

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2021090582

DECISION

Carmen D. Snuggs-Spraggins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on January 5 and February 7, 2022.

Claimant, who was not present for the hearing, was represented by his mother (Claimant's Mother). Titles are used to protect the privacy of Claimant and his family.

Candace J. Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 7, 2022.

ISSUE

Is Claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

EVIDENCE RELIED ON

Documentary: Service Agency's exhibits 1-10; Claimant's exhibits A-E and G-Q.

Testimonial: On behalf of WRC, Kaely Shilakes, Psy.D.; on behalf of Claimant, Claimant's Mother and Madison Leber, ABA Supervisor for Home and School Behavioral Support.

Parties and Jurisdiction

1. Claimant is an eight-year-old boy who lives with his mother. He receives Applied Behavioral Analysis (ABA) therapy three hours per day, six days per week and four hours of distance learning five days per week. Although Claimant's physician recommended Claimant take medication for Attention Deficit Hyperactivity Disorder (ADHD), he does not currently do so as Claimant's Mother considers medication a last resort.

2. On a date no later than May 19, 2021, Claimant's mother asked the Service Agency to determine Claimant's eligibility for services and supports due to her concerns that Claimant may have autism spectrum disorder (ASD) or intellectual disability (ID). The Service Agency had previously determined Claimant ineligible for regional center services in 2018.

3. By a Notice of Proposed Action (NOPA) dated August 24, 2021 and letter dated August 12, 2021, WRC notified Claimant that he is not eligible for regional center services under the Lanterman Act because he did not meet the full criteria for ASD. The letter also stated that Claimant is not substantially disabled by an eligible diagnosis of ID, ASD, epilepsy, cerebral palsy or a condition similar to ID as that term is defined in the Lanterman Act and applicable regulations, citing Welfare and Institutions Code section 4512, and the California Code of Regulations, title 17, section 54000. WRC recommended that Claimant have a structured school environment, support for ADHD and behavioral disorders, parent supports, and a mental health evaluation with ongoing child and family treatment. WRC also informed Claimant that his family could also contact the Westside Family Resource and Empowerment Center. (Ex. 2.)

4. On September 7, 2021, Claimant's Mother filed a fair hearing request to appeal the Service Agency's eligibility determination. This hearing ensued.

5. All jurisdictional requirements have been met.

Evaluations of Claimant

6. Kaely Shilakes, Psy.D., a licensed psychologist and WRC's Chief Psychologist and Manager of Intake Services, testified. She was a member of the interdisciplinary eligibility team that observed Claimant on July 30 and August 2, 2021, in relation to his request for services and supports. Dr. Shilakes was also a member of the interdisciplinary eligibility team that considered Claimant's requests for services and supports on November 21, 28, and 29, 2017, and February 14, 2018. Prior to becoming WRC's Chief Psychologist and Manager of Intake Services, Dr. Shilakes contracted with WRC to perform psychological evaluations.

7. Dr. Shilakes is familiar with the evaluations and assessments performed to determine whether Claimant presented with symptoms of ASD, as set forth below.

EVALUATIONS IN 2017

Evaluation by Ioana Pal, Psy.D.

8. Ioana Pal, Psy.D., Clinical Psychologist at Miller Children's & Women's Hospital Long Beach's Stramski Children's Development Center (SCDC) evaluated Claimant on October 5, 2017. Dr. Pal administered the Autism Diagnostic Observation Scale, module 2 (ADOS-2), which is an assessment used to evaluate individuals suspected of having autism or ASD. The assessment "provide[s] an observation period with opportunities for the examinee to exhibit behaviors relevant to a diagnosis of an autism spectrum disorder." (Ex. C, p. B. 9.) With respect to language and communication, Dr. Pal noted that Claimant's speech was "abnormal with odd intonation and inappropriate pitch." (*Ibid.*) However, Claimant did not demonstrate repetitive speech, nor did he use stereotypical or idiosyncratic words. Dr. Pal also reported that Claimant's conversation generally flowed, he spontaneously elaborated on some of his own responses, and he was minimally able to point to objects and express interest. Claimant used appropriate gaze, demonstrated a range of facial expressions, made eye contact when he heard his name, effectively used non-verbal and verbal means to make clear social overtures to Dr. Pal, but showed limited responsiveness to most social contexts. Dr. Pal concluded that Claimant's rapport was appropriate to the context of the ADOS-2 assessment.

