BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: CLAIMANT, v. INLAND REGIONAL CENTER, Service Agency.	OAH No. 2018090740

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on May 16, 2019.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother and father appeared on behalf of claimant, who was present.

The matter was submitted on May 16, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Act under the category of Autism Spectrum Disorder (autism)?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On August 20, 2018, following a review of records provided by claimant, IRC notified claimant, a 25-year old man, that he was not eligible for regional center services because the records provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as an individual with an intellectual disability.

2. On September 8, 2019, claimant's father filed a fair hearing request on claimant's behalf. As the basis for the fair hearing request, claimant's father wrote:

> 1) Sex discrimination by intake coordinator . ...; 2) Multiple Palm Desert professionals referred us to IRC based on their evaluations. Denied in 2014 & now 2018, still referring to IRC, denied again! 3) Unethical assessment by Psy. Paul Greenwald on 7/19/18. Leading [claimant] to give the answer he (Greenwald) wanted so he could deny services. Despicable! 4) Texas Children's Hospital Autism Diagnosis – IRC should request all doctors notes pertaining to diagnosis

DIAGNOSTIC CRITERIA FOR AUTISM

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) identifies criteria for the diagnosis of autism. The diagnostic criteria include persistent deficits in social communication and social interaction across multiple contexts; restricted repetitive and stereotyped patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or

other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. An individual must have a DSM-5 diagnosis of autism to qualify for regional center services under the category of autism.

RECORDS CONCERNING CLAIMANT

4. Included in the evidence packet from IRC were voluminous medical and psychological records concerning claimant, including: Prescription Listing; Evaluation of Emotional Disability Summary (November 13, 2007); Immediate Action/Discipline Form from claimant's school (December 20, 2007); Full and Individual Evaluation by claimant's school (December 21, 2007); Full and Individual Evaluation by claimant's school (February 27, 2008); ADOS Module 4 by Dr. Treadwell-Deering, M.D. (October 5, 2010); Full and Individual Evaluation by claimant's school (April 13, 2012); Chart Document by Children's Epilepsy Surgery Clinic (January 28, 2013); Letter from Daniel Lopez, M.D. (January 11, 2017); Neuropsychological Evaluation by Dr. Chalgujian, Ph.D. (May 11, 2017); Psychological Assessment by Paul Greenwald, Ph.D. (July 19, 2018).

5. Medical and psychological records included in the evidence packet from claimant's parents, that were not duplicative of those provided by IRC, included: an internet printout of a news article regarding Diane Treadwell-Deering, M.D., written by Karen Bengston, and what appeared to be a curriculum vitae of Dr. Treadwell-Deering (neither Karen Bengston or Dr. Treadwell-Deering testified at the hearing); medical records from a hospital in Conroe, Texas (records were not the complete record, rather, they were certain pages selected, and were dated various months in 1994); claimant's medication history; an audiological evaluation by claimant's school district (August 30, 2001); a summary completed by Bernard A. Rosenberg, M.D., regarding an assessment of claimant completed between March 2005 and November 2007; a report completed by claimant's school district on January 10, 2008, (poor quality copy, indicating something about "other health impairment" the remaining portion of the report was not

legible); a letter dated February 11, 2005, indicating claimant and his family have attended therapeutic support groups; Texas Children's Hospital Progress Notes (July 13, 2010); Texas Children's Hospital Progress Notes, ADOS Module 4 (August 25, 2010); Situational Assessment from Desert Arc (October 20, 2014); Assessment Report from Riverside University Health System (August 14, 2018); Assessment/Care Plan from Riverside University Health System for diagnoses of Bipolar Disorder dated (June 6, 2018).

All records were reviewed and considered. The following is a summary of pertinent information contained in those records.

6. Claimant was born in 1994. Claimant suffered intracranial hemorrhage at birth and was diagnosed with Failure to Thrive Syndrome. Review of claimant's history showed prenatal exposure to stimulants and opiates. In claimant's first three years of life, there were 23 contacts with claimant's mother and child protective services, resulting in termination of parental rights. Claimant had been abused and neglected while in the care of his biological mother. Claimant's biological mother had a history of mental disorders, including Bipolar Disorder and Schizophrenia. Claimant was placed with his adoptive parents at age three, and formally adopted by them (along with his brother) at age seven.

