BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: Claimant, vs. FAR NORTHERN REGIONAL CENTER, Service Agency.	OAH No. 2017110331

DECISION

This matter was heard before Administrative Law Judge Ed Washington, State of California, Office of Administrative Hearings (OAH), in Chico, California, on July 10, 2018.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Claimant was present and represented by his mother, and stepmother, who appeared at hearing telephonically.

Oral and documentary evidence was received.At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Is claimant eligible for regional center services based on a qualifying condition of autism or based on a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability, commonly referred to as "the fifth category," because he has a condition closely related to intellectual disability, or that requires treatment similar to that required for

individuals with an intellectual disability pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?[1]

FACTUAL FINDINGS

1. Claimant is a forty-four-year old man seeking eligibility for services from FNRC. He lives independently in his own home, and is divorced with a seventeen-year old son. He seeks regional center eligibility based, in part, upon a diagnosis of Asperger's Syndrome stemming from a 2010 neuropsychological evaluation. Claimant reported experiencing socialization challenges as a child. As an adult, he has found it difficult to remain gainfully employed in a field that suits him. Claimant has also experienced medical difficulties as an adult, including a heart attack, neuropathy (drop foot), carpal tunnel syndrome, alcohol dependency, and reported bouts of depression and anxiety.

2. Robert Magee, Ph.D. is a licensed psychologist. In June and July 2010 he subjected claimant to a neuropsychological evaluation, and prepared a seventeen-page evaluation report. Claimant sought this evaluation "for learning difficulties and to understand himself better." Claimant wanted "to find out what's going on, what [he] might be good at … what kind of help [he] may need, why [he] is overweight, and what psychological factors contribute to [his] unemployment." Dr. Magee interviewed claimant, claimant's mother, and claimant's stepmother to obtain a complete history, and administered the following testing instruments:

Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV)

Wechsler Individual Achievement Test, Second Edition

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[1] Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

(WIAT-II)

Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2)

The California Verbal Learning Test (CVLT-II)

Nelson-Denny Reading Test

Test of Auditory Processing (SCAN-A)

Delis-Kaplan Executive Function System (D-KEFS)

3. Dr. Magee determined that claimant's writing was in the borderline range of impairment when his score on the Written Expression subtest of the WIAT-II was compared to his general intellectual functioning scores (Average: 86-104). Claimant also had borderline impairments in reading speed and comprehension. Additionally, Dr. Magee determined that claimant exhibited impairment in three primary areas of cognitive functioning: (1) Severe impairment on all Auditory Processing subtests except the Competing Sentences subtest; (2) borderline impairment in working memory; and (3) borderline impairment in visual scanning and visual data processing.

4. Dr. Magee determined that claimant was less capable than others of his age and intelligence at coping with emotions and stress. He felt claimant was particularly vulnerable to painful emotions, such as anger, sadness and shame, to which he responded by becoming immobile and isolated. Dr. Magee also noted that claimant's inability to create and sustain fully reciprocal relationships as "a significant concern," because claimant does not have the full capacity to reciprocate in an expected manner. Despite these concerns, Dr. Magee felt claimant was "a very likeable personality and is quite engaging on the level that he is capable of … who seems to have a very brilliant understanding about

the ways that mechanics operate [which] should probably be cultivated."

5. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR[2]) was the standard for diagnosis and classification when Dr. Magee evaluated claimant. At the conclusion of the evaluation, Dr. Magee reached the following DSM-IV-TR diagnostic impressions:

Axis I: **299.80** Asperger's Disorder

300.40 Dysthymic Disorder, Early Onset

315.20 Disorder of Written Expression – Organization, Content & Structure

315.00 Reading Disorder – Reading Speed & Comprehension

294.90 Cognitive Disorder NOS – Borderline to Severe Neurocognitive Disorder: with severe impairment in Auditory Processing, borderline impairment in Working Memory, & moderate

[2] The DSM-IV-TR is a multiaxial system which involves five axes, each of which refers to a different domain of information as follows:

Axis I	Clinical Disorders
	Other Conditions That May Be a Focus of Clinical Attention
Axis II	Personality Disorders
	Mental Retardation
Axis III	General Medical Conditions
Axis IV	Psychosocial and Environmental Problems
Axis V	Global Assessment of Functioning

impairment in Visual Scanning/Processing

307.44 Primary Insomnia – difficulty maintaining sleep

305.10 Nicotine Dependence – With Physiological Dependence

303.90 Alcohol Dependence – Sustained Full Remission

Axis II: V71.09 No Diagnosis

Axis III: Unemployment, many medical issues, possible disability

Axis IV: Diabetes, Foot Drop, Hypertension, Cardiomegaly, obesity, and Hypertriglyceridemia

Axis V: GAF: 55 (current)

(Bolding in original.)

6. According to Dr. Magee, the Asperger's Disorder diagnosis was given to capture claimant's primary psychological difficulties. He felt that any withdrawal of attention or limited concentration exhibited by claimant were related to claimant's preoccupation with his emotions, stress, and difficulty relating to others, and did not require separate diagnosis. Dr. Magee also noted that individuals with Asperger's Disorder may be clumsy, exhibit visual-spatial difficulties, and have poor hygiene, and determined that "this appears to be at least partially true for [claimant]."

7. The diagnostic code (299.80) used by Dr. Magee encompassed the diagnosis of Rett's Disorder, Pervasive Developmental Disorder NOS and Asperger's Disorder.

DSM-IV-TR section 299.00, Autistic Disorder, states:

> The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. Manifestations of the

disorder vary greatly depending on the developmental level and chronological age of the individual … The impairment in reciprocal social interaction is gross and sustained … The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills … Individuals with Autistic Disorder have restricted, repetitive, and stereotyped patterns of behavior, interests, and activities.

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

8. The DSM-IV-TR classifies Asperger's Disorder separately from Autistic Disorder as follows:

299.80 Asperger's Disorder:

Diagnostic Features

By definition the diagnosis is not given if the criteria are met for any other specific Pervasive Developmental Disorder or for Schizophrenia (although the diagnosis of Asperger's Disorder

and Schizophrenia may coexist if the onset of the Asperger's Disorder clearly preceded the onset of Schizophrenia.)

Differential Diagnosis

Asperger's Disorder must be distinguished from the other Pervasive Developmental Disorders, all of which are characterized by problems in social interactions. It differs from Autistic Disorder in several ways. In Autistic Disorder there are, by definition, significant abnormalities in the areas of social interaction, language, and play, whereas in Asperger's Disorder early cognitive and language skills are not delayed significantly. Furthermore, in Autistic Disorder, restricted, repetitive, and stereotyped interests and activities are often characterized by the presence of motor mannerisms, preoccupation with parts of objects, rituals, and marked distress in change, whereas in Asperger's Disorder these are primarily observed in the all-encompassing pursuit of a circumscribed interest involving a topic to which the individual devotes inordinate amounts of time amassing information and facts.

9. DSM-5 was released in May 2013. It no longer recognizes a specific diagnosis of Autistic Disorder. The DSM-5 established a diagnosis of Autism Spectrum Disorder (ASD) which encompasses disorders previously referred to as Early Infantile Autism, Childhood Autism, Kanner's Autism, High-functioning Autism, Atypical Autism, Pervasive Developmental Disorder Not Otherwise Specified, Childhood Disintegrative Disorder, and Asperger's Disorder.

10. The plain language of the Lanterman Act's eligibility categories includes "autism" but does not include PDD or the other related diagnoses included in the DSM-IV-TR (Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-5 to reflect the current terminology of ASD. Claimant was originally diagnosed under the DSM-IV-TR, while the DSM-5 was the operative version during his most recent evaluation.

