BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT,[1] vs. CENTRAL VALLEY REGIONAL CENTER, Service Agency.	OAH No. 2018010238

DECISION

This matter was heard by John E. DeCure, Administrative Law Judge with the Office of Administrative Hearings, on February 27, 2018, in Merced, California.

Claimant, who was not present, was represented by his mother (mother).

Central Valley Regional Center Inc. (CVRC or service agency) was represented by Shelley Celaya, Program Manager.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on February 27, 2018.

ISSUE

Does claimant have a developmental disability, in particular Autism Spectrum Disorder (ASD), entitling him to receive regional center services?

[1] Claimant's and his relatives' and caretakers' names are omitted to protect their privacy.

FACTUAL FINDINGS

1. Claimant is a six-year-old male. He seeks eligibility for regional center services based on a July 2017 diagnosis of ASD made by licensed psychologist Uvaldo Palomares, Ed.D. Claimant's claim for eligibility is further based on observations by mother, claimant's maternal grandmother, and his maternal uncle, all of whom testified at hearing.

2. On December 27, 2017, CVRC sent a Notice of Proposed Action to claimant, informing him that CVRC had determined he is not eligible for regional center services. On January 4, 2018, claimant requested a fair hearing.

BACKGROUND INFORMATION

3. Claimant was born weighing six pounds, 13 ounces, with prenatal exposure to methamphetamine and marijuana, but otherwise without any noted complications. His birth parents had a history of drug abuse and domestic violence, and engaged in a domestic dispute at the hospital upon his birth. Due to claimant's prenatal drug exposure, the County of Merced (County) detained him as a dependent of the court. Two days later, the County placed him in the home of mother, who had obtained a foster-parent license with the hope of adopting a child with special needs. Mother, who is approximately 37 years of age, resides in Merced with her biological brother, who is approximately 35 years of age. On October 11, 2012, when claimant was approximately nine months old, his biological parents' parental rights were terminated. On January 25, 2013, mother became his legal adoptive mother.

4. According to the County's History of Child Placement Report, claimant was able to sit up and roll at a developmentally appropriate time. Mother testified that he was initially "very easy" to care for as a new baby, despite suffering some withdrawal symptoms. However, at ten months old, he contracted his first common cold, and has

been susceptible to colds since then. He also became inconsolable. He did not speak until he was two-and-a-half years old, and did not speak clearly until he turned three. At that point, be began stuttering, repeating words again and again "until he got them right." His stuttering was worse when he was upset.

CLAIMANT'S FAMILY MEMBERS' OBSERVATIONS

5. Mother enrolled claimant in preschool when he was two years old. She testified that she noticed various behaviors that led her to believe he was "wired differently." He did not call mother "mommy" or "mama." He was obsessed with small toy cars. If another child touched one of his cars, he would cause a fight. He displayed unusual strength and was difficult to restrain. He engaged in head-butting, was sensitive to loud noises, and had heightened skin-sensitivity when having his hair cut, to the point that it was near-impossible for mother to get him to cooperate with haircuts. He insisted on consuming food and drink that was at room temperature, rejecting anything too warm or cold. His drinks had to be filled to the top of the glass, repeatedly. He preferred to eat with his hands instead of utensils. Claimant had an aversion to tags on clothing, and insisted on wearing jeans, shirts, and shorts that had pockets. He took his toy cars everywhere. He also lined up objects, including his cars, blocks, and balls. He engaged in "fecal painting" by smearing his fecal waste on walls in the home.

6. Mother further described signs she noticed that made her believe claimant may have been autistic. As claimant grew older, he engaged in spinning himself in circles. He was averse to noise and became overwhelmed if too much activity surrounded him, such as in a restaurant or bowling alley. He constantly chewed his fingernails, and other objects, including his toy cars, damaging his teeth. He reacted to having his toenails cut as if it was "torture." He fixed on sharp objects, such as knives, without awareness of their danger. He seemed impervious to pain, running barefoot on hot pavement during the summer. He eloped frequently, running away so quickly that

mother had difficulty catching him. Claimant often had "meltdowns," becoming enraged and inconsolable. He displayed an extraordinary memory.

7. Mother noted several problems claimant has with communication. He has difficulties communicating, such as repeatedly failing to respond to the same question, then growing angry at the questioner, as if claimant had already responded and was annoyed at being asked again. He does not know how to match his emotions with the situation at hand, such as smiling when mother wept over her recently deceased grandmother. He will kick and bite his sister or his uncle, becoming upset for unpredictable reasons. He can be self-injuring, putting himself down, and punching himself when upset. Claimant is highly competitive and cannot tolerate losing. He has destroyed several electronic tablets after playing a game on them and becoming upset with the outcome. Claimant is highly dependent on routines, and any deviation, such as taking a different way home from school, upsets him.

