Children Teacher Rating Scale – Child, which facilitates a differential diagnosis and classification of a variety of emotional and behavioral disorders of children. Clinically significant findings were indicated in the areas of aggression, anxiety, depression, somatization, atypicality, withdrawal, and learning problems. He was found to be at risk in the categories of conduct problems, attention problems, adaptability, social skills, leadership skills and study skills. As a result of the testing, it was recommended that claimant's parents consider counseling and the IEP team consider a behavioral plan.

14. On May 19, 2005, a supplemental assessment of claimant was performed as a result of academic concerns expressed by his first grade teacher. Testing demonstrated an auditory processing deficit. Claimant had clinically significant scores in the areas of externalizing and internalizing problems, school problems, and the behaviors symptom index; he had "at risk" scores in the adaptive skills composite. Academically, claimant's scores ranged from low to very low. Claimant was found eligible for special education services on the basis of a learning disability in June 2005. He was also referred for mental health services due to ongoing behavior problems.

15. In 2006, claimant participated in special education classes approximately 20 percent of the time. By January 2007, however, he was attending special education of approximately 62 percent of the day. School records indicate a continued lack of

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academic progress, repeated Individualized Education Plan (IEP) goals and steadily increasing special education services. Claimant entered a full-time special day class on March 5, 2007, at age nine. He was also referred to extended school year services. Claimant demonstrated a severe discrepancy between intellectual ability and achievement in reading comprehension and written expression. The discrepancy was thought to be a result of a visual and auditory processing disorder. Based on his prior WISC-IV scores, the assessment team did not consider claimant to be intellectually disabled. School reports indicate claimant was diagnosed with an anxiety disorder and had frequent tantrums and mood swings in his special day class. Claimant was hitting himself, slamming his hands of the desk, stomping his feet, and pushing desks toward others. On September 10, 2007, claimant was referred to psychiatric counseling.

16. As a result of an assessment in November 2007, claimant was found eligible for special education services in the area of speech and language impairment. In December 2007, school records indicate that claimant had been diagnosed with bipolar disorder and autistic disorder. (The underlying documentation of these diagnoses was not established at hearing.) Due to an increase in behavioral problems, claimant was moved to a different special day class and a behavior support plan was developed. He continued on a shortened day program. Claimant's mother provided documentation to school administrators of the following diagnoses: speech and language delay, mood disorder, impulse control disorder and pervasive developmental disorder – not otherwise specified (PDD-NOS). As a result of claimant's continuing behavioral issues, he was moved to a special day class for the emotionally disturbed.

17. A report of a multidisciplinary psychoeducational evaluation dated February 13, 2008, indicated that claimant remained eligible for special education under specific learning disability. As a fourth grade student at age 10, claimant had not met

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goals for reading at the second grade level. He also continued to demonstrate delays and deficits in math and writing skills.

As part of the assessment, claimant's mother completed the Gilliam Autism Rating Scale (GARS-2) with the assistance of a translator. The GARS-2 results indicated that claimant exhibited a high likelihood of autism. The assessment documented claimant's language delay before age three, repetitive motor mannerisms, and social communication delays. It also documented that claimant avoided eye contact, withdrew from social situations, was unreasonably fearful, became easily upset with routine changes, and responded with temper tantrums when given commands or requests. The assessment also documented that claimant engaged in hand flapping, finger flicking, and rocked while seated. The assessment further documented that claimant frequently repeated words out of context, spoke in a flat affect and failed to initiate conversations. Claimant was found to be eligible for continued special education services under the "Other Health Impaired" category due to his diagnoses of mood disorder and impulse control disorder. The school examiner agreed with claimant's physician's diagnosis of PDD-NOS.

18. Claimant's January 2009 and 2010 IEP's indicate that he continued to demonstrate inconsistent progress, and his goals were not met. In 2010, claimant was becoming more familiar with sight words and phonics at a first grade level.