9. Claimant played with a variety of toys in a conventional manner, but in the area of stereotypical behaviors and restricted interests, Claimant demonstrated a need for routine and stacking to the extent that it interfered with Claimant's ability to

complete activities in succession, but Claimant was redirected and completed all required tasks. In the area of "other behaviors," Dr. Pal observed that Claimant moved incessantly and energetically around the room, needed constant reminders to complete tasks, and displayed mild upset at the removal of toys.

10. Dr. Pal concluded that Claimant scored six out of 10, the moderate range of autism related symptoms, which is moderate evidence of an ASD classification, and that Claimant's ADOS-2 results placed him in the autism classification.

Evaluation by Monika Mathur, M.D.

11. On October 11, 2017, Claimant was assessed at SCDC by Monika Mathur, M.D., as the second part of an initial consultation regarding suspected ASD. In determining whether to diagnose ASD, Dr. Mathur used the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5). With respect to persistent deficits in social communication and social interaction across multiple contexts, Dr. Mathur found that Claimant met the criterion of demonstrating deficits in social-emotional reciprocity (Claimant did not seem to read emotions or facial expressions well) and nonverbal communicative behaviors used for social interaction (Claimant did not always make eye contact, seemed to stay in his own world, Claimant's Mother had to get his attention, and Claimant did not gesture or use nonverbal communication well). However, Dr. Mathur found that Claimant did not meet the criteria of developing, maintaining, and understanding relationships because Claimant likes to play with other children and can usually get children to follow him. Claimant also had no difficulty approaching other children. Dr. Mathur rated the severity of Claimant's deficits in this area as level 1, meaning he requires support.

12. In the area of restricted, repetitive patterns of behavior, interests or activities, Dr. Mathur found that Claimant met the criterion of stereotyped or repetitive use of objects or motor movements, or speech (Claimant lined up cars, and engaged in echolalia and scripting), insistence of sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (Claimant had difficulty with changes to order and significant difficulty with transitions), and hyper-or hypoactivity to sensory input (Claimant had difficulty with different textures, how things feel and the sound objects made when they fell). Claimant did meet the criteria of highly restricted, fixated interests that are abnormal in intensity or focus because he did not demonstrate any fixed interests. Dr. Mathur rated the severity of Claimant's deficits in this area as level two, meaning he requires substantial support.

13. Claimant also met the DSM-5 criterion of a) autism symptoms being present in the early developmental period; b) the deficits cause significant impairment in Claimant's social and other important areas of functioning; and c) Claimant's deficits were not better explained by ID or global developmental delay.

14. Dr. Mathur recommended, among other things, that Claimant's Mother complete the GARS-3, that an ADOS assessment be completed, and a developmental assessment be performed to help with an Individualized Education Plan (IEP) if the GARS-3 and ADOS were unrevealing.

15. Claimant was assessed at four years and eight months old on February 14, 2018, by WRC's multidisciplinary team to determine Claimant's level of functioning, provide a diagnosis, and determine Claimant's eligibility for regional center services. Following behavior observations and the administration of the ADOS-2, WRC's multidisciplinary team diagnosed Claimant with ADHD with significant sensory issues and

mixed receptive and expressive language disorder and concluded Claimant did not meet the criteria for an ASD diagnosis.

2017 Psychological Assessment by Dr. Shilakes

16. On November 21, 2017, and November 28, 2017, Dr. Shilakes performed a psychological assessment of Claimant at WRC's request. She also observed Claimant at school on November 29, 2017. Claimant was 4 years and one month old at that time. Dr. Shilakes wrote that her evaluation would determine claimant's "current levels of cognitive, adaptive, and social functioning. The purpose of the assessment is to rule-out or substantiate a diagnosis of [ASD] and determine Regional Center eligibility." (Ex. 8, p. A41.)

17. Dr. Shilakes reviewed Dr. Pal's report; conducted an interview with Claimant's Mother; and applied the following testing instruments: Autism Diagnostic Interview-Revised (ADI-R), Wechsler Preschool and Primary Scale of Intelligence- 4th Edition (WPPSI-IV); Vineland Adaptive Behavior Scales – Second Edition (VABS-II); Adaptive Behavior Assessment System-II (ABAS-II) – Teacher Report; and ADOS-2.