8. Mother earned an associate of arts degree in child development and a bachelor of arts degree in sociology, and she has worked in child day-care settings for years. She considers herself a very good observer of children's behavior and expressed tremendous dismay with CVRC for what she sees as its failure to properly assess claimant as autistic and make him eligible for services. She brought claimant to CVRC's October 2017 assessment and recalled that claimant eloped from CVRC's testing area so quickly that the examiner, Kaitlin Nichols, Psy.D., and mother had to halt everything and chase claimant outside the building. Mother was critical of Dr. Nichols' reportage of the incident, which she believed was noted incorrectly and not given sufficient weight in Dr. Nichols' assessment. Mother alleged that Dr. Nichols falsified information, asking mother only three or four questions, but fabricating the answers to many other questions she never asked mother. Mother contended the Vineland-3 adaptive testing

information, which the report says was based on input from mother, was not supplied by her, but instead was supplied by Dr. Nichols.

9. Mother's brother, who is claimant's maternal uncle (uncle), testified about claimant's behaviors he has observed in the home. Claimant has "acted out" over routine things such as wanting a snack, or when a banana would break apart while claimant was eating it, or when asking a question and receiving an answer he did not like. He is attracted to knives, which have been locked away as a result, and he might elope and run directly into the road without any sense of fear or safety. Once, he located a butcher knife and ran at uncle, threatening him with it. Claimant has a remarkable memory, is very intelligent and very athletic. He demands routines but needs much prompting with activities like dressing himself. He will run late and miss the school bus if not adequately prompted to complete his morning tasks. He has difficulty sleeping regularly; one night, he awoke uncle while in a sleep state, hitting uncle because he believed uncle had taken his toy cars. If claimant gets upset, he may try to hurt himself. He is obsessed with certain video games, and balls of all types. He has sensory issues, such as "freaking out" when it rains and attempting to strip off his clothing if rain gets him wet. Claimant has regressed in the area of potty-training twice.

10. Claimant's maternal grandmother (grandmother) testified regarding claimant's behaviors she has observed. She lives several houses away from claimant's home and sees him up to six days per week. She witnessed the knife incident uncle described, and was also threatened with the knife before claimant was disarmed. She considered this episode to be deeply concerning. She worked as an elementary school resource aide for 26 years and has worked with special needs children, and opined that claimant displays autistic-like behaviors as follows. Claimant must be asked nicely to do things, not directed or told; if he is ordered to do something, he will automatically refuse. As a one-year-old, claimant engaged in head butting, rocking, and throwing

objects. He presently exhibits repetitive behaviors. He will spin in circles, line up his toy cars, and he refuses to function without his toy cars present. He has a very good memory, and can recall obscure details regarding makes and models of all sorts of automobiles. He has sensory problems, as displayed by his trouble tolerating haircuts. He chews constantly, and always has to have something in his mouth. He wears headphones when out to dinner, so he can avoid being overwhelmed by the ambient noises in restaurants. He is bothered by cluttered décor hanging on restaurant walls.

11. Grandmother is constantly concerned claimant will elope and run outside, because he has no sense of safety or danger. He is very smart and will devise ways to elope, frustrating his family's measures to keep him inside and safe. He displays fearlessness, has "meltdowns" when he is angry, and throws objects at people. He has trouble expressing himself, becoming angry if his sister is doing something without including him, but not realizing that he did not ask, or try, to participate in the activity. He is reluctant to show affection, hugging relatives "backward," while partly turning away. Claimant plays and socializes well with cousins he knows, but must be reintroduced to relatives he sees less often. He will typically "buddy" with one other child when playing. Sometimes he has difficulty sleeping, waking during the night and not going back to sleep. Claimant does not want to be touched, insists on having a routine, and will have a "meltdown" if upset by a change in routine. He does not understand joking or humor and may get upset if people laugh. If a new person is around him, he displays none of his unusual behaviors; grandmother opined that he goes through this "honeymoon phase" when he is examined for possible autism. He behaves differently toward people if they are in a different setting than the setting most normal to him.

12. Grandmother opined that claimant has become "a little more aggressive" since recently entering kindergarten. He displays more language, and dances in a more

sexually suggestive manner. Regarding living skills, he struggles to cope with his feelings, can become violent "out of the blue," and often doesn't get along with his sister and other relatives. Claimant eats with his hands and fidgets at the table when eating. He makes odd, concerning facial expressions. He can be alternately mean and very kind toward the family's pet dogs. He obsessively removes the dogs' collars. In sum, grandmother opined that claimant is autistic, but believes his autism is "not severe by any means."