19. In January 2011, the WISC – IV was again administered. Claimant's full scale intelligence quotient (FSIQ) was measured at 78. He demonstrated significant variation between subtest scores, with verbal comprehension index measuring 93 (average), nonverbal skills at 82 (low average) and processing speed index at 73 (deficit). A communication assessment measured claimant's expressive ability skills as age appropriate, but his receptive vocabulary in the borderline range. Claimant was also noted to demonstrate difficulties in articulation.

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Claimant's mother and teacher completed GARS-2 on January 24, 2011. The results of this assessment indicated an unlikely possibility of autism. Claimant's mother reports that the assessment was performed without the assistance of a translator. There is no indication in the records of a reconciliation in these results and the 2008 GARS-2 results, which indicated a high likelihood of autism.

Claimant's teacher reported that although his overall skills had improved, claimant remained severely delayed in academics, and that she had difficulty understanding his speech due to mispronunciations and articulation errors. Claimant continued in special education under the category of Other Health Impaired, and with a secondary disability of speech and language impairment.

20. Claimant is now in the ninth grade student and attends a special day class. Claimant has continued as a special education student under the categories of Other Health Impaired and speech and language impairment. Claimant's behavior at school improved over time in his more restricted environment.

Medical Records

21. Claimant was first evaluated by the Kaiser Child and Adolescent Psychiatry Clinic in 2003, at age six. These records reflect that claimant would hit his head and bang his head against the wall, behavior which continues to the present day. In addition, the records indicate that claimant was not learning as expected and, when frustrated, would scratch his face and hit his head. He demonstrated impulsivity, distractability, inattention, articulation issues, fear and anxiety. He was diagnosed with multiple disorders, including, speech and language delay, mood disorder and impulse control disorder.

22. On January 3, 2008, Maria-Pilar Bernal-Estevez, M.D., diagnosed claimant with PDD-NOS, and noted that he had previously been diagnosed with a speech and language delay, a mood disorder, and an impulse control disorder. Dr. Bernal-Estevez

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referred claimant for an autism assessment through the Kaiser autism clinic; however, claimant's family lost their Kaiser insurance before an evaluation was performed.

23. On December 13, 2011, claimant was evaluated by neurologist Christopher Lee-Messer, M.D., for a possible seizure disorder, developmental delays and features of autism. Dr. Lee-Messer concluded that claimant was not suffering from seizures, but he was concerned about claimant's behavior problems. Dr. Lee-Messer noted that claimant had been diagnosed with autism early on. (The underlying documentation of this diagnosis was not established at hearing.) During the evaluation, claimant demonstrated limited interaction, but answered questions; he made "short eye contact" with Dr. Lee-Messer. Claimant was evaluated by Dr. Lee-Messer again on June 22, 2012, for behavioral issues. Dr. Lee-Messer felt that behaviorist services might be helpful for the family and hoped that SARC would provide these services.

Mental Health Records

24. Claimant's records with San Benito County Mental Health Services reflect that he has received mental health services due to ongoing difficulties with peer relationships, self-injurious behavior, tantrums, growling, non-compliance with school work, and destruction of school property. In February 2011, claimant's mental health providers noted that claimant had a history of developmental delays, cognitive impairment, speech and language delays, and symptoms consistent with autism.

25. An assessment of claimant by his county mental health providers dated March 6, 2012, indicated that claimant was impaired in his ability to concentrate, was inattentive, had poor memory skills, and demonstrated concrete thinking, poor judgment and poor insight. Notes reflected concerns of "avoidance of eye contact, withdrawal from social situations, [unaffectionate] stance, repetitive [tics], and upset with changes in routine." The assessment author indicated that claimant had demonstrated delayed developmental milestones, and the author had advocated for claimant's parents

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to seek a rule out for autism. The school testing indicated a high rating for autism, and claimant's IQ was below the mean. Claimant's parents were referred to SARC for services.