7. Claimant began receiving special education services in first grade under the category of specific learning disability, although those services were discontinued several years later when he no longer met the criteria. Claimant was later re-assessed, and received special education services over the years under the categories of either emotional disturbance, other health impairment, or both. Claimant was never served in special education under the category of autism. Claimant, in 2007, was disciplined for touching himself inappropriately at school. In 2007, claimant also began urinating and defecating in his pants (encopresis), something he had never done before. According to

his parents, as noted in some of the records, claimant also began engaging in anal poking behavior.

8. Claimant graduated high school and is currently attending college, although he is not doing well.

9. Claimant has been warned by his parents about self-care and hygiene, but refuses to do things like cut his fingernails and toenails or brush his teeth. Claimant has adequate short-term memory but struggles with long-term memory. He often does not follow instructions to do chores around the house, although he is capable of doing what is asked of him. Claimant has no outside interests or a social life and does not work.

10. Claimant's medication/prescription history shows he has been on countless medications since early in his life. These medications were prescribed for the purpose of mental illness, medical problems, and other psychiatric conditions such as: depression, mental illness, Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), Mood Disorder, Schizophrenia, Depression, sleep problems, allergies, and thyroid problems.

11. Claimant has a well-documented history during his developmental years of psychiatric disorders, as opposed to neurodevelopmental disorders, including ADD, ADHD, Schizophrenia, Bipolar Disorder, Mood Disorder, and Obsessive Compulsive Disorder (OCD). No evidence in any of the records demonstrate that, during his developmental years, claimant featured the characteristic features of autism such as persistent deficits in social communication and social interaction across multiple contexts; echolalia; or restricted repetitive and stereotyped patterns of behavior, interests, or activities.

12. On November 13, 2007, Bernard A. Rosenberg, M.D., who also has the title of psychiatrist, completed a two-page "Evaluation of Emotional Disability Summary," diagnosing claimant with Chronic Undifferentiated Schizophrenia. He noted the

characteristics of that psychiatric disorder had been present for at least three years. There was no mention of autism or any other characteristics typical of autism.

13. Claimant's school district completed an assessment on December 21, 2007, when claimant was 13. The report lacks any information concerning autism, and concluded claimant was eligible for special education services under the category of "other health impairment." In the notation portion of the report, many behaviors consistent with ADD and ADHD are explained (i.e. lack of attention, lack of focus). Claimant is described as having above-average intelligence and adaptive behavior in the above-average range. In the areas of expressive and receptive language, claimant was observed to be average. The report stated:

> Observations were also made throughout the interview and testing sessions. Claimant quickly seemed appropriately comfortable with the examiner once introductions were made and the evaluation was explained to him. He was cooperative and polite, and answered all questions candidly. He behaved appropriately and remained engaged even while being asked to fill out the lengthy self-report questionnaires. During the interview and questionnaires he would frequently pause to consider the questions before answering, and he frequently asked appropriate clarifying questions . …
>
> [¶] … [¶]
>
> In addition to the ADHD characteristics, it appears that claimant is also experiencing difficulties with social interactions and interpreting social cues. He is currently displaying a range of behaviors that fall outside of the realm

> typically associated with ADHD. Claimant is also displaying features of internalizing difficulties, specifically, depression and emotional lability. Given these observations and claimant's diagnosis of Bipolar Disorder, Obsessive-Compulsive Disorder, and Chronic Undifferentiated Schizophrenia in the private sector, it is recommended that these difficulties be followed up with further psychological assessment to determine if he meets eligibility criteria as a student with an Emotional Disturbance. …

There is no mention in the report regarding stereotypical behaviors; restrictive/repetitive interests; echolalia; sensory sensitivities; or any other features characteristic of autism as per the DSM-5.

14. A progress note entitled, "Initial Psychiatric Evaluation" from the Texas Children's Hospital dated July 13, 2010, indicated that claimant has a strong family support system; enjoys a structured home environment; has ideals and aspirations in life; values his family and harbors good insight into his condition and present circumstances; and has good interaction with his adoptive parents. The progress note detailed claimant's extensive history of psychiatric diagnoses, and stated that claimant's parents wanted him re-evaluated for autism.