CLAIMANT'S EVIDENCE REGARDING DISABILITIES

13. Claimant relied on a Comprehensive Diagnostic Evaluation report authored by Uvaldo Palomares, Ed.D., a licensed psychologist who evaluated claimant on July 12, 2017. Dr. Palomares took a family history from mother, reviewed records of services provided by Aspira Wellness Education, Inc. (Aspira), observed claimant, and administered psychological assessment testing.

14. When Dr. Palomares observed claimant, he noted claimant had brought his toy cars with him, which mother "skillfully" removed without claimant noticing the removal as other toys were introduced. Claimant could not get a jack-in-the box to open and initially refused Dr. Palomares' offer of assistance in fixing the toy, but after some frustration, he asked Dr. Palomares in a clear manner for help. Claimant sometimes responded readily to his name, and at other times stared "into space." He played excitedly with a balloon. He was not affectionate toward Dr. Palomares or mother during the examination. He gazed at a remote control toy animal as directed, but showed no further interest in the toy. A bubble machine was playfully withheld from him, after which he made an angry face, turned his back, and refocused himself on another toy. He fixed on an airplane and ignored the introduction of other toys. During a "birthday party," he showed much interest in the objects of a birthday party, rather than in the doll whose birthday was being celebrated.

15. Based on his observations of claimant, Dr. Palomares utilized the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) assessment modules to assess claimant's communication, social interactions and play for the purpose of diagnosing ASD. Claimant's score of 14 was above the minimum cut-off score of 12 for ASD, and was interpreted as a "moderate level of evidence" of ASD-related symptoms.

16. Dr. Palomares also administered the Gilliam Autism Rating Scale – Third Edition (GARS-3), a 56-item rating scale to assess autism-like behaviors, which was completed by mother. The GARS-3 results indicated a "very likely" probability of ASD "requiring very substantial support."

17. In his report, Dr. Palomares considered claimant's condition relative to diagnostic criteria for ASD as set forth in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5).[2] However, his findings as to whether claimant met or failed to meet the criteria were stated only in conclusory terms as follows:

- Severity level for social communication: Level 2, requiring substantial support
- Severity level for restricted, repetitive behaviors: Level 3, requiring very substantial support
- Without possible accompanying language impairment:
- Without accompanying cognitive impairment
- Not associated with known medical factors:
- Associated with other neurodevelopment disorder: ADHD
- Symptoms present in early development period
- Symptoms are causing clinically significant impairment in social and other areas of current functioning.

---

[2] The Diagnostic and Statistical Manual of Disorders is a generally accepted tool for diagnosing mental and developmental disorders.

Dr. Palomares further concluded that claimant has ASD, and currently meets criteria for a DSM-5 diagnosis of 299.00 (F84.0) ASD. He recommended Applied Behavior Analysis (ABA)[3] therapy, and further diagnostic testing to rule out disruptive, impulse-control and conduct disorders.

SERVICE AGENCY'S EVIDENCE

Evaluation by Dr. Redwine

18. Claimant has been evaluated twice for ASD by CVRC assessors. His first evaluation was performed on June 30, 2015, by Katherine Redwine, Ph.D., a licensed clinical psychologist who detailed her findings in a Psychological Eligibility Evaluation report. Dr. Redwine obtained a history, reviewed CVRC and historical documentation, interviewed mother, performed a phone interview with claimant's then-current therapist at Madera County Mental Health, made behavioral observations, and administered psychological testing, including: the Wechsler Preschool and Primary Scale of Intelligence - Fourth Edition (WPPSI-IV); the Adaptive Behavior Assessment System - Second Edition (ABAS-II); the Childhood Autism Rating Scale - Second Edition (CARS-II); and the Autism Mental Status Examination. Dr. Redwine also considered the diagnostic criteria for ASD as defined in the DSM-5, and found that while some criteria were met:

> many of these [findings] can adequately be explained by [claimant's] prenatal exposure to multiple substances as expressed in a current level of exquisite sensitivity in multiple sensory modalities, as well as what appears to be emerging

[3] ABA generally involves the use of systematic interventions to bring about positive changes in behavior.

ADHD[4] behaviors typified by distractibility, hyperactivity and impulsivity. His most significant issues at this time are his behavioral problems in the form of tantruming and aggression. He would likely benefit from continued treatment through a mental health agency to treat his ADHD and/or any mood disorders as appropriate.