26. Psychiatrist Herbert Cruz, M.D., provides psychiatric services to students who are referred to San Benito County Behavioral Health. He is on the San Benito County Mental Health team and is responsible for screening patients to determine if referral to SARC is appropriate. Dr. Cruz has reviewed and is familiar with claimant's mental health records, has delivered psychiatric services to claimant, and was a member of his mental health treatment team from December 23, 2011 until May 25, 2012. Dr. Cruz believes that claimant suffers from autistic disorder and borderline intellectual functioning as defined in The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (DSM-IV-TR). He believes that these disorders are likely to continue indefinitely. Dr. Cruz also opines that claimant's autism and intellectual functioning result in substantial impairment in the following areas of adaptive functioning: self-care, receptive and expressive language, learning, self-direction, capacity for independent living and economic self-sufficiency. Dr. Cruz is in full agreement with the findings of Pegeen Cronin, Ph.D., which are detailed below.

CLAIMANT'S AUTISM ASSESSMENT

27. Disability Rights California referred claimant for evaluation by clinical psychologist Pegeen Cronin, Ph.D. Dr. Cronin has extensive experience in the treatment and assessment of individuals on the autism spectrum. She was the clinical director of the Autism Evaluation Clinic of the Department of Child Psychiatry at the UCLA Semel Institute for Neuroscience & Human Behavior from 2004 to 2012. She served as the assistant director of the clinic from 1997 to 2004. Dr. Cronin was a member of a team of professionals that developed the Autism Spectrum Disorders: Best Practice Guidelines for Screening, Diagnosis and Assessment, published in 2002 by the Department of

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Developmental Services. Dr. Cronin has also provided training to a number of service agencies, including SARC, in the diagnosis and assessment of autistic disorder. She is currently in private practice, providing assessments of individuals being evaluated for autism spectrum disorders.

28. Dr. Cronin evaluated claimant on April 9, 2013. She observed him in his school setting on April 8, 2013, and met with his teacher, the school psychologist and a speech and language pathologist intern. She also reviewed claimant's medical records, educational records and mental health records, and spoke with his therapist, his parents and his sister. Dr. Cronin wrote a thorough 43-page report on her findings and testified at hearing. In her report, Dr. Cronin gave a detailed developmental, family, medical and educational history. She also discussed previous assessments, including those performed by SARC evaluators, providing her professional opinion about the consistency or inconsistency of test results and the appropriateness of various tests administered.

29. The school psychologist with whom Dr. Cronin spoke stated that she worked with claimant to help him develop problem-solving and anger management strategies, but it was "difficult to get anything from him;" he did not demonstrate problem-solving; presented as "very flat;" and, typically responded with one-word answers. The school psychologist predicted that claimant would benefit from and proceed to the district's life skills class that would provide a foundation for community based instruction in an effort for claimant to live semi-independently when he transitions to adulthood.

30. Claimant's teacher indicated that he had not observed the behavioral problems that had been reported earlier. Claimant was described as unable to read and write, and the teacher conducts oral testing whenever possible. Claimant's teacher's goal was to teach the fifth grade curriculum; however, the curriculum approximated the third

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grade level. While Dr. Cronin observed claimant in class, he was attentive, but frequently bit his nails or placed the pencil lad underneath his fingernail.

31. Dr. Cronin administered the following test instruments: 1) Autism Diagnostic Interview – Revised (ADI-R); 2) Autism Diagnostic Observation Schedule – Second Edition (ADOS-2) Module 3; 3) Social Language Development Test – Adolescent (SLDT-A); and 4) Vineland Adaptive Behavior Scales-Second Edition (Vineland); and 5) Adolescent Test of Problem Solving – Second Edition (TOPS-2).

32. *ADI-R results*: Dr. Cronin interviewed claimant's parents and sister in administering the ADI-R. Based on the information gathered, Dr. Cronin noted that claimant had developmental delays, and deviance in reciprocal social interactions, language, communication and play. Dr. Cronin found claimant's loss of language and social interaction at a young age to be indicative of autism. In addition, claimant's longstanding difficulties in following routines, repetitive behaviors, restricted interests and his significant delays in social and communication abilities, indicated a diagnosis of autistic disorder.