15. In August 2010, claimant's parents had him evaluated at the Texas Children's Hospital by Dr. Treadwell-Deering. A two-page report, entitled, "ADOS Module 4," concluded that claimant "met the diagnostic criteria for autism." However, nothing shows how this conclusion was reached and there is no raw data attached. The report is written in narrative format, and does not contain a diagnosis on each Axis, as one would normally expect for a proper psychological assessment. According to Dr. Greenwald, the behaviors listed in the report are, in fact, inconsistent with what one

would normally expect to see in a person with autism. For example, claimant used correct and complex sentence structure. He had no unusual sensory interests, odd mannerisms, self-injurious behavior, compulsions, or rituals. Claimant was able to communicate effectively and demonstrated "very learned" responses to questions. Claimant expressed a "robust enjoyment" in creating a story during the assessment and communicated effectively regarding emotion and anger. Finally, the last few lines of the report note that although claimant fully met the criteria for autism, "the result need be interpreted in the context of [claimant's] entire evaluation and history and should be utilized to reach a diagnostic conclusion and develop a treatment plan."

Consequently, this report is of limited value for several reasons. First, it is not a full report; no raw data is attached to see how the assessment was administered and how the data was interpreted. Second, the summary is inconsistent with a DSM-5 diagnosis in that it lacks the characteristic features of autism. Finally, given the last line, it appears that more work needed to be done; no formal diagnosis was reached and the report indicated that interpretation needed to be completed in order to "reach a diagnostic conclusion."

16. A September 28, 2010, progress note from the Texas Children's Hospital indicated that claimant's parents referred to his "new diagnosis" of Asperger's Syndrome[1], although no formal assessment or other documentation shows that a full psychological assessment or battery of testing was completed to reach that conclusion.

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[1] Asperger's Syndrome was considered a separate diagnosis from autism prior to 2013. In 2013, the DSM-5 eliminated Asperger's Syndrome as a stand-alone diagnosis and instead incorporated many of the symptoms of Asperger's Syndrome into the new diagnostic criteria for autism.

A later progress note also mentions Asperger's Syndrome as a diagnosis, without explaining how that diagnosis was reached. The progress note merely referred back to Dr. Treadwell-Deering's August 2010 report, which similarly, lacked data to evaluate whether her conclusion was appropriate.

17. In 2017, Hilda Chalgujian, Ph.D., conducted a very comprehensive psychological assessment, and diagnosed claimant with Bipolar Affective Disorder and Depressive Attention Deficit Disorder. In the report, claimant's intellectual functioning showed he functions mostly at the average and high average levels. Nowhere in this report was claimant diagnosed with autism.

Dr. Chalgujian engaged in a "neuropsychological consultation" with claimant and his parents on March 21, 2019. In this consultation, which was not a formal assessment and which did not include the comprehensive battery of tests that she conducted in 2017, Dr. Chalgujian interviewed claimant's parents and reviewed claimant's past psychiatric and social history. Her "assessment procedure" was listed as merely the interview, mental status exam, and review of medical records. By this time, the diagnosis of Asperger's Disorder from Dr. Treadwell-Deering was in records provided to her. Yet, without completing any additional assessment, Dr. Chalgujian added the diagnosis of "Autism Spectrum Disorder, without language or intellectual impairment," along with Major Recurrent Depression, and ADHD.[2]

18. The Situational Assessment report completed Desert Arc in October 2014 appears to have been for the purpose of evaluating claimant's suitability for employment, in connection with the Department of Rehabilitation. Claimant was 20 years old at the time. The report mention's claimant's prior diagnoses of Asperger's

[2] Encopresis is mentioned as a diagnosis, however, that is not a neuropsychological condition nor a qualifying condition for regional center services.

Syndrome, Schizophrenia, a Learning Disability, ADD, Seasonal Affect Disorder, and Sleep Disorder. No additional objective psychological assessments were completed to verify the presence of Asperger's Syndrome, rather, the mention of it appears to be by history only.

The report describes characteristics and behaviors completely inconsistent with a DSM-5 diagnosis of autism, and worth repeating verbatim. The report reads:

> Participant Interview and Work History
>
> During the self-evaluation, claimant was asked several questions about his work experience and education, including any vocational training and his life in general. He was able to answer all questions independently.
>
> Claimant describes himself as being in "good health." He takes prescription medication independently and states that the medications will not have an impact on his ability to work. When asked the question "physically are there things you cannot do?" He stated that he does not have "a lot of physical endurance." He states that he is unable to stand for more than two hours at a time without taking a break.
>
> Claimant reports that he does not require assistance handling cash transactions and is able to perform tasks that require counting of the use of a calculator or cash register. He was able to provide his date of birth and current age. Claimant has a current California [driver] license and reliable transportation.