Dr. Redwine's diagnosis of claimant was: F80 Communication Disorder, Unspecified, consistent with relatively stronger expressive than receptive abilities. Dr. Redwine made further recommendations for potential services, evaluations, and re-evaluations which would potentially benefit claimant.

19. On July 30, 2015, a CVRC multidisciplinary eligibility-review team consisting of a physician, a psychologist, and a CVRC intake counselor, performed an "Eligibility Team Review" of Dr. Redwine's recommendations and report, determining that claimant was not eligible for regional center services because he did not meet the DSM-5 criteria for ASD.

Evaluation by Dr. Nichols

20. On October 12, 2017, Kaitlyn Nichols, Ph.D., under the supervision of Emon Abdolsalehi-Najafi, Ph.D., evaluated claimant on behalf of CVRC. Dr. Nichols reviewed claimant's history, CVRC and medical records, County records, and treatment records from Aspira. She considered the results and findings of Dr. Redwine's evaluation, and Dr. Palomares's evaluation. She interviewed mother and observed claimant. She

---

[4] ADHD is an acronym for Attention Deficit Hyperactivity Disorder, a chronic condition that includes a combination of persistent problems, such as difficulty sustaining attention, hyperactivity and impulsive behavior.

administered testing, including: the WPPSI-IV test; the Vineland Adaptive Behavior Scale – Third Edition (Vineland 3), which assessed communication, daily living skills and socialization to measure the subject's adaptive behavior; and the Childhood Autism Rating Scale: Second Edition/ Standard Version (CARS-2-ST), a screening tool designed to differentiate children with autism from those with other developmental delays. Dr. Nichols wrote a Psychological Eligibility Report detailing her findings.

21. Claimant presented as clean and well-groomed, greeting the evaluator with an immediate "Hello," and appropriately maintaining personal space and a reciprocal handshake. Once in the evaluation room, he was easily engaged by a foam dart rocket the evaluator showed him, and received assistance on how to launch it. He was introduced to a ball and initiated a reciprocal game, and demonstrated good eye contact and social smiling. He laughed when the evaluator kicked a basketball to him. Later, he asked to draw, wrote his name a few times, and drew a house upon the evaluator's request. He demonstrated joint attention by asking that letters be drawn so he could copy them, which he did. He imitated the evaluator's actions and responded quickly with good eye contact when called by name. Outside his mother's presence, he attentively discussed school, best friends, favorite activities, and family, relating that he enjoys school, especially recess.

22. Claimant was responsive to testing, cooperating earnestly and without prompts or cues. He displayed anxiety when asking repeatedly if he had gotten the questions right. He smiled warmly when praised by the evaluator. He repetitively made a throat-clearing noise, explaining he was "sick," but did not make the noise during the second half of the evaluation. When mother returned, she showed the evaluator a photo of an autistic child, made statements indicative of ASD symptoms, and said, "This is exactly what [claimant] is like." Claimant responded, "No, it's not." At that point, claimant began to decompensate, displaying impulsive behavior such as pulling the rocket darts

away from the evaluator, and smiling as if enjoying his negative behavior. As mother became frustrated and implored him to comply, claimant became more defiant, doing everything mother told him not to do. Dr. Nichols opined that claimant's motivation was attention-seeking. At one point, mother stood over claimant as he lay on the floor, admonishing him as she stood over him. Claimant, giggling, responded by punching the air. Mother drew her face near claimant, grabbed his hands, and said, "We don't hit Mommy." Claimant showed restraint by not doing so.

23. As the evaluation concluded, claimant gathered and put away the toys he had played with. Upon his exit, he fled the building, running from Dr. Nichols and smiling back at her; yet she interpreted this as a behavioral game he played "in which he exemplified referencing, by looking back to this evaluator and smiling, social/emotional reciprocity, and was gauging others emotions." Dr. Nichols was able to take claimant's hand and bring him back into the building.

24. Dr. Nichols administered WPPSI-IV testing, which measures general thinking and reasoning skills, and provides information about the subject's cognitive strengths and weaknesses. Claimant's testing revealed a Full Scale Intelligence Quotient (FSIQ) of 90, which is within the average range.