33. *ADOS-2 results*: The ADOS-2 is a standard tool for assessing individuals who are suspected of having autism or other pervasive developmental disorders. The Autistic Spectrum Disorders Best Practice Guidelines for Screening, Diagnosis and Assessment recommends administering the ADOS-2 in connection with diagnosing autism. Dr. Cronin found that claimant's scores on the ADOS-2 indicated a lack of social reciprocity and verbal and nonverbal communication deficits that were consistent with autistic disorder.

34. *SLDT-A results*: The SLDT-A is a diagnostic measure of social language skills in adolescents ages 12 to 17. Claimant exhibited a great deal of difficulty on all of the subtests on this measure and achieved results that measured below the normative sample and significantly below his measured cognitive abilities and age expectations.

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35. *Vineland results*: The Vineland measures the extent to which an individual performs day-to-day activities that are required for personal and social sufficiency. Adaptive behavior scores measure what an individual is actually doing as opposed to what an individual is capable of doing. In the area of communication, claimant demonstrated significant delays in his expressive language. His speech is not consistently understandable in Spanish or English, and he does not engage in reciprocal conversations. In addition, claimant's writing is often illegible or difficult to understand. In the area of self-help skills, claimant demonstrated significant difficulties, including in toileting and bathing. In the area of social skills, claimant is very limited; he has few friends, and lacks social insight.

36. *TOPS-2 results*: This measure was chosen to further evaluate claimant's ability to interpret and respond to social scenarios. It is a measure of inferential reasoning, problem solving and critical thinking abilities for adolescents 12 to 17 years old. Claimant's responses tended to be concrete and general. He demonstrated delays and deficits in understanding others' perspectives.

37. Based on a review of extensive records, several interviews and conclusions drawn from testing, Dr. Cronin found that claimant had a significant history that persists for qualitative impairments in reciprocal social interaction, communication, restricted and repetitive and stereotype behaviors, and activities. She also found he demonstrated substantial impairments in verbal communications and longstanding problems in pragmatics. A regression in loss of skills, as claimant demonstrated in language and social skills, is present in approximately 30 percent of individuals with autism. Dr. Cronin noted that claimant has notable delays in learning, with his modified school curriculum hovering around the second grade level. She also found pronounced delays in social comprehension and perception. Dr. Cronin noted that claimant has a substantial disability in communication as documented by his limited, monotone speech and

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difficulties asserting appropriate language. Claimant has also demonstrated a lack of motivation to care for himself independently. Dr. Cronin found he has a substantial disability in self-care across skills of daily living including hygiene, dressing, feeding himself, brushing his teeth, bathing and toileting. He does not demonstrate independence in activities such as cooking or laundering, raising questions about his capacity for independent living. Finally, claimant does not demonstrate economic self-sufficiency, as he does not understand monetary values.

38. *DSM-IV-TR Criteria for Autistic Disorder*: Based on her review, Dr. Cronin concluded that claimant met the DSM-IV-TR diagnostic criteria for autistic disorder.[4] Section 299.00 of the DSM-IV-TR sets forth the 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 interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

[4] The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) was released in May 2013. Claimant applied for services in August 2012 and the parties assessed claimant's eligibility under the DSM-IV-TR.

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(b) failure to develop peer relationships appropriate to developmental level

(c) 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

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(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.

39. The DSM-IV-TR requires the presence of a total of six or more items, with at least two in the first category (social interactions). Dr. Cronin found that claimant exhibited all 12 items in the first three categories. She also found that claimant demonstrated delays or abnormal functioning with onset prior to age three in social

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interaction, language and play. In Dr. Cronin's opinion, claimant is eligible for regional center services under the category of autism.

SARC EVIDENCE

40. *Interview by Irene De La Rosa*: Intake service coordinator[5] Irene De La Rosa performed an intake assessment by gathering claimant's school and medical records, reviewing his parent's written submissions, interviewing claimant and his family, and speaking with his case manager at San Benito Mental Health Services, who assisted claimant's family in filling out the application for services. De La Rosa provided the information she gathered to the SARC eligibility team.