18. Using the DSM-5, Dr. Shilakes diagnosed Claimant with ADHD (rule out) and Language Disorder (rule out).

19. Dr. Shilakes found that Claimant's cognitive functioning was in the average range and his verbal comprehension was in the high average range. Claimant's Mother rated his adaptive functioning in the moderately low range for day-to-day skills for his age, which was lower than the adaptive function rating of below average based on Claimant's teacher's report.

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20. In regard to ASD, Dr. Shilakes found:

[Claimant] presents with many strengths including his strong family support. While presenting concerns include sensory, behavioral, and social issues, [Claimant] is able to show social-emotional reciprocity, coordinate verbal and nonverbal communication, engage in back and forth communication, joint attention, and was observed seeking out and playing with peers and adults. He engaged in pretend play and seeks to engage with others. He does choose not to listen to his teaches and essentially follows his own agenda at school, though there also does not seem to be enough structure and consequences. [Claimant] is not presenting with enough significant or pervasive characteristics of [ASD] across settings to make a diagnosis at this time. Based on observed behaviors, [Claimant] likely has challenges with attention, restlessness, and hyperactivity, reflecting possible [ADHD].

(Ex. 8, p. A305.)

21. Dr. Shilakes recommended that her findings be presented to WRC's eligibility team for consideration of services; a structured, daily learning environment with Claimant's peers; speech and occupational therapies through Claimant's school district, new social situations, play dates or peer group activities, and child and family therapy to address behavioral and emotional concerns.

WRC's MULTIDISCIPLINARY TEAM EVALUATION IN 2018

22. WRC's multi-disciplinary team evaluated Claimant on February 14, 2018, based upon Dr. Shilakes's recommendation. The multi-disciplinary team consisted of Wilhelmina Hernandez, M.D., Developmental Behavioral Pediatrician, Soryl Markowitz, LCSW, an Autism and Behavioral Specialist, Thompson Kelly, Ph.D., Lead Psychologist, Rita Eagle, Ph.D., and Sylvia Young, Ph.D. Dr. Hernandez conducted the examination while the rest of the observers watched behind a two-way mirror.

23. Dr. Hernandez prepared a report of the evaluation. In the area of behavioral observation, she noted that Claimant, who was accompanied by his mother and grandmother, separated easily from them and played with stuffed animals while in the play area with Dr. Kelly while Dr. Hernandez obtained a history of Claimant's Mother's concerns regarding Claimant's behavior. Claimant then engaged with Dr. Hernandez and played make believe with her using toy superheroes and other items.

24. Dr. Hernandez administered the ADOS-2 to observe Claimant's responses to a variety of toys and activities to assess his social communication and to identify symptoms of ASD. In the area of communication, Dr. Hernandez reported Claimant spoke in full sentences to communicate, he was able to follow a back and forth conversation, and he listed several items he wanted to have. Dr. Hernandez wrote that Claimant "did not display echolalia while playing neither did [he] use scripted speech during play. As part of the demonstration task, [Claimant] was observed to use descriptive and informative gestures and combine it with adequate eye contact and detailed instruction." (Ex. 7, p. A37.)

25. In the area of reciprocal social interaction, Dr. Hernandez noted that Claimant's communication was combined with adequate eye contact and joint

attention. She also noted that during the end of the evaluation, Claimant's eye contact was consistent, he high-fived the providers, and waved goodbye. Claimant smiled in response to someone smiling at him, demonstrated understanding of empathy, appropriately described situations that made him sad, and showed some facial expressions toward his mother and grandmother. Claimant maintained respectful boundaries and respected the personal space of others. He also followed Dr. Hernandez's gesture of pointing toward a car.

26. In the area of play, Claimant displayed a "vast imagination" while playing and participating in some functional play. In the area of stereotyped behaviors and restricted interests, Claimant focused on multiple toys. He did not display maladaptive behaviors when the toys were taken away and, did not demonstrate experiencing specific sensory issues. Claimant did demonstrate motor planning issues.

27. Using the DSM-5 criteria for ASD, Dr. Hernandez determined Claimant met only one criterion (hyper-or-hypo reactivity to sensory input or unusual interest in sensory aspects of environment). She concluded that Claimant did not meet the criteria for ASD.