25. Dr. Nichols administered Vineland-3 testing, which measures adaptive behaviors, resulted in a composite score of 85, placing claimant within borderline moderately low to average range. His socialization domain score of 90 was considered to show an adaptive strength. His testing within the communication domain revealed that he could always follow instructions with two related actions, identify three actions in a book, and respond to questions that ask "who." He only sometimes followed instructions with one action and two objects, paid attention to a show for 30 minutes, or identified left and right sides of his body. He never followed instructions requiring three actions, paid attention to a 60-minute-long show, or understood sarcasm. Regarding

daily living skills, he could always choose exercise for health and enjoyment, clear dishes, utensils, napkins, and cups after eating, and operate two electronic devices. He only sometimes understood safety precautions while riding in a car. He never remained a safe distance of his caregiver in a public space, prepared simple snacks, or made healthy eating choices. Regarding socialization, claimant could always respond positively to the good fortune of others, play simple card games, and copy others' appropriate behaviors. He was sometimes willing to compromise with peers. He could never control hunger or hurt feelings, refrain from entering a group when given unwelcoming verbal cues, or converse about topics uninteresting to him. Claimant's motor skills revealed he could always hop on one foot without falling, catch a beach ball from six feet away, and draw a freehand triangle while looking at an example. He sometimes drew a straight line using a ruler, and could never cut out simple shapes, pedal a tricycle, or catch a tennis ball.

26. Dr. Nichols tested claimant using the Childhood Autism Rating Scale, Second Edition (CARS2-ST), a screening tool designed to differentiate children with autism from those with other developmental delays. Fifteen different behaviors associated with autism are rated from normal to severely abnormal using a scale from 1 to 4. Those scores are then used to calculate a total CARS-2-ST raw score. Individual scores of 2 or higher and total scores of 30 or higher suggest an increased probability of autism. Claimant's raw total score was 19.5, evidencing minimal to no symptoms of ASD. Claimant demonstrated "moderately abnormal responses" in the domains of Emotional Response, and Activity Level.

27. Dr. Nichols described claimant's strengths and challenges relative to diagnostic criteria for ASD as set forth in the DSM-5. Her findings as to whether claimant met or failed to meet the criteria are set forth below in parentheses following each

criteria description:

> A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history.

1. Deficits in social/emotional reciprocity.

> ([Claimant] was observed during the course of this evaluation to frequently initiate social interaction with this evaluator in multiple ways. [Claimant] often created behavioral games which involved social/emotional reciprocity and referencing, which often involved gauging others' emotions. Throughout the evaluation, [claimant] demonstrated adequate pragmatic and social use of language. He was also observed to evidence an appropriate social smile, share enjoyment with others, and responded to this evaluator's praise. Furthermore, he demonstrated an ability to engage in social simple games. It was this evaluator's belief that his mother's reports of social difficulties and overt aggression are highly consistent with the presence of prenatal exposure to multiple substances and an affective disturbance.
>
> **Criteria not met**)

2. Deficits in nonverbal communicative behavior.

> (Per observation, [claimant] is able to make and sustain socially appropriate eye contact as observed. Contrastly [*sic*],

[claimanto's] mother reported having to go to great lengths in order for [claimant] to maintain appropriate eye contact with others on a daily basis.

Criteria subclinical)

3. Deficits in developing, maintaining, and understanding relationships.

(While talking with[claimant], he was able to identify two close friends that he interacts with at school. He was also able to differentiate one of his friend's interests that is not necessarily one of his own. Towards the latter half of his evaluation, [claimant] evidenced inappropriate expression of emotions, while he was observed to laugh and smile while his mother was observably frustrated. [Claimant] was observed to adhere to social conventions and appropriate social behavior as evidenced by his ability to greet the evaluator, shake her hand, and clean up his toys.... Per parent report, school has been exceptionally helpful in [claimant] learning to cooperate with other same-aged peers.

Criteria subclinical

Zero criteria out of three criteria was met with two being sub-clinical.

Current severity: Level "Not applicable as category A was not met")

B. Restricted, repetitive patterns of behavior, interest, or activities, as manifested by at least two of the following currently or by history.

1. Stereotyped or repetitive motor movements, use of objects, or speech.

([Claimant] was reported to have a history of rocking his body and spinning as a child; however, these were not observed during the course of this evaluation. [Claimant] was observed to make a noise in which he cleared his throat repetitively throughout the beginning half of this evaluation. After testing, [claimant] completely lacked this grunting noise and this evaluator did not observe this behavior for the rest of the evaluation.

Criteria not met)

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior.

([Claimant] evidenced no difficulty with transitions during the course of this evaluation. Per parent report, [claimant] has a history of difficult transitioning. [Mother] noted that at the age of three [claimant] would know if they used a different

route while traveling home. [Claimant's] speech was negative for rigid thinking patterns or idiosyncratic greeting rituals.

Criteria not met)

3. Highly restricted, fixated interests that are abnormal in intensity or focus.

(Per parent report, [claimant] used to have a highly fixated interest regarding his pockets, his shorts, as well as cars. According to [mother], his interest in pockets has subsided. While cars were presented to him during the course of this evaluation, he did not interact with them at all.