Claimant graduated [from high school in 2013]. His work experience includes dog walking, yard work, and landscaping. He also volunteers in his community for organizations such as Baseball Buddies, senior meals delivery programs, and he has obtained training as a member of the C.E.R.T. in Coachella Valley.

Claimant states that his employment goal is to become "an electrical engineer, R&D section, and find new methods of creating and transporting electricity." When asked to list the duties associated with the job he responded that he was not completely aware but [had the desire to learn]. When asked how he would respond if learning the skills associated with the job was difficult, he responded, "I'm passionate about it so I would push myself . ..."

[¶] ... [¶]

Community and Mobility Assessment

Throughout the assessment claimant demonstrated good safety skills while performing job-seeking skills and while in the community. He has no difficulty initiating conversation with individuals while in the community. He states that he [is] not comfortable entering a business and requesting an employment application and he will require assistance completing the application to ensure that all questions are answered clearly and completely.

[¶] … [¶]

Summary and Recommendations

Throughout the assessment claimant expressed an interest to be independently employed in the community. However, his employment goal is limited to one field of interest which will require a higher level of education. Based on this assessment claimant's most significant identified barriers are accepting constructive criticism from an experienced supervisor, development of skills to learn and retain information for multi-step instructions, and workplace grooming and hygiene. In addition he will need job skills training to learn how to appropriately communicate with his supervisor when he is offered suggestions to improve efficiency and productivity. If he chooses to work part time while attending college claimant will need to be prepared to accept an entry level position due to limited work experience. With employment and interpersonal skills training claimant has the potential to be successfully employed in the community. … [Emphasis Added].

The report noted that claimant needs long-term supports in order to achieve his employment goals and recommended that he apply to Inland Regional Center to obtain those supports.

19. Other than as noted above, claimant's entire history completely lacked any mention of Asperger's Syndrome or autism, and the reports provided that contained those references either did not contain sufficient diagnostic information to indicate how

those conclusions were reached, or were merely a repetition of the diagnosis by history, without conducting any additional independent assessments to support a diagnosis of autism. None of the reports discussed above contained behavioral information consistent with a DSM-5 diagnosis of autism. The reports also showed that claimant is not substantially disabled within the meaning of applicable law.

PSYCHOLOGICAL EVALUATION CONDUCTED BY PAUL GREENWALD

20. Dr. Greenwald has been a licensed psychologist since 1987. He is licensed in California and Florida. He has been a staff psychologist at IRC since 2008. Dr. Greenwald has extensive experience in conducting psychological assessments of children and adults suspected of having developmental disabilities that may qualify them for regional center services. He also supervises psychological assistants who conduct similar assessments. Dr. Greenwald is an expert in the field of psychology, as it relates to the diagnosis of autism under the DSM-5 and the Lanterman Act. Dr. Greenwald testified about his assessment of claimant. The following is a summary of his testimony and the report he completed memorializing his assessment.

Dr. Greenwald conducted a psychological assessment of claimant on July 19, 2018. At the time, claimant was 23 years and 11 months old. Dr. Greenwald reviewed prior medical and psychological records provided by claimant's parents and conducted a mental status exam. He also utilized the following measures to assess whether claimant qualified for regional center services: Kaufman Brief Intelligence Test – 2nd Edition (KBIT-2); Autism Diagnostic Observation Schedule – 2nd Edition, Module 4 (ADOS-2); Childhood Autism Rating Scale, 2nd Edition (CARS-2); and the Street Survival Skills Questionnaire (SSSQ). The measures utilized by Dr. Greenwald were typical of those used to assess whether a person meets the diagnostic criteria for autism under the DSM-5.

The ADOS is the "gold standard" for autism testing. It is a standardized, comprehensive assessment measure that consists of a semi-structured interview and cooperative play activities that provide contexts for observing real time behaviors critical to determining if a person has autism. On the ADOS, claimant did not show any stereotyped behaviors or repetitive/restricted interests. He also did not fall within the range for autism in the areas of communication or reciprocal social interaction. Overall, claimant received a score of 4 – which is well below the score of 7, required for a diagnosis of autism.