41. *Evaluation by Ubaldo F. Sanchez, Ph.D.*: Ubaldo Sanchez, Ph.D., is a licensed psychologist. He evaluated claimant on September 26, 2012, and provided a report to SARC for its consideration in determining claimant's eligibility for regional center services based on mental retardation or autistic disorder. Based on his evaluation, Dr. Sanchez concluded that claimant was not eligible for services. Dr. Sanchez met with claimant and his parents for approximately one hour and reviewed some of claimant's school records; he was not provided the San Benito Mental Health records. He administered the following tests: 1) WISC-IV; 2) ABAS-II; 3) ADOS-III; and a structured diagnostic interview. Dr. Sanchez noted that claimant initially refused to get out of his parents' truck, was unable to state the year he was born, was biting his nails, very labile, easily irritated with his parents, constantly moving and spoke with a speech impediment.

42. Dr. Sanchez measured claimant's FSIQ at 75 on the WISC-IV, which is in the borderline range. The ABAS-II, completed by claimant's parents, indicated significant impairment in his communication, community use, functional academic, home living,

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[5] De La Rosa is now the district manager of the SARC Gilroy office.

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health and safety, leisure, self-care, self-direction, and social skills. Dr. Sanchez found these results consistent with his presentation and attributable to his "serious mental health issues." When Dr. Sanchez administered the ADOS-III, the only speech abnormality typically associated with autism that he observed was an occasional stutter. Claimant did not ask Dr. Sanchez about his thoughts or experiences or engage in hand or finger mannerisms. Claimant did use some gestures. Dr. Sanchez was able to make eye contact with claimant and did not find him self-absorbed or self-directed. However, claimant was unable to communicate any degree of understanding and sharing emotions with others, and showed only limited insight into typical social interaction. Dr. Sanchez did not observe claimant to engage in restrictive, repetitive or stereotyped behavior, interests or activities, or in any stereotyped or repetitive motor mannerisms.

43. Dr. Sanchez diagnosed claimant with dysthymic disorder, early onset; ADHD, learning disorder – not otherwise specified; disruptive behavior – not otherwise specified; and a rule out diagnosis of pervasive developmental disorder – not otherwise specified.

44. Dr. Sanchez found that claimant's ability to be moderately impaired in the following categories: 1) ability to understand and respond to increasing complex requests; 2) ability to communicate by understanding, initiating, and using language; and, 3) ability to socially integrate with peers and adults in an age appropriate manner. Dr. Sanchez found claimant's ability to sustain an activity for a period of time to be markedly impaired. Dr. Sanchez opined that claimant should remain in special education for the foreseeable future, and to continue with mental health treatment and medication. Dr. Sanchez did not testify at hearing.

45. *Observations of Nancy Krogseng-Adams, Psy.D.*: Nancy Krogseng-Adams, Psy.D., is a licensed psychologist. Dr. Krogseng-Adams obtained a doctorate in clinical psychology in 1998, specializing in neurobiology of emotional development. She has

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been in private practice since 2008, specializing in chronic pain psychological evaluations for implant technologies, substance abuse risk assessment and treatment appropriateness. Dr. Krogseng-Adams has been a consulting staff psychologist for SARC since 2009. When consulting for SARC, Dr. Krogseng-Adams makes recommendations on regional center services eligibility, conducts psychological testing, testifies at hearings, evaluates conservatorships and reviews behavioral plans.

46. Dr. Krogseng-Adams reviewed the portions of medical and school records provided to her, and Dr. Sanchez's report. Dr. Krogseng-Adams testified at hearing, but had not met or interviewed claimant, his parents, his therapists or school employees. Dr. Krogseng-Adams considered Dr. Sanchez's report, but did not consult with him because she did not find any discrepancies that required discussion. Dr. Krogseng-Adams also reviewed De La Rosa's assessment. She did not have access to his San Benito County Mental Health records or Dr. Cronin's report when she wrote her summary; however, she reviewed them prior to the hearing.