28. Dr. Hernandez recommended, among other things, that Claimant's family consult with Ms. Markowitz regarding insurance-funded behavioral therapy providers who would be a good fit for him, as well as a special education evaluation by the school district for speech/language and occupational therapy.

WRC'S 2018 DENIAL OF ELIGIBILITY

29. In a NOPA letter dated March 1, 2018, WRC notified Claimant's Mother that its interdisciplinary eligibility team had completed its evaluation and determined

claimant was not eligible for services and supports because he did not have a developmental disability.

2020 EXAMINATION BY BRIAN HOLT, M.D.

30. Brian Holt, M.D., Child/Adolescent Psychiatrist, performed a telehealth psychiatric evaluation of Claimant on August 5, 2020, and prepared a report. Under Chief Complaint/Presenting Problems, Dr. Holt wrote:

[Claimant] has had significant delays in both speech and motor activities since his infancy. He was see [*sic*] by a developmental pediatrician and diagnosed with autism at age 3. He has continued to struggle since then with a variety of developmental delays. He has significant issues with expressive speech, he will often become aggressive with others when he is not understood or cannot express himself. He is rigid around rules and schedules and becomes agitated when schedules are not followed. He perseverates on a variety of changing issues most recently concerning the coronavirus, he makes little to no eye contact with others and has no friends. He does well academically but has trouble staying focused on some tasks at times. He becomes agitated with certain sounds or sensations and often engages in a variety of self-stimulating behavior. No [auditory hallucinations/visual hallucinations] or other psychotic symptoms.

(Ex. N. p. B88.)

31. Dr. Holt's impressions were that Claimant had a primary diagnosis of ASD and his delays explained his maladaptive behaviors, including aggression. Dr. Holt further concluded that although Claimant has attention issues, "his strong academic performance suggests his primary issues are his developmental delays and sensory integration issues." (Ex. N. p. B89.) Dr. Holt discussed starting Claimant on stimulants to help with attention issues, but Claimant's Mother declined and wanted Claimant to continue with ABA therapy.

MAY 2021 PSYCHO-SOCIAL EVALUATION

32. In response to Claimant's Mother's 2021 request for an eligibility assessment, Maritza Cortes, an intake coordinator at WRC, conducted a telephonic psychosocial assessment of Claimant. In her report dated May 19, 2021, Ms. Cortes recommended that a psychological evaluation to evaluate for ASD be performed, that all findings be presented to the interdisciplinary eligibility team to determine whether Claimant is eligible for regional center services, that a copy of the report of the psychological evaluation be shared with Claimant's school so that Claimant's need for services could be assessed, and that Claimant continue with behavioral intervention plans, and annual medical and dental care.

33. Ms. Cortes noted that Claimant had been diagnosed with ASD and ADHD outside the regional center in 2017, and that he receives special education services from the school district based upon ASD and Other Health Impairment (OHI) eligibility. Mother reported that Claimant has deficits in motor, self-care, and social and communication skills. She also reported that Claimant engages in maladaptive behavior.

JUNE 2021 EVALUATION BY DOUGLAS VANDERBILT, M.D.

34. On June 1, 2021, Douglas Vanderbilt, M.D., a Developmental-Behavioral Pediatrician, who is an attending physician, at Keck School of Medicine of the University of Southern California (USC), Children's Hospital of Los Angeles conducted a telehealth follow-up visit with Claimant, Claimant's Mother and Claimant's grandmother. Claimant's family reported that Claimant's aggressive behavior had worsened since his last telehealth visit on November 24, 2020. During his ABA therapy Claimant had to be restrained due to his behavior four times per week because he engaged in hitting, biting, and using profanity. Claimant had a history of making holes in walls, kicking, punching, breaking things and throwing furniture. During an ABA session Claimant ran back and forth across the street without looking until his mother intervened. Claimant also entered a neighbor's house without permission. Claimant's family is concerned about Claimant's social difficulties. He says unrelated things during a conversation, talks about subjects other children are not interested in, and continues to talk about his preferred topics, including Windows XP and video games, even when the subject has changed. Claimant engages in staring spells where it is very hard to get his attention.