11. On September 8, 2017, FNRC Intake Specialist Ann Popp interviewed claimant and prepared a social assessment report. Claimant provided oral and documentary information regarding his condition. FNRC referred claimant to Clinical Psychologist J. Reid McKellar, Ph.D. for ASD evaluation based on claimant's 2010 diagnosis of Asperger's Disorder, to assist them in determining whether claimant was eligible for regional center services.

12. Pursuant to the Lanterman Act, Section 4500 et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines "developmental disability" as follows:

> "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.... [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability [commonly known as the "fifth category"], but shall not include other handicapping conditions that are solely physical in

nature.

13. California Code of Regulations, title 17, section 54000, further defines the term "developmental disability" as follows:

> (a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
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> (b)The Development Disability shall:
>
> (1)Originate before age eighteen;
>
> (2)Be likely to continue indefinitely;
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> (3)Constitute a substantial disability for the individual as defined in the article.
>
> (c)Developmental Disability shall not include handicapping conditions that are:
>
> (1)Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2)Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3)Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

14. Section 4512, subdivision (l), defines "substantial disability" as:

(l)The existence of significant functional limitation 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.

15. California Code of Regulations, title 17, section 54001, provides:

(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 functional limitation, 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:

(1) Receptive and expressive language.

(2) Learning.

(3) Self-care.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

16. Dr. McKellar evaluated claimant on September 15, 2017, and prepared a twelve-page report. As part of Dr. McKellar's evaluation, he reviewed documents,

interviewed claimant's mother, and administered the following testing instruments: (1) Adaptive Behavior Assessment System, Third Edition (ABAS-3); (2) Autism Diagnostic Observation Schedule, Second Edition, Module 4 (ADOS-2); and (3) The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), symptoms for ASD, which was the standard for diagnosis and classification at the time of his evaluation.

17. The ABAS-3 is an individually administered, norm-referenced assessment of adaptive behavior compatible with the American Association on Intellectual Disabilities and the DSM-5. Based on the input of claimant's mother, each of claimant's qualitative range scores for the nine measured categories were in the "extremely low" range. His composite scores ranked in the 0.1 percentile in the "General Adaptive Composite" and "Conceptual" categories, and in the 0.2 percentile in the "Social" and "Practical" categories. In his report, Dr. McKellar noted that while "[t]he obtained adaptive behavior profile indicates that [claimant's mother] perceives [claimant] as exhibiting pervasive deficits in adaptive functioning across all domains … the profile likely represents an under-estimate of [claimant's] adaptive behaviors."

18. The ADOS-2 is a semi-structured, standardized assessment of communication, social interaction, play or imaginative use of materials, and restricted and repetitive behaviors for individuals referred due to the possible presence of ASD. Claimant's cumulative ADOS-2 score for Communication, Reciprocal Social Interaction, Imagination and Creativity, and Stereotyped Behaviors and Restricted Interests totaled 6, which is in the sub-clinical range.

19. DSM-5 section 299.00, Autism Spectrum Disorder, states:

> The essential features of [ASD] are persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interests or activities (Criterion B). These symptoms must be

present in early childhood and limit or impair everyday functioning. (Criterion C and D)… The impairments in communication and social interaction specified in Criterion A are pervasive and sustained … Manifestations of the disorder also vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. [ASD] encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

To diagnose [ASD], it must be determined that an individual has 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, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. The individual must also have restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests

that are abnormal in intensity or focus, and/or (4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. In addition, symptoms must be present in the early developmental period and must cause clinically significant impairment in social, occupational, or other important areas of current functioning.

20. Dr. McKellar reviewed each of the DSM-5 diagnostic criteria for ASD to determine whether there were sufficient indicators to support a diagnosis. After reviewing the information available to him, Dr. McKellar concluded that claimant did not meet the DSM-5 criteria for ASD, because he only met one of the seven specified criteria for a diagnosis of that disorder. Dr. McKellar added that although Dr. Magee diagnosed claimant with DSM-IV Asperger's Disorder in 2010, that diagnosis was not the result of a standard of practice Autism Spectrum evaluation.