Criteria not met)

4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment.

(Per parent report, [claimant] was reported to have multiple sensory sensitivities to tactile sensations, biting objects, and noises. He was observed to exhibit sensory sensitivities and a tendency to bite objects, only after his mother indicated that he should not bite a specific object.

Criteria subclinical

Zero out of four criteria were met with one being subclinical.

Current severity: Level "Not applicable as category A was not met")

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

(Not applicable as category A was not met.

Criteria not met)

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

(Not applicable as category A was not met.

Criteria not met)

E. These disturbances are not better explained by intellectual disability (Intellectual Developmental Disorder) or global developmental delay. Intellectual Disability and Autism Spectrum Disorder frequently co-occur; to make comorbid

diagnoses of Autism Spectrum Disorder and Intellectual Disability, social communication should be below that expected for general developmental level.

(Not applicable as category A was not met.

Criteria not met)

28. Dr. Nichols noted that categories A through E must be met, with three criteria from category A and at least two criteria from category B, for a diagnosis of ASD. Because claimant did not meet any of the above criteria from category A or B, a diagnosis of ASD was inappropriate. Dr. Nichols noted this was consistent with claimant's CARS-2 raw score of 19.5, which indicated minimal to no symptoms of ASD. She further noted the lack of support in CVRC's other documentation which did not support an ASD diagnosis, with the exception being Dr. Palomares's report. Because testing scores were not provided in his report, Dr. Nichols could not comment on the discrepancies of his findings. Dr. Nichols noted her current findings were more consistent with the findings from Dr. Redwine's 2015 evaluation of claimant. Dr. Nichols opined that claimant's current behavioral difficulties were more likely attributable to an "underlying affective disturbance which would require further assessment and evaluation." Dr. Nichols believed that diagnoses of ADHD, and prenatal exposure to marijuana and methamphetamines, per history, were warranted.

29. On December 27, 2017, CVRC's Eligibility Review Team issued a report detailing its review of claimant's psychological evaluation performed by Dr. Nichols along with other relevant records and documents, and indicated its agreement that claimant did not meet the clinical criteria for a diagnosis of ASD in accordance with the DSM-5. Thus, the team determined claimant was not eligible for regional center services.

Testimony of Dr. Yang

30. Dr. Kao Yang is a CVRC Staff Psychologist, serves as a CVRC eligibility reviewer, and has been performing eligibility assessments for CVRC for over 11 years. She also reviews and considers cases in which parents of potential regional center clients are appealing a CVRC decision of ineligibility. Dr. Yang testified that the Eligibility Team reviewed all of the available records and information regarding claimant in making its determination regarding his eligibility for services as a potential CVRC client. Dr. Yang agreed with the team's determination regarding claimant's ineligibility as follows.

31. Dr. Yang reviewed the findings of Dr. Nichols, which she believed were well-considered and supported by reliable test results. In particular, the CARS2-ST raw score of 19.5 indicated claimant had minimal to no symptoms of ASD; and none of the DSM-5 criteria under subdivisions A or B were met, meaning there could be no diagnosis of ASD. Although claimant's Vineland 3 scores were relatively low, they were based on mother as the informant, and the overall composite score of 85 was not below 70, a level which generally represents two standard deviations and indicates substantial disability. In addition, socialization is a core deficit among children with ASD, yet claimant's score of 90, is well above the low benchmark of 70.

32. Dr. Yang reviewed the findings of Dr. Redwine's 2015 evaluation and found them to be persuasive. Using the DSM-5 criteria, Dr. Redwine had noted only one criterion under subdivision A was met, a result insufficient to support a diagnosis of ASD.

33. Dr. Yang was critical of Dr. Palomares's diagnosis of ASD, based on his evaluation and report, because Dr. Palomares provided only scant, conclusory details in support of his determination that claimant met the DSM-5 criteria. Whereas Drs. Redwine and Nichols set forth their analyses and diagnoses in thorough detail, Dr.

Palomares did not sufficiently demonstrate, through each criteria, how he reached his diagnosis.

34. Mother did not agree with the eligibility decision and filed an appeal. On January 18, 2018, she met with CVRC personnel and reached an agreement that Dr. Yang would conduct a school observation of claimant in order to gather additional information.