35. During the June 1, 2021 remote observation, Claimant ran back and forth and climbed on the couch. At one point, Claimant identified Dr. Vanderbilt as "my new doctor" when Dr. Vanderbilt asked Claimant if he knew who Dr. Vanderbilt was. (Ex. P, p. B98.) Dr. Vanderbilt then observed Claimant run off and continue to run back and forth in the background. At another point during the observation, Claimant again approached the camera and told Dr. Vanderbilt "I'm seven." (*Ibid.*)

36. Dr. Vanderbilt "highly" recommended medication given the level of Claimant's aggression. (Ex. P, p. B98.) Because of Claimant's social difficulties, Dr.

Vanderbilt recommended a reassessment for autism. He also recommended an EEG evaluation to rule out seizures due to the reports of Claimant's staring spells. Dr. Vanderbilt indicated in his report that he would prescribe occupational and speech therapy for Claimant.

**JUNE AND JULY 2021 TELEHEALTH PSYCHOLOGICAL ASSESSMENT BY
REBECCA R. DUBNER, PSY.D.**

37. Rebecca R. Dubner, Psy.D., a WRC consultant, conducted a remote psychological assessment of claimant on June 28, 2021, and July 5, 2021, when Claimant was seven years old. In her evaluation report, Dr. Dubner wrote Claimant had been previously diagnosed with ASD and ADHD, and that Claimant had been referred for an evaluation "due to concerns of [ASD]" and "for a psychological evaluation to determine his current level of functioning in order to assist in the application process for Regional Center services." (Ex. 4, p. A17.)

38. Dr. Dubner reviewed Dr. Shilakes's report of her 2017 psychological examination and a multi-disciplinary assessment dated December 2, 2020. The December 2, 2020 multi-disciplinary assessment was not submitted by either of the parties at the hearing. She administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), VABS, Third Edition (VABS-III), ADI-R, and Raven's 2 Progressive Matrices, Clinical Edition.

39. Dr. Dubner observed that Claimant's mother stayed next to Claimant throughout the assessment. Claimant appeared to Dr. Dubner to be hyperactive and demonstrated poor eye contact. Claimant replied with something off-topic when Dr. Dubner asked him how he was doing. Dr. Dubner noted that Claimant had difficulty engaging in reciprocal conversation, modulating his voice volume as he often spoke at

a high volume and pressure, and his communication was repetitive and focused on perceived failures or shortcomings. Dr. Dubner also noted that Claimant demonstrated "behavioral oddities and repetitive behaviors" such as "spinning, wandering around, and wrapping his arms around his body." (Ex. 4, p.A19.) According to Dr. Dubner, Claimant showed no interest in her thoughts or feelings.

40. In the area of cognitive functioning, Claimant scored in the high average range on the verbal comprehension index of the WISC-V, and in the average range on the Raven's 2, a nonverbal assessment of general cognitive ability. In the area of adaptive functioning, Claimant's scores in overall adaptive functioning were in the low (mild) range, his communication skills score was within the moderately low range, and his daily living and socialization skills score was in the low (mild) range.

41. Dr. Dubner administered the ADI-R to Claimant's Mother remotely over the phone, and Claimant was evaluated in terms of his reciprocal social interactions, communication, and behaviors. Mother reported that Claimant is able to engage in eye contact with his mother on some occasions and that he often looks away while talking. He also "zone[s] out and stares into space." (Ex. 4, p. A20.) Claimant's Mother also reported that he did not engage in pretend play with other peers, he did not consistently engage in interactive play with his peers, and that he had a limited range of facial expressions. Claimant's Mother noted that he showed items of interest that are repetitive.

42. With respect to Claimant's communication, Mother stated Claimant lacks a social filter, has difficulty engaging with others due to lack of focus and attention, and he does not use gestures unless prompted. According to Claimant's Mother, he does not often play with toys but creates items out of random objects. Claimant constantly talks about and draws the Windows XP logo and is fixated on germs, which

sometimes leads to aggressive and destructive behaviors. Claimant's Mother also told Dr. Dubner that Claimant has difficulty with transitions, and she has to give him several warnings about upcoming changes to his routines. Claimant's Mother described "odd body movements" that Claimant engages in, and reported that Claimant is overly sensitive to noise, including the hand dryers in public restrooms.

43. Dr. Dubner reviewed the DSM-5 diagnostic criteria with Claimant's Mother. Claimant's mother reported that Claimant met all of the criteria.