21. Dr. McKellar's report contains the following summary and conclusions:

[Claimant] presented for evaluation at the request of the Far Northern Regional Center. [Claimant] was diagnosed with DSM-IV Asperger's Disorder in 2010, and the diagnosis was based largely on parent report.

[Claimant] was delayed in expressive language in early childhood … [He] exhibited advanced motor skills, he was bold in temperament, and he exhibited hyperactive behavior and a deficit in attention span.

[Claimant] was reportedly teased in elementary school and later years for his learning difficulties, yet [claimant] was able

to form and maintain lasting friendships. [He] exhibited a behavior profile suggestive of conduct disorder in childhood.

[Claimant] has had interpersonal difficulties in the past, and he reported he was in a very unhappy marriage for four years. During this period of time, [claimant] struggled with an extensive alcohol abuse issue, which seemed to have triggered a medical crisis.

During evaluation, [claimant] had a tendency to talk at great lengths about his lifelong history of disappointment and mistreatment … [y]et, [claimant] verbalized insight into his emotions, and his diatribes were more suggestive of residual symptoms of ADHD, and Narcissistic traits [than] Autism. [Claimant] exhibited a sarcastic sense of humor, he utilized expressive intonations, fair use of language pragmatics and liberal use of non-literal speech. [Claimant] integrated gestures with verbalizations, and he demonstrated a strong awareness of social emotions and non-verbal communication. [Claimant] evinced some signs of Depression, with a mild deficit in impulse control.

[Claimant's] performance on the ADOS-2, his social history and the results of the DSM-5 symptom review do not indicate the presence of [ASD]. [Claimant] exhibits numerous residual symptoms of [ADHD] as well as prominent features of Narcissistic Personality Disorder.

DSM-5 Diagnoses:

314.01 Unspecified Attention Deficit Hyperactivity Disorder

300.4 Persistent Depressive Disorder by history

301.9 Unspecified Personality Disorder (consider Narcissistic Personality Disorder)

(Bolding in original.)

22. The FNRC Eligibility Review Team met again on October 11, 2017, to discuss claimant's eligibility for services.After reviewing Dr. McKellar's report, claimant's medical records, Social Assessment, and parental input, the team concluded that claimant had no qualifying developmental disability. Because of that determination, FNRC issued a Notice of Proposed Action (NOPA) informing claimant that he was not eligible for regional center services. The NOPA stated:

> Reason for action:
>
> [Claimant] does not have intellectual disability and shows no evidence of epilepsy, cerebral palsy, autism, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. Psychological records show evidence of Unspecified [ADHD], Unspecified Personality Disorder and Persistent Depressive Disorder, but these are not a qualifying condition for regional center services. Eligibility Review (multi-disciplinary team) determined [claimant] was not eligible for FNRC services based on Psychological dated

09/28/17 J. Reid McKellar, Ph.D. Psychological dated 07/16/10 by Robert Magee, Ph.D. Intake summary/medical history dated 09/08/17 by Ann Popp.

23. Claimant filed a Fair Hearing Request, dated October 19, 2017, which contained the following reason for requesting the hearing: "Don't agree with the psychologist's assessment. We have our own extensive assessment for myself. I need my mother … and [stepmother] to be involved with meeting by phone."

24. Claimant also specified that to resolve his complaint, he would need the FNRC "to [take] into consideration the extensive testing that has been done and [his] mothers' input."

25. Representatives of FNRC, claimant, and claimant's representatives participated in an informal meeting on November 27, 2017. At this meeting, claimant informed the regional center he believed the assessment of Dr. McKellar was invalid and not a true representation of claimant's limitations, based on reported inaccuracies or omission in Dr. McKellar's report. Based on the information presented at this meeting, the regional center's Executive Director, Laura Larsen, deferred the eligibility decision pending an additional ASD assessment by Monica Silva, Ph.D.