The CARS-2 helps identify children with autism and determine symptom severity. Ratings are assigned to discrete behavioral categories via clinical observation, parent report, and record review. The CARS-2 is especially effective discriminating persons with autism from those with cognitive deficits. It is also more sensitive to those on the "high functioning" end of the autism spectrum. On the CARS-2, which tests many different skills such as social and emotional skills, understanding, emotional expression, relation to people, adaptation to change, responses, communication, and intellectual ability, among others, claimant showed mild to moderate impairment in some of the areas but also age appropriate in others. Overall, claimant's score was 24, which puts him in the "minimal to mild" category for autism.

The SSSQ assesses a person's adaptive skills critical to community life and independent living. On the SSSQ, which tested claimant across 10 different domains, claimant scored in the average range in all domains. Dr. Greenwald noted that claimant's scores matched the norms established for average non-neurologically impaired adults between the ages of 15 and 55, and "most definitely" did not show claimant functions like a person with autism.

Overall, Dr. Greenwald's diagnostic impressions were: ADHD by history, Unspecified Bipolar Disorder by history, and a Reactive Attachment Disorder (RAD) rule-out diagnosis. Dr. Greenwald specifically ruled out a diagnosis of autism.

21. Dr. Greenwald explained that it is quite possible for a person to have features of autism but not meet the full criteria for a DSM-5 diagnosis. For this reason, the ADOS-2 and CARS-2 are invaluable because they discriminate between someone who is truly autistic and someone who merely has features of autism that may be attributable to some other psychiatric or non-neurodevelopmental disorder. However, the ADOS Module 4, which is what was used by Dr. Treadwell-Deering in 2010 in reaching an autism diagnosis, was a generic version of the ADOS and not the most updated version in effect at that time. It is crucial to use the most updated form of the ADOS because, over time, the measures are tightened in order to ensure that the assessment discriminates between autism and other non-neurodevelopmental disorders. Dr. Greenwald questioned the validity of Dr. Treadwell-Deering's finding of autism on that basis, especially because the behaviors listed in her two-page report were inconsistent with what a person with autism would do (as discussed above).

Dr. Greenwald also explained that the progress notes and few mentions of Asperger's Disorder and Pervasive Development Disorder (PDD) subsequent to claimant's 2010 autism diagnosis by Dr. Treadwell-Deering were not helpful and did not change his conclusion because they contain no information as to how those diagnoses were reached and because those diagnoses indicate a person is very high functioning. So, even if claimant had autism, he is not substantially disabled. Dr. Greenwald did not see any evidence of a substantial disability in three or more major life activities throughout claimant's developmental period, or at present.

With respect to the one-paged, four-line letter written by Dr. Lopez in January 2017, Dr. Greenwald noted that it merely stated that claimant had a history of "low-

functioning autism" associated with "a component of mental retardation." Dr. Greenwald pointed out that the term "mental retardation" is no longer used in the industry and nothing in claimant's records show a history of being "low-functioning." The letter also contains no basis for how Dr. Lopez reached that conclusion. Thus, this letter's validity is called into question.

22. Dr. Greenwald pointed out that psychiatric disorders, like those claimant has been diagnosed with over the years, do not go away. Symptoms can be managed, and they can get better or worse. Although it was not the purpose of Dr. Greenwald's assessment to test for one of the many psychiatric disorders claimant has been diagnosed with in the past, Dr. Greenwald explained that he has spent his entire career focusing on neurodevelopmental disorders like autism. While claimant's parents focused markedly on claimant's encopresis and anal poking, Dr. Greenwald has never seen that type of behavior in an autistic child or adult. To the contrary, that behavior is a classic symptom of many psychiatric disorders like Schizophrenia or Bipolar Disorder. Further, after claimant's parents noted that claimant likes the feeling of silk and women's clothing, Dr. Greenwald pointed out that this is more of a "fetish" type behavior than a sensory issue; thus, indicative of something psychiatric as opposed to neurodevelopmental. If all these unusual behaviors and desires for certain textures were sensory as opposed to indicative of a psychiatric disorder, claimant would have exhibited other sensory desires throughout his developmental period. Yet, he did not.