44. Dr. Dubner concluded that Claimant does meet diagnostic criteria for ASD but did not meet the diagnostic criteria for a diagnosis of an ID. She based her conclusions upon the ADI-R results and her clinical observations. Dr. Dubner also diagnosed Claimant with ADHD (by history). She recommended, among other things, continued special education services, group therapy for social skills, mental health therapy, psychoeducational family interventions, and one-on-one behavioral support and/or ABA therapy.

45. Dr. Dubner included the following reservation with her diagnoses and recommendations:

Due to the current circumstances (i.e., COVID-19) that prevents in-person clinical visits, this assessment was conducted using telehealth methods (including remote audiovisual presentation of test instructions and test stimuli, and remote observation of performance via audiovisual technologies). The standard administration of these procedures involves in-person, face-to-face methods. The impact of applying non-standard administration methods

has been evaluated only in part by scientific research. While every effort was made to simulate standard assessment practices, the diagnostic conclusions and recommendations for treatment provided in this report are being advanced with these reservations.

(Ex. 4, p. A90.)

2021 MULTIDISCIPLINARY TEAM OBSERVATION

46. WRC's multidisciplinary team conducted observations of Claimant on July 30 and August 2, 2021. In addition to Dr. Shilakes, the eligibility team consisted of Mayra Mendez, Ph.D., a mental health specialist, and Jessica Haro, BCBA, an autism/behavior Board Certified Behavior Analyst (BCBA) specialist. The eligibility team considered the reports of the May 19, 2021 telephonic psycho-social assessment by Maritza Cortes and the telehealth psychological assessment conducted on June 28 and July 5, 2021, by Dr. Dubner.

47. According to Dr. Dubner's report, generally Claimant "was very talkative, used gestures, demonstrated facial expressions, laughed, asked questions, responded to questions, and showed objects, seeking the attention of the assessors." (Ex. 5, p. A27.) In addition, Dr. Dubner noted that Claimant shared emotions, did not demonstrate atypical speech, nor demonstrate restrictive or repetitive interests or behaviors. Dubner described in her report the range of topics discussed by Claimant including whether Santa Clause is real, what he wants to buy with the money he has saved, the fact that he had gone on a cruise in the past, and his interests. When Claimant was excused so Claimant's Mother could share her concerns about Claimant,

she expressed surprise that Claimant stayed on the Zoom call and did not run off as he typically did.

48. Claimant's Mother shared that Claimant would "flip out" when confronted with sudden changes such as the change to daylight savings time. She also reported that Claimant becomes angry when he is told "no." Claimant's Mother described his social deficits including missing out on social activity at summer camp when one of the children did not want to be Claimant's friend anymore. Claimant's Mother explained that Claimant's maladaptive behavior decreased as a result of his participating in ABA therapy. She expressed the desire that Claimant receive OT and a cognitive therapist for his anger issues, and stated that the recently-completed Parent-Child Interaction Therapy (PCIT) was helpful.

49. On August 9, 2021, the observers met with Claimant's Mother and Claimant's ABA therapist. Claimant's mother explained that Claimant had been demonstrating an intense fear of germs because of the pandemic, and he had been obsessively washing his hands and using hand sanitizer every five minutes, to the point where Claimant's arms became red and inflamed. If Claimant did not have access to the hand sanitizer or could not wash his hands, he would become aggressive and use profanity. Claimant's Mother also reported that Claimant had threatened her with a knife on multiple occasions, including when she was sleeping. However, Claimant has not threatened her since completing PCIT. One of Claimant's ABA therapists quit when Claimant became verbally and physically aggressive after being told to fold his clothes.

50. Claimant became aggressive and non-compliant when he began attending school virtually. He wrote "F-you" to the teacher, broke his laptop, and threw things. (Ex. 5, p. A29.) The ABA therapist worked on breathing exercises, keeping his hands to himself, and asking for permission. The ABA therapist and Mother reported

that Claimant was doing well at that time, but Claimant's Mother was concerned about resuming in-person classes because Claimant's behavior regresses for approximately one month when his routine changes.

51. During in-person schooling, Claimant requires an ABA aide. He has a history of eloping when unattended. Claimant's Mother reported that Claimant does not like to play with everyone and has one or two friends. He talks about one friend obsessively. Claimant may hit others or make "snide" remarks and therefore, Claimant's Mother is concerned that Claimant cannot attend school independently.