26. Dr. Silva testified at hearing. She has been a licensed clinical psychologist for over 20 years. For the past 15 years, her practice has been almost exclusively dedicated to performing psychological assessments for clients or prospective clients of FNRC and Alta California Regional Center. Dr. Silva evaluated claimant on February 8, 2018. She performed an ASD assessment to determine claimant's level of adaptive functioning, and prepared a twenty-page report at the conclusion of her evaluation. As part of Dr. Silva's evaluation, she reviewed records from FNRC, interviewed claimant's mother, completed a clinical interview, made behavioral observations, and administered the ADOS-2 and ABAS-3 test instruments.

27. Dr. Silva described the ADOS-2 as the "established industry standard" for inclusion in a "best practices" evaluation for ASD, which includes taking a detailed history and reviewing records. Claimant's scores from the ADOS-2 were as follows:

> *Language and Communication:*
>
> [Claimant] was notably easy to engage verbally and in many respects, he appeared to enjoy the opportunity to share his thoughts and concerns. He presented with the capacity for fluid speech, used sentences in a largely correct fashion, and one was able to follow him fairly easily in conversation, though he sometimes benefited from questions or comments to stay on track as he could be tangential.
>
> There were no marked idiosyncrasies in speech common to ASD noted. [Claimant's] intonation was typical and he did not exhibit incidences of echolalia, delayed echolalia, or stereotyped or idiosyncratic us of words or phrases. The most idiosyncratic aspect of his presentation was a tendency to share his thoughts in a highly-detailed and sometimes verbose fashion.
>
> [Claimant] spontaneously shared his thoughts, feelings, and experiences and also did so in response to questions or comments. He asked this examiner questions regarding her experiences and left appropriate pauses or made comments in conversation designed to facilitate reciprocity. In general, however, [Claimant] had some difficulty with reciprocal

communication, as he tended to monopolize the conversation and share information in a one-sided monologue fashion.... These challenges were especially notable when [Claimant] discussed his interest in building or rebuilding vehicles....

[Claimant] presented as an animated adult who used all manner of nonverbal gestures which he coordinated with speech.

Communication Total = 1	Autism Cutoff = 3	Autism Spectrum Cutoff = 2

Reciprocal Social Interaction:

[Claimant] presented as an interactive adult who was easy to engage socially and he appeared comfortable relating to an unfamiliar adult. He directed appropriate eye contact and a range of facial expressions and nonverbal gestures that he coordinated with speech.

[Claimant] conveyed his own emotions eloquently and when interacting with him, one sensed that he likely feels emotion strongly. One of the more salient aspects to his presentation was the consistent manner in which he spontaneously mentioned the thoughts and emotions of others in his life, as well as characters he was shown in a book. In many respects, [Claimant] presented as a caring and sensitive individual who appears empathic of the emotions of others.

[Claimant's] insight into typical social relationships, including

his role in those relationships, seemed well-developed and he appeared to have keen understanding of the challenges he has experienced socially throughout his life.... While he endorsed having a history of social difficulties, [Claimant] presented as an individual with a strong need for social connectedness.

This examiner was able to quickly establish and maintain a rapport with [Claimant] in light of his affable and cooperative nature. The most idiosyncratic aspect to his presentation was social immaturity in some respects and a tendency to share information in a one-sided fashion with limits in his ability to understand the needs of the interlocutor. [Claimant] responded well to this examiner's support and redirection.

Social Interaction Total = 3	Autism Cutoff = 6	Autism Spectrum Cutoff = 4

Imagination and Creativity:

[Claimant] made many imaginative comments in conversation and he showed well-developed creativity with his use of novel objects during the creating a story task.

Stereotyped Behaviors and Restricted Interests:

[Claimant]'s passion for mechanics and vehicles was palpable and he shared highly detailed information regarding those interests. However, he also covered a variety of other topics with notable detail as well and his passion for vehicles did not present as a restricted interest.