Dr. Greenwald explained that he spent a lot of time at a psychiatric center for children when he worked many years earlier as a psychologist in Miami. There, he saw children who were in foster care due to trauma, neglect, violence, or other negligent/chaotic environments. These backgrounds were every similar to claimant's background. Although these children manifested autistic-like symptoms, what these children really suffered from was Reactive Attachment Disorder (RAD), a psychiatric

condition. Claimant's presentation and history are more indicative of Bipolar Disorder and RAD, which is why Dr. Greenwald listed RAD as a rule-out diagnosis and Bipolar Disorder, by history, in his assessment.

ELIGIBILITY DETERMINATION

23. The IRC eligibility team is an interdisciplinary group of personnel, comprised of social workers, managers, and clinical psychologists who review the recommendations, reports, and make a decision regarding eligibility. The eligibility team, after considering all applicable reports, concluded that claimant was not eligible for regional center services on the basis of autism.

OBSERVATIONS OF CLAIMANT AND CLAIMANT'S TESTIMONY

24. During the entirety of the hearing, claimant sat next to his parents, quietly. He did not move or fidget. He did not show any inappropriate expression. He did not show any repetitive movements or behaviors. As the hearing ensued, and more detailed discussion regarding claimant took place, claimant became a little fidgety. When engaged in questioning by the administrative law judge, claimant was quiet, polite, and focused. He listened intently, and responded appropriately, in a complex and intelligent manner. He exhibited the appropriate emotion based on discussions (i.e. a smile when something was funny, seriousness when something was serious, and no particular expression when the questioning was neutral). Overall, claimant was a very pleasant, bright, young man who could clearly articulate his ideas, thoughts, and feelings.

25. Claimant was asked to raise his right hand to be sworn to testify. Claimant followed instructions and turned towards the administrative law judge. Claimant testified as follows: Claimant remembers one incident where he was caught masturbating in school in front of another student; there were other times, as he has

been told, but he does not remember them. Claimant received detention for that incident.

Claimant said that he has gotten better about engaging in that type of behavior in public, though admits his behavior is not "ideal." He recalled a few incidents, with vivid detail, of being bullied in school. Claimant said he does not hear any voices and does not have delusions. He typically avoids drugs or alcohol because of his family history. Claimant recalled a rock he purchased in Scotland around 2008 that he carried around everywhere because he liked how it felt and liked the color.

Claimant has no friends; he used to have one friend but they stopped communicating. Claimant feels he should have at "least 4 to 5 friends minimum, if not more." Claimant said his medicine keeps his anger in control when he remembers to take it. Generally, he is a happy person and gets along well with those around him. Claimant then laughed and said "as long as [he] is doing his chores and not getting yelled at for not doing them."

Claimant's future plans include "several invention concepts" that he would like to create and would also like to start a business. He found out he needed to learn a lot of math to do what he wanted to do, so he decided to downgrade to a certificate program in college involving technology.

SUMMARY OF CLAIMANT'S PARENTS' TESTIMONY

26. Claimant's mother testified that claimant came into her and her husband's care when he was three years old. Claimant's really bad behavior did not start until 2007. Claimant's mother spent a lengthy amount of time testifying about claimant's encopresis, and also became visibly and emotionally upset. It was obvious that speaking about it was difficult for her. Claimant's mother believes that the first incident in 2007 when claimant defecated in his pants, in church, may have "triggered" a "sensory" issue that now renders this activity enjoyable to him. Claimant began, thereafter, engaging in

that activity on purpose. They have tried for years to find the most qualified people to help with this behavior. This behavior is a barrier to employment. According to a letter written by claimant's mother and father to claimant's doctor in 2015, claimant had been poking and inserting things in to his anus for several years, including items like a 12-inch piece of metal tubing. Claimant likes the feeling of silky clothing, specifically, women's underwear. He has also shown an interest in cross-dressing, although he has shown no interest in "being gay." Claimant does not like to cut his nails and claimant's mother feels that such behavior is a sensory problem and consistent with autism. Claimant has left something cooking on the stove before. This incident was troubling because in the past they have had a fire at their home. Claimant does try to follow rules but he is not reliable.

27. Claimant's father testified generally that he believes Dr. Greenwald's assessment is invalid. He believes Dr. Greenwald steered claimant to answer questions during the assessment in a particular way. He does not agree with IRC's conclusion that claimant is not eligible because claimant received a diagnosis of autism from the Texas Children's Hospital before claimant turned 18, and that is a highly regarded facility.