47. Based on her review of the records, Dr. Krogseng-Adams acknowledged that some of claimant's behaviors may appear autistic-like; however, she found the testing results did not support an autistic spectrum disorder. Dr. Krogseng-Adams diagnosed claimant with ADHD; dysthymia, early onset; and, oppositional defiant disorder. She considered claimant to have attention and language deficits, but not an intellectual disability.[6] In order to qualify for the diagnosis of mental retardation, an

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[6] Welfare and Institutions Code section 4512 refers to "mental retardation" as a category of eligibility. However, the DSM-V uses the phrase "intellectual disability" rather than mental retardation. The experts and parties used the terms intellectual disability and mental retardation interchangeably at hearing. Because the Lanterman Act refers to mental retardation, that term is used in analyzing eligibility criteria here.

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individual must have a FSIQ of less than 70 and impaired adaptive functioning. Claimant's FSIQ is 75. In Dr. Krogseng-Adams's opinion, claimant's low IQ scores are the result of a learning disorder, which is typically overcome with maturity. In addition, medical research shows a strong correlation between ADHD and pragmatic language deficits and social deficits. Claimant's WISC-IV scores were inconsistent between parts of the test. It is not uncommon for someone with ADHD to have trouble on some parts of the test and not on others. In addition, children with ADHD also have impaired social function due to aggression and impulsivity. Dr. Krogseng-Adams agreed that claimant's 2008 GARS report, and some of his behaviors and deficits, indicated a screening for autism; however, in her opinion, the testing did not result in an autism diagnosis.

Dr. Krogseng-Adams disagrees with Dr. Cronin's assessment. In her opinion, Dr. Cronin's report to contains many details and a clinical profile that do not fit with records she reviewed. [7]

FIFTH CATEGORY ASSESSMENT

48. Dr. Cronin also found that claimant's history and cognitive testing indicated borderline intellectual functioning, and when considered with his impairments in adaptive functioning, made him eligible for regional center services under the fifth category because he has a condition closely related to mental retardation or requires services similar to those required by individuals with mental retardation.

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[7] Dr. Cronin found SARC's evaluation procedures were flawed for a number of reasons. First, Dr. Cronin felt that Dr. Sanchez erred in meeting with claimant and his parents jointly. In addition, Dr. Cronin felt that Drs. Sanchez and Krogseng-Adams overlooked information in claimant's medical, mental health and educational records, as well as information provided by claimant's parents, in reaching their conclusions.

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49. The fifth category of eligibility enables individuals who have a condition similar to mental retardation, or who require treatment similar to individuals with mental retardation, to receive regional center services. Claimant's intellectual functioning was measured by Dr. Sanchez to be in the borderline range. In addition, claimant scored in the clinically significant range on all areas of daily functioning in adaptive testing by both Dr. Cronin and Dr. Sanchez. The experts agree that claimant's condition has profoundly impaired his ability to function academically.

50. The service needs for someone with mental retardation depend on the individual's level of function. In Dr. Cronin's opinion, claimant requires treatment similar to those needed by individuals with mental retardation. Claimant has demonstrated significant delays in toileting, cooking, bathing, dressing, using money and participating in the community, which require targeted instruction. The school psychologist also anticipated that claimant would attend a life skills class after high school. In Dr. Cronin's opinion, claimant qualifies for services under the fifth category because his condition is similar to mental retardation and requires treatment similar to someone with mental retardation.

51. Dr. Krogseng-Adams does not consider claimant to have mental retardation or to have a condition similar to an mental retardation. In Dr. Krogseng-Adams's opinion, claimant's FSIQ does not fairly describe his cognitive ability. She feels that Dr. Cronin placed a lot of emphasis on claimant's lack of academic progress as an indicator of intellectual disability. Dr. Krogseng-Adams believes in IQ tests; in her opinion, claimant's IQ scores do not demonstrate low IQ, but a learning disability. She does not consider claimant to be eligible for services under the fifth category.