Other Abnormal Behaviors:

[Claimant] presented as mildly anxious at the outset of the interview, though this dissipated fairly quickly and he developed a strong working rapport shortly after meeting this examiner.

Com/Social Interaction Total = 4	Autism Cutoff = 10	Autism Spectrum Cutoff = 7

[Claimant's] ADOS-2 score did not meet or exceed the Autism Cutoff or Autism Spectrum Cutoff for Module 4.

(Bolding and italics in original.)

28. Dr. Silva also administered the ABAS-3. This time the ABAS-3 test was completed via interview format with claimant, rather than his mother. In her report, she noted that claimant had a good sense of his adaptive skills strengths and weaknesses. Claimant described himself as typically functioning independently, but struggling to make academic gains due to a learning disability. In 2010, Dr. Magee diagnosed him with Specific Learning Disorder in Reading and Written Expression, and Asperger's Disorder, although Dr. McKellar did not find him to meet DSM-5 criteria for ASD in an evaluation completed in 2017. Dr. Silva also noted that claimant had "a long-standing history of symptoms of [ADHD] … and has struggled with symptoms of depression that were exacerbated by a difficult marriage, contentious divorce, and estrangement from his adolescent son." Dr. Silva reached the following conclusions from claimant's ABAS-3 test results:

[Claimant's] cognitive potential has been previously evaluated and the results are difficult to summarize as they range from Borderline to Average. However, [claimant] does not present

> with the global cognitive and adaptive delays characteristic of Intellectual Disability or Borderline Intellectual Functioning. It is not uncommon for individuals who present with characteristics of Specific Learning Disorder and [ADHD] to experience challenges functioning typically.

29. After considering Dr. Silva's evaluation report, along with all the information obtained, Ms. Larson upheld the FNRC's initial determination that claimant was ineligible for regional center services. By way of a letter, dated March 6, 2018, she advised claimant of her determination and noted that the information and assessments indicated that claimant's executive functioning deficits were "best attributed to a diagnosis of ADHD … rather than ASD [and] ADHD is not an eligible condition for regional center services.

30. Christine Austin, M.D., testified at hearing. She is the Medical Director for FNRC and is also a practicing physician with an office in Redding, California. As Medical Director she serves as a member of the Eligibility Review Team. She also performs evaluations to determine whether a person is eligible for regional center services due to autism, cerebral palsy or epilepsy. Dr. Austin is familiar with the Lanterman Act and the provisions that define developmental disability and related exclusionary conditions.

31. Dr. Austin testified that to be eligible for regional center services, a person must first be diagnosed with a developmental disability, which is either cerebral palsy, epilepsy, intellectual disability or autism; or something similar to an intellectual disability in nature or treatment. Once a qualifying diagnosis is confirmed, there must be evidence of substantial handicaps in adaptive functioning.

32. In 2002, the Department of Developmental Services provided the regional center with guidance on what must be included in a "best practices" ASD evaluation. The guidance specified that "best practices" ASD evaluation should include completing "a thorough history, some form of direct observational piece, like the ADOS-2, and a review

of the DSM criteria for [ASD]."

33. Dr. Austin did not evaluate claimant. Her testimony is based on her review of the information and her participation on the Eligibility Review Team. She agrees with the team's conclusions that claimant does not have a developmental disability or ASD.

34. Dr. Austin reviewed Dr. Magee's neuropsychological report and noted that although a diagnosis of Asperger's Disorder was given, it was not a "best practices" evaluation. It had no direct observational component to it and did not sufficiently identify why claimant did or did not meet any of the listed DSM criteria. It appeared to Dr. Austin that everything in the report was determined based on a description of history and no observational component was included. It was due to these deficiencies that the Eligibility Review Team felt an additional evaluation would be helpful in more accurately determining whether claimant had ASD or met any of the other qualifying conditions.

35. Both Dr. McKellar and Dr. Silva performed "best practices" evaluations and concluded that claimant did not have ASD. Based on these evaluations, and all the information reviewed by the Eligibility Review Team, Dr. Austin supported FNRC's determination that claimant was not eligible for regional center services.