Claimant's father also provided a detailed letter with the exhibits that summarized his position with respect to this matter. Claimant's father described claimant as a resilient and nice person. As an adult, claimant has specifically rejected drugs, alcohol, and pre-marital sex, as a way of ensuring that he does not follow in the footsteps of his biological mother. Claimant's memory and ability to follow-through with activities are his two greatest deficits. Claimant's encopresis is a major problem that first began in 2010. Claimant's father also wrote:

> Seeking help for claimant, we had been referred to the Inland Regional Center as early as 2014. He was denied services, even rejecting meeting with claimant personally.

They directed us to the Department of Rehabilitation (DOR) who accepted claimant's case immediately. DOR sent him on a job assessment with Desert Arc and that ***report conclusion recommended to go to IRC for services.*** Desert Arc also noted in the job assessment that a supervisor detected an 'odor,' although he had dressed up in nice clothes for the assessment and they had not been informed of claimant's encopresis.

We more recently were verbally referred to IRC again by a psychiatrist for the Tay Center in La Quinta California because she insisted his unresolved symptoms were due to Autism and would not accept him into their program for treatment. Now comes IRC, telling us claimant doesn't even have Autism, based on a short assessment done by their resident psychologist, Dr. Greenwald, Ph.D. This is unacceptable. We are trying to do the best for claimant and continue to run into roadblocks. … [emphasis in original]

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.
>
> [¶] ... [¶]
>
> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

3. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that "originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual." A developmental disability 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." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

4. California Code of Regulations, title 17, section 54000, provides:

> (a) "Developmental Disability" means a disability that is attributable to mental retardation,[3] 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.
>
> (b) The Developmental Disability shall:
>
> (1) Originate before age eighteen;
>
> (2) Be likely to continue indefinitely;
>
> (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

[3] Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

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.

5. 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 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.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

6. Welfare and Institutions Code section 4642 requires a regional center to perform "initial intake and assessment services" for "any person believed to have a developmental disability." Intake shall also include a *decision* to provide assessment but does not require an assessment. (*Id.* at subd. (a)(2).)

7. Welfare and Institutions Code section 4643, subdivision (a), provides: "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs . ..."

EVALUATION

8. IRC argued that the evidence showed claimant does not meet the DSM-5 diagnostic criteria for autism and does not have a substantial disability within the meaning of applicable law.

9. Claimant's parents argued that claimant is permanently disabled and was diagnosed with autism at the Texas Children's Hospital, and his autism is likely to continue indefinitely. They again raised the issue of the encopresis and said they feel

they are being discriminated against with respect to the provision of services because people do not like to talk about that behavior. As a result, claimant has not been able to obtain the services he needs.

10. Claimant had the burden to establish eligibility for regional center services. A preponderance of the evidence did not establish that claimant either has autism or is substantially disabled. Indeed, the documents showed quite the contrary; they established that claimant suffers from a variety of non-neurodevelopmental disorders which do not qualify him for regional center services. It is important to note also that the only expert witness to testify was Dr. Greenwald, and his conclusion was based on a comprehensive assessment and review of claimant's records. No equivalent expert witness testified to rebut Dr. Greenwald's conclusion that claimant does not have autism and is not substantially disabled.

Claimant has a well-documented history of significant psychiatric problems. Those diagnoses include: OCD, Bipolar Disorder, ADD, and ADHD, among others. Claimant has never been served in special education for autism; he has been served under the categories of Specific Learning Disability, Other Health Impairment, and Emotional Disturbance. Although claimant's psychiatric disorders may present behavioral features similar to autism, simply having behavioral features of autism does not equate with a full DSM-5 diagnosis of autism.