35. On February 8, 2018, Dr. Yang observed claimant in his kindergarten classroom at Franklin Elementary School in Merced for approximately one hour and 15 minutes. As background, Dr. Yang noted that claimant was enrolled in regular education and did not currently have an Individualized Education Program (IEP[5]). Dr. Yang further noted that on August 16, 2017, claimant's current teacher, Ms. Cardelia, had participated in a Merced City School District (MCSD) "Student Success Team Meeting" attended by a Resource Specialist Program teacher, a Learning Director, the School Psychologist, mother, and claimant's sister. The MCSD meeting notes state that on October 5 and 6, 2016, an MCSD preschool team conducted preschool classroom observations of claimant, and "no characteristics of Autism were observed; there were no areas of suspected disability identified by [the] school psychologist."

36. Dr. Yang testified that on February 8, 2018, claimant was not formally made aware of her presence during her observation, which took place both in the classroom, and outside during recess. The observation began with claimant and other students sitting and listening to the teacher reading a story. The teacher periodically asked the students questions about the story's characters and plot. Claimant quietly sat

---

[5] A child eligible for special education services due to a learning disability must have an IEP, which is a written statement of the educational program designed to meet a child's individual needs.

and listened to the story. At one point he began to play with his jacket and his teacher took it away. He counted numbers with other students and talked with a boy sitting behind him. He raised his hand appropriately when the teacher asked questions, and when called on he provided an appropriate answer. When the teacher asked if the students liked the story, claimant nodded and gave a thumbs-up sign. When he began to speak with the same boy behind him again, his teacher asked him to turn around and he complied. Claimant attempted to get a nearby female student's attention by talking to her. The class sang a song, and claimant sang along, smiling at the other students as they sang. He continued talking with the boy behind him.

37. During a classroom "Sentence Starter" group activity, claimant sat between a boy and girl student, smiling and talking and making good eye contact with the boy, who was being silly. Claimant picked at his mouth, then worked on his assignment and looked around the classroom. He used his pencil to point to another student's paper and asked him a question. He completed the assignment, handed it in, and smiled as the teacher gave him feedback. He went back to his group and spoke with the girl student, corrected his assignment, and returned it to his teacher again. His teacher directed him to complete his drawing. He noticed another boy and asked him, smiling, "Hey, where's your tooth?" He followed the other boy to the teacher and laughed and smiled when the teacher commented on the silliness of the other boy's assignment. Claimant returned to his seat and colored his picture, engaging in a reciprocal discussion with the girl student about how his picture looked. He turned in his assignment, smiling, and told his teacher that he and mother jumped in puddles on rainy days. He put away his assignment, as instructed. He then picked out an iPad device, turned down another student's offer of headphones, saying "I already got one," and sat with other students as he searched through Apps on the iPad. He accessed his teacher when he needed assistance with the iPad, and told another student to wait,

when she tried to get his attention while he was using the iPad. He then told her what he found on the iPad, and spoke to other students as he played with the device. When the activity was over he put the iPad away.

38. Claimant interacted appropriately with other students after the iPad activity. The teacher told another student to pick up a fallen backpack, and claimant went over and helped the boy pick it up. During the following reading activity, claimant fidgeted but was appropriately engaged, at one point spontaneously asking a question about the book cover the teacher was discussing. Claimant utilized pointing and was verbally engaged with the teacher. When recess was about to begin, he lined up first, and wanted another student to be in front as well.

39. At recess, Dr. Yang observed claimant interacting with other students, talking with them, then joining a bigger group of students and running around the playground. He took one boy's jacket, ran off with it, then gave it back to the other boy, as if he had wanted the other boy to chase him. At the end of recess claimant ran off to stand in line, and was the first student to line up. While in line, he spoke with other students, smiling and pointing appropriately.

40. Dr. Yang interviewed Ms. Cardelia prior to the observation. Ms. Cardelia reported that claimant did "very well" in school and was academically in her highest group. Claimant behaved "like a typical six-year-old," and Ms. Cardelia had "no issues" with his behavior. Following the observation, Dr. Yang made a follow-up phone call to Ms. Cardelia and asked if the observation represented a "good snapshot" of claimant's typical behavior. Ms. Cardelia said yes. Dr. Yang asked Ms. Cardelia if she had any concerns about autistic behaviors, but Ms. Cardelia had none. She reported that claimant has the same difficulties with transitions as the other students, but does not get angry and has never thrown a tantrum or fit. Claimant has lots of friends, gets along with other children, is well liked, and "always does fine with everybody." He is "very

verbal" and "goes with the flow" with Ms. Cardelia. Claimant is not scared or shy, and approaches Ms. Cardelia and the instructional assistant.