52. In the area of learning, Claimant's scores on the WISC-6 and Raven's 2 Progressive matrices indicate that he functions in the high average range of verbal cognitive abilities and in the average range for non-verbal abilities. Dr. Dubner reported that Claimant's general education teacher commented on his IEP that Claimant "is on standard across all subjects ... [and] does not appear to have any weaknesses in the area of overall intellectual ability." (Ex. 5, p. A30.)

53. In the area of self-direction, the observers noted that Claimant had positive interactions with them and shared his thoughts while remaining engaged. Mother reported that Claimant had difficulty controlling his emotions as evidenced by his throwing lamps and chairs at home. Also, at the end of one play date, Claimant had to be carried out of the house and he punched and used profanity on the way out.

54. Claimant had no issues with mobility. He did not demonstrate any issues with receptive or expressive language and did not engage in echolalia or stereotyped language. Claimant's teacher reported in the December 2020 IEP that Claimant has a good vocabulary, knows a lot of words, and has a high receptive understanding of vocabulary.

55. In the area of self-care, Claimant does not bathe himself and needs supervision in the bathroom. Claimant's needs assistance after a bowel movement and will smear soap on the wall and use too much water. Claimant puts his clothes on backward at times and takes up to two hours to eat a meal because of difficulty with fine motor skills. He also struggles with safety awareness but displays appropriate adaptive skills.

56. The consensus of the multi-disciplinary team was that Claimant's overall presentation did not reflect an individual with a developmental disability, specifically ASD. They found that Claimant was engaging, reciprocal in communication, and displayed a sense of humor. The multi-disciplinary team believes Claimant's Mother's concerns reflect "ADHD and a mood disorder or a condition within the Disruptive, Impulse-control and Conduct Disorder cluster due to problems in the self-control of emotions and behaviors." (Ex. 5, p. A32.) They noted Claimant's difficulty keeping his hands to himself, hyperactivity, defiance, verbal and physical aggression, use of a weapon to threaten and the destruction of property.

57. The multidisciplinary team recommended, among other things, a structured school environment, supports for ADHD and behavioral disorders, and a mental health evaluation.

Evidence at Hearing

58. Dr. Shilakes afforded Dr. Pal's report and diagnosis little weight. She explained that Dr. Pal seemed to base her diagnosis almost entirely on the ADOS results. Dr. Shilakes explained that although the ADOS is a tool used in clinical settings to diagnose ASD which provides a classification score, the ADOS in and of itself does not provide an ASD diagnosis. A clinician must also, among other things, evaluate the

diagnostic criteria from the DSM-5 and conduct a clinical interview and observation. Dr. Pal did not use the DSM-5, nor did she indicate that she conducted an interview of Claimant's family.

59. Dr. Shilakes reviewed Dr. Mathur's report and diagnosis of ASD. She disagrees with Dr. Mathur's diagnosis because Dr. Mathur concluded Claimant did not meet one of the criteria of part A of the DSM-5. Dr. Mather determined that Claimant did not have a deficit in developing, maintaining, and understanding relationships. All of the criteria listed in part A of the DSM-5 must be met in order to arrive at an ASD diagnosis. Accordingly, Dr. Shilakes offered the opinion that Dr. Mathur's diagnosis of ASD is incorrect.

60. With respect to Dr. Dubner's assessment and diagnosis of ASD, Dr. Shilakes and the multidisciplinary team disagreed with and questioned the diagnosis and the criteria used by Dr. Dubner. Dr. Shilakes explained that a lot of Dr. Dubner's report was based upon statements made by Claimant's Mother and not Dr. Dubner's observations. Although it is common for information in an evaluation to be based upon information gathered from a parent report, it is not commonplace for an assessment to be based solely upon that information. Although the parent sees the child every day, a clinical diagnosis should be based upon more than that. Dr. Shilakes also noted that Dr. Dubner did not observe Claimant in school with other children or in person.