It appears that in 2010, claimant's parents – seeking assistance for some worsening behaviors (encopresis) – decided to have claimant evaluated for autism. However, the first (and only) mention of autism as a possible diagnosis by Dr. Treadwell-Deering in 2010 is problematic. She utilized the ADOS Module 4, which was not the most current version of the ADOS at that time. The two-page summary report did not contain any raw data or comprehensive observations assessing the whole person to determine if claimant's challenges were attributable to autism (i.e. no intelligence

assessments, no adaptive skills assessments, and no raw scores provided).[4] Further, Dr. Treadwell-Deering's two-page report described behavior completely incompatible with a person who is autistic, which rendered her conclusion questionable. As for the other instances of autism and Asperger's Syndrome mentioned in subsequent documents, they appear to be merely a mentioning of those disorders by history only; no additional objective testing was completed at any later point in time to verify the diagnosis. Finally, even if one were to accept any of these notations or diagnoses of autism or Asperger's Syndrome in claimant's late teen and adult history as true, the same reports and many others show claimant is not substantially disabled. A person must have a qualifying condition as well as be substantially disabled to qualify for regional center services.

Claimant's parents focused a lot on claimant's encopresis and their belief that, in general, claimant is being discriminated against in pursuing services because of this undesirable behavior. The evidence does not support that assertion. This undesirable behavior is but one behavior. A DSM-5 diagnosis is not based on one behavior. Encopresis is also not specific to autism; in fact, according to Dr. Greenwald, it is a classic symptom of psychiatric disorders like Schizophrenia and Bipolar Disorder, and Dr. Greenwald has never encountered that behavior in connection with the countless autistic individuals he has assessed over almost three decades of practice. Further, as Dr. Greenwald explained, even if claimant's encopresis; anal poking/inserting things into his anus; affinity for silky scarves/female clothing; and refusal to cut his nails were viewed as

[4] Scoring within a certain range on the ADOS alone does not mean someone meets the full criteria for autism under the DSM-5. To achieve a diagnosis of autism, one must meet the diagnostic criteria as stated in the DSM-5. Thus, Dr. Treadwell-Deering's summary does not assist in determining whether her assessment rendered claimant eligible for regional center services.

sensory issues – as opposed to behavioral problems consistent with his psychiatric diagnoses - claimant would have exhibited other sensory issues during one of his many assessments if the behaviors were attributable to autism. Yet, he did not.

Even assuming claimant did meet the DSM-5 diagnostic criteria for autism, a preponderance of the evidence did not show claimant is substantially disabled in three or more major life activities as required in order to be eligible for regional center services. In this respect, the Situational Assessment Report completed by Desert Arc in 2014 is most illustrative. The report concluded that "with employment and interpersonal skills training claimant has the potential to be successfully employed in the community." Claimant's testimony and the documentary evidence provided also shows claimant has, at a minimum, average to superior receptive and expressive language skills; the ability to learn; the ability to care for himself; normal mobility; self-direction when he desires; and both a capacity for independent living and economic self-sufficiency.

Claimant's parents disagree and contend he is substantially disabled, at least in the areas of self-care, self-direction, capacity for independent living, and economic self-sufficiency. However, what is important to understand is that *not wanting* to do something is entirely different than *not being physically or mentally capable* of doing something. Claimant's records show that he is absolutely capable of all these things; but, perhaps due to his many well-established psychiatric challenges, he elects not to engage in self-care, self-direction, or do what is required to live independently and be economically self-sufficient. The Desert Arc Situational Assessment Report supports this conclusion.

Claimant's parents' desire to seek out as many services as possible for claimant is admirable and understandable. They were very organized and thoughtful in their presentation of claimant's case. Their frustration with the process of obtaining services is also evident. Claimant developed some very troubling behaviors in 2007 (encopresis,

among others), and those problems have led to many years of attempting to seek out services to rectify those behaviors. However, autism is not a disability that manifests by presenting unusual behaviors or sensory issues late in the developmental period; the many features characteristic of autism as noted in the DSM-5 must be present *throughout* the developmental period. Here, they were not.

It is also not unusual for service agencies such as DOR to make recommendations, as they did in this case, for their consumers to seek out services from other service agencies. Part of their mandate is to assist their consumers with seeking out the greatest degree of assistance possible, to enhance whatever services they are providing. However, service agencies such as DOR have their own criteria with respect to whether someone qualifies for services. Those criteria are not the same as the criteria to become eligible for regional center services. Put another way, a recommendation from another service agency holds no weight with respect to whether someone qualifies for regional center services; regional center eligibility decisions are made exclusively based on the criteria set forth in the Lanterman Act and applicable regulations.

Accordingly, the conclusion of IRC's eligibility team that claimant does not qualify for regional center services is fully supported by the record.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services is denied.

DATED: May 29, 2019

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KIMBERLY J. BELVEDERE

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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