41. Dr. Yang opined that claimant did not demonstrate symptoms that would support a diagnosis of ASD, because while social deficits are "at the core" of ASD, throughout the observation claimant demonstrated social-emotional reciprocity with others in a variety of forms. His nonverbal communication was also appropriate, and his facial expressions were congruent with his feelings and appropriate with the context. He interacted well with other students both inside and outside the classroom, showed interest in others, and engaged in typical play. He did show fidgetiness and picked at his lip, but not pervasively in a way that interfered with his duties. He displayed no fixated interests and no sensory sensitivities.

42. When questioned by mother about whether claimant was essentially masking his autistic behaviors in the presence of evaluators, Dr. Yang said that in her opinion, this was not the case. Dr. Yang credibly explained that in her experience, ASD behaviors are consistently apparent from one setting to another. "A child cannot selectively be autistic," Dr. Yang stated. Dr. Yang did not attribute claimant's lip-biting and fidgetiness as signs of ASD, but opined that they were consistent with hyperactivity.

DISCUSSION

43. Dr. Palomares's lone diagnosis that claimant suffered from ASD was not supported by a thorough analysis of the criteria set forth in the DSM-5 for establishing such a diagnosis. Dr. Palomares's findings were contradicted by Dr. Redwine's 2015 evaluation report of claimant, and by Dr. Nichol's 2017 evaluation and report, both of which demonstrated, step-by-step, how those evaluators had interpreted each category of the DSM-5 criteria to reach their diagnoses.

44. Dr. Yang's recent observation of claimant in his school setting revealed that claimant displayed no ASD symptoms or characteristics, but instead showed him to

be a well-liked student who interacted appropriately with his teacher and classmates. Previously MCSD had observed claimant over a two-day period in 2016, and no autism characteristics were noted. Claimant is placed in a regular education kindergarten setting and appears to be thriving. Claimant's teacher reported no concerns or issues with regard to claimant, and she considers him to be in her highest group academically. No IEP is in place, and no special education services are being provided, as none seem necessary.

45. At hearing, mother presented as a fiercely dedicated advocate on claimant's behalf. She sincerely believes claimant suffers from ASD and requires regional center services in order to develop further and succeed. However, her contention that Dr. Nichols falsified information during her evaluation of claimant was not supported by any evidence. Dr. Nichols's report was detailed, thorough, and absent any judgment or criticism toward mother. Dr. Nichols's description of claimant's elopement was well-reported and included an analysis of that behavior in the context of the evaluation; there was nothing to indicate incorrect or false reporting, as mother had alleged. Mother also contended that MCSD had merely observed claimant in preschool "for five minutes" in 2016, rendering their observation process dishonest and illegitimate. Yet mother offered no evidence in support of this contention. By contrast, claimant's schooling was an apparent strong point. Dr. Yang assessed MCSD's Student Success Team's involvement, observed and interviewed claimant's teacher, and observed his classroom and playground activities. Dr. Yang credibly opined that claimant's current educational setting was appropriate.

46. Although mother and witnesses close to claimant testified credibly that they had observed claimant exhibiting certain autistic-like behaviors, this anecdotal evidence was not sufficient to offset the testing, observations, and analyses of CVRC's two expert assessors. Drs. Redwine and Nichols provided the only comprehensive

analyses, assessments and reports on the issue of ASD, and both convincingly reached the conclusion that claimant did not meet the DSM-5 criteria for establishing an ASD diagnosis. At the hearing, claimant fell short of refuting these findings.

47. The evidence did not establish that claimant suffers from significant functional limitations in three or more areas of substantial disability as required under the Lanterman Act, and Title 17 regulations, to qualify him for regional center services. This result underscores claimant's ineligibility for regional center services under the diagnoses of ASD.

48. The totality of the evidence failed to establish that claimant suffers from ASD, or that he suffers from any area of substantial disability identified in the Lanterman Act and Title 17 regulations.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability (Autism Spectrum Disorder) which would entitle him to regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act).

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

> a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.... This [includes] intellectual disability, cerebral palsy, epilepsy and autism. [It also includes] disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

> "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.

5. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

6. The totality of the evidence did not establish that claimant suffers from an area of substantial disability in any specific category. No areas of significant functional limitation within the definitions set forth above were supported by the evidence.

7. In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: intellectual disability, cerebral palsy, epilepsy, and autism. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512.)

8. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with either a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone

whose conditions originate from just the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does *not* have a developmental disability would not be eligible.

9. Claimant maintains that he is eligible for regional center services under a diagnosis of Autism Spectrum Disorder. This diagnosis was not established by the totality of the evidence. Therefore, a preponderance of the evidence does not support a finding that claimant is eligible to receive regional center services.

ORDER

Claimant's appeal is denied. The Service Agency's determination that claimant is not eligible for regional center services is upheld.

DATED: March 13, 2018

_____

JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)