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LEGAL CONCLUSIONS

Introduction

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Lanterman Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. A claimant appealing a service agency's denial of eligibility must show by a preponderance of the evidence that he is eligible for services. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

3. As defined in the Lanterman Act, a developmental disability is a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual." (Welf. & Inst. Code, § 4512, subd. (a).) Welfare and Institutions Code section 4512 provides that the term "developmental disability" shall include autism, and under the fifth category, disabling conditions found to be closely related to mental retardation, and disabling conditions that require treatment similar to that required for individuals with mental retardation.

Claim for Services based on Autism

4. The experts for claimant and SARC express different conclusions as to whether claimant has autism. Dr. Sanchez spent approximately one hour with claimant

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and his parents but did not testify at hearing concerning his findings. There was no indication that Dr. Sanchez reviewed Dr. Cronin's report and findings, or the opinions of Dr. Cruz. Dr. Krogseng-Adams reviewed Dr. Sanchez's report and some of claimant's available school and medical records, but never met or spoke with claimant, his parents, school employees or his mental health workers. While the testimony of all of the witnesses was forthright and credible, Dr. Cronin's report and testimony was ultimately more persuasive because she spent over four hours with claimant and spoke with his parents, sister, teacher, speech and language intern, school psychologist, and county mental health therapist. In addition, Dr. Cronin observed claimant at school, and had access to more in-depth records and information. Moreover, Dr. Cronin has an extensive history of assessing individuals for conditions on the autism spectrum. (Factual Findings 27 and 28.) Finally, Dr. Cruz, who treated claimant over a six-month period and advocated for his application for regional center services, reviewed and concurred with Dr. Cronin's findings. (Factual Finding 26.)

5. As set forth in Factual Findings 27 through 39, claimant has established by a preponderance of the evidence that he has a qualifying condition under the category of autism.

6. In order to be eligible for regional center services, an individual with a qualifying condition must also be substantially disabled by the condition. (Welf. & Inst. Code, § 4512, subd. (a).) Substantial disability is defined as the existence of significant functional limitations in three or more of the following areas of major life activity: 1) self-care; 2) receptive and expressive language; 3) learning; 4) mobility; 5) self-direction; 6) capacity for independent living; and 7) economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd. (l).) The term "substantial handicap" is defined in California Code of Regulations, title 17, section 54001, subdivision (a), as a "condition which results in a major impairment of cognitive and/or social functioning" that requires "interdisciplinary

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planning and coordination of special or generic services to assist the individual in achieving maximum potential." Whether an individual suffers from a substantial disability in cognitive and/or social functioning depends on his functioning in a number of areas, including: communication skills, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency. (Cal. Code Regs., tit. 17, § 54001, subd. (b).) Claimant established that he is substantially disabled as a result of autistic disorder. (Factual Findings 37.)

FIFTH CATEGORY ELIGIBILITY

7. According to Dr. Sanchez's intelligence testing, claimant's FSIQ was measured at 75. This is in the borderline range. (Factual Finding 42.) Dr. Krogseng-Adams opined that claimant's FSIQ measurement was brought down by his low scores in processing speed and expressive language that she attributes to ADHD and a speech delay rather than mental retardation. (Factual Finding 51.) Dr. Cronin opined that claimant would benefit from treatment similar to that required of individuals with mental retardation. (Factual Finding 50.) In addition, the school psychologist with whom Dr. Cronin spoke predicted that claimant would benefit from participating in the district's life skills class that would provide a foundation for community based instruction in an effort for claimant to live semi-independently when he transitions to adulthood. (Factual Finding 29.)

The evidence established that claimant is of borderline intelligence and that he has a condition closely related to mental retardation and requires similar services as those required by people with mental retardation.

CONCLUSION

8. The evidence established that claimant qualifies for services pursuant to Welfare and Institutions Code section 4512 under autism and the fifth category. The

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evidence also established that claimant's disability is substantial and is expected to continue indefinitely. Claimant, therefore, is eligible for regional center services.

ORDER

The appeal of claimant from the service agency's denial of regional center eligibility is granted. Claimant is eligible for regional center services.

DATED: 10/16/13

_________/s/__________________________

JILL SCHLICHTMANN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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

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