36. Robert Boyle, Ph.D., testified at hearing. He is an FNRC Staff Psychologist and has been a licensed clinical psychologist since 1991. Dr. Boyle's responsibilities include performing psychological assessments, participating on the multi-disciplinary team and participating on the Eligibility Review Team. He has performed psychological assessments his entire career and is familiar with the Lanterman Act definition of "developmental disability" and its exclusionary conditions. He is also familiar with the criteria for Autism Disorder and ASD, as specified in the DSM-IV and DSM-5, respectively.

37. Dr. Boyle did not assess claimant directly. His testimony is based on his review of records as a Staff Psychologist for FNRC, and his involvement on the Eligibility Review Team. He testified that FNRC reviewed and considered Dr. Magee's 2010 report at

intake. Because one conclusion from Dr. Magee's neuropsychological evaluation was that claimant had Asperger's Syndrome, they decided to investigate further into possible Lanterman Act eligible conditions, including ASD, Intellectual Disability, and the fifth category.

38. Regarding Dr. Magee's 2010 diagnosis of Asperger's Disorder, Dr. Boyle noted there were no instruments used other than clinical interview to reach the diagnosis. Regarding claimant's intellectual functioning; Dr. Magee administered "an IQ test," the WAIS-IV, and an achievement test, the WIAT-II. On the WAIS-IV, claimant scored in the average range in both verbal comprehension and perceptual reasoning, scoring 103 and 104, respectively, and scored in the low average range in processing speed, with a score of 86, and a score of 77 in working memory, which is in the borderline range. On the WIAT-II, Dr. Boyle noted that claimant scored an 87 in Word Reading, 94 in Pseudoword Decoding, 90 in Numerical Operations, 105 in Math Reasoning, 87 in Spelling, and 76 in Written Expression.

39. Dr. Boyle testified that the primary way a learning disability is determined through testing is by evidence of a significant discrepancy between an area of intellectual functioning and an area of achievement. When he looked at claimant's score in written expression, 76, and compared them to his scores in verbal comprehension and perceptual reasoning , 103 and 104, respectively, he concluded this "fairly significant discrepancy," suggested that claimant had learning difficulties in certain areas.

40. Dr. Boyle opined that the evaluations performed by Drs. McKellar and Silva were more useful in determining whether claimant is eligible for regional center services on the basis of ASD, because that is what their evaluations were specifically designed to determine. Each of those evaluations were consistent with established "best practices," as they included taking a thorough history, a direct observational component, autism diagnostic testing, and a review of DSM-5 criteria for an Autistic Spectrum Disorder

diagnosis.

41. Dr. Boyle felt the neuropsychological evaluation performed by Dr. Magee was appropriate for its purpose, which was not to determine whether claimant had ASD. Because the neuropsychological evaluation was much broader in scope, FNRC referred claimant to Dr. McKellar for a "best practices" ASD evaluation. After performing a "best practices" ASD evaluation, Dr. McKellar concluded that claimant did not have ASD. FNRC then referred claimant out for a second evaluation with Dr. Silva. She also performed a "best practices" ASD evaluation, and also determined that claimant does not have ASD. Since FNRC had two evaluations that were both "best practices state of the art evaluations, versus one very broad [neuropsychological evaluation], that did not give any [testing] instruments related to autism," FNRC concluded that claimant does not have ASD, despite Dr. Magee's 2010 Asperger's Disorder diagnosis.

42. Dr. Boyle also concluded there was no evidence of "fifth category" eligibility, as claimant had no disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. There was no information he reviewed which indicated that claimant required treatment similar to what the population of individuals with intellectual disability would require. He noted that claimant has "splinter skills that are less developed than other skills, but also has skills and abilities in the average range in important areas." Dr. Boyle considered this dissimilar to those with intellectual disability, because a person with an intellectual disability has "uniformly low skills and abilities across all areas."

43. Claimant testified at hearing and challenged the validity of the evaluations performed by Drs. McKellar and Silva. He asserted that Dr. McKellar's evaluation report had multiple errors, and that both evaluators spent very little time with him. Claimant testified that his evaluation by Dr. Magee was far more thorough and comprehensive than the evaluation performed by Drs. McKellar and Silva. He spent approximately 90 minutes with

Dr. Silva during her evaluation, and approximately an hour with Dr. McKellar during his evaluation. However, he testified that he spent approximately 4 hours each day with Dr. Magee over a four day period to complete his neuropsychological evaluation.

44. Claimant also asserted that because he has had decades to compensate for his challenges with adaptive functioning, they can be difficult to identify without prolonged inspection. Claimant's representative attempted to submit into evidence, as Exhibits B, C, D, F, G, H, I, J, L and M, portions of several articles she obtained from the internet to support claimant's eligibility. FNRC objected to the admissibility of these documents. Claimant's representative could not provide a sufficient foundation for these "internet clippings" to establish that they were sufficiently reliable to be used at hearing. These exhibits were not admitted into evidence.

DISCUSSION

45. When all the evidence is considered, claimant did not establish that he qualifies for services from FNRC under the Lanterman Act. Claimant relied heavily on Dr. Magee's 2010 neuropsychological evaluation and the diagnosis of Asperger's Disorder resulting from that evaluation. He contends that Dr. Magee's evaluation was more thorough, because it took considerably more time to complete. However, Dr. Magee's neuropsychological evaluation was not a "best practices" ASD evaluation. Determining whether claimant had ASD was neither the focus nor purpose of the evaluation. Further, the portion of Dr. Magee's evaluation related to any prospective ASD, appears to be largely, if not entirely, based on the reports of claimant and his mother. Neither the ABAS-3 nor ADOS-2 were utilized. Although there are DSM-IV diagnoses specified in Dr. Magee's report, there is little information provided to correlate the Asperger's Disorder diagnoses to claimant's circumstance or condition.

46. Conversely, the conclusions of Drs. McKellar and Silva, that claimant does not have ASD, were based on "best practices" ASD evaluations, specifically designed for that

purpose. In addition to obtaining a history from claimant and his mother, both evaluators utilized behavioral observations, the ABAS-3 and ADOS-2, and consideration of the DSM-5 criteria. The reports of both Dr. McKellar and Dr. Silva more thoroughly analyzed and applied the DSM criteria to claimant's circumstances, when compared to the relatively limited DSM assessment included in Dr. Magee's 2010 neuropsychological evaluation report. For each of these reasons, the conclusions reached by Drs. McKellar and Silva, based on their comprehensive "best practices" evaluations, were persuasive. Although claimant exhibited some symptoms associated with autism, the evidence was insufficient to establish that he has ASD. Based on the evidence presented, claimant's challenges appear to stem from his ADHD, compounded by characteristics of Specific Learning Disorder, which does not constitute a developmental disability under the Lanterman Act. Consequently, claimant's request for services and supports from FNRC under the Lanterman Act must be denied.

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LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

> "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.... [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This

> term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability [commonly known as the "fifth category"], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. Claimant bears the burden of establishing that he meets the eligibility requirements for services under the Lanterman Act.[3] He has not met that burden. The evidence presented did not prove that claimant is substantially disabled by a qualifying condition that is expected to continue indefinitely. He did not meet the diagnostic criteria for ASD and there was no evidence to show that he has epilepsy, cerebral palsy, intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. Accordingly, claimant does not have a developmental disability as defined by the Lanterman Act. Consequently, he is not eligible for regional center services.

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[3] California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

ORDER

Claimant's appeal from the Far Northern Regional Center's denial of eligibility for services is DENIED. Claimant is not eligible for regional center services under the Lanterman Act.

DATED: July 24, 2018

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ED WASHINGTON

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).)