61. Dr. Shilakes opined that her in-person observations of Claimant in 2017 and 2018 carried weight for her diagnosis in 2021, but that since ASD is a developmental disability, she and the multi-disciplinary team wanted to observe Claimant's behaviors at a different age. According to Dr. Shilakes, remote assessments have drawbacks and benefits but are not less valid than in-person assessments. The

benefits are that clinicians can observe individuals in their natural state at home. She contended that individuals can “bring something to the screen that they could not bring to the office.” Dr. Shilakes also stated that an in-person assessment may be better for some individuals, but that the multidisciplinary team felt that their observations of Claimant resulted in insight into Claimant’s day-to-day behavior.

62. Dr. Shilakes explained that ASD symptoms are consistent between contexts and days. When an individual’s symptoms fluctuate, that is indicative of an emotional or behavioral issue, rather than ASD. Dr. Shilakes does not find it odd that Claimant received ABA services through his insurance but does not receive regional center services and supports because she is aware that this occurs.

63. Dr. Shilakes testified that the conclusions of the multi-disciplinary team in 2021 outweigh Dr. Dubner’s report and conclusions because the multidisciplinary team is made up of several different specialists. According to Dr. Shilakes, the multi-disciplinary team were able to conduct another clinical observation of Claimant, obtain more information and “piece together” (her testimony) the symptoms displayed by Claimant. Ultimately, eligibility is determined by the multi-disciplinary team and not the psychologist who is contracted with the regional center.

64. Dr. Shilakes’s opinion that Claimant does not have ASD was unchanged by the fact that Claimant is eligible for special education services under a diagnosis of ASD and OHI. She clarified that the school district typically awards eligibility based upon a diagnosis received elsewhere. Here, Claimant was diagnosed with ASD in 2017 and the school district appears to have relied upon that diagnosis.

65. Dr. Shilakes explained that in order to be eligible for regional center services, not only does an individual have to have a qualifying developmental

disability, but he or she must establish that the condition is substantially disabling, meaning he or she has significant functional limitations in three or more of the following areas: self-care; receptive and expressive language; learning; mobility; self-direction; or capacity for independent living. Claimant failed to demonstrate during Dr. Shilakes's observations that he was substantially disabled in three or more categories.

66. Dr. Shilakes reviewed the August 25, 2020 letter written by Dr. Holt, who works at Star View Community Services, which was submitted by Claimant as Exhibit E and admitted into evidence. Dr. Holt indicated that Claimant was evaluated on August 5, 2020, "and is diagnosed with [ASD] which is his primary diagnosis. He will need further support and services to address his significant developmental delays." However, Dr. Holt did not indicate in his letter when or what assessments were performed, nor did he include the results of any testing. Similarly, Gary Feldman, M.D., wrote a letter dated June 11, 2020, indicating that Claimant has been his patient since 2017 and was diagnosed with ASD in October 2017. Dr. Feldman asserted that Claimant would benefit from continued ABA therapy, as well as speech and occupational therapy. Dr. Shilakes did not offer any opinion about Dr. Holt's letter. She noted that Claimant already receives ABA therapy through his insurance and WRC does not fund speech or occupational therapy.

67. Dr. Shilakes reviewed Claimant's Special Education Local Plan Area (SELPA) Offer of Free Appropriate Public Education related to Claimant's IEP. The Services include 240 hours of behavior intervention services per month. Her opinion remains unchanged. Dr. Shilakes explained that Claimant does have behaviors that do need to be addressed. As discussed in the multidisciplinary meeting with Claimant's Mother, Claimant is academically far beyond his peers and may need to skip a grade or receive other placement. The multidisciplinary team found that Claimant's behavior

challenges stem from being advanced and lack of focus. Dr. Shilakes's testified similarly with respect to Claimant's IEP and SELPA Behavior Intervention Plan dated November 29, 2021. The SELPA Behavior Intervention Plan addresses Claimant's non-compliance, physical aggression of pushing, hitting, biting, kicking or kneeing peers, verbal outbursts including inappropriate sexual language, and threats, disrobing, and elopement.

68. Claimant's Mother testified that Claimant was first diagnosed with ASD at four years old by Dr. Feldman. Dr. Mathur initially assessed Claimant for ADHD; however, following the hours-long evaluation, Dr. Mathur recommended further testing for ASD. Claimant's Mother was very upset because she was not expecting an ASD diagnosis. Claimant was subsequently diagnosed with both ADHD and ASD. Claimant's Mother testified that Claimant displays ADHD symptoms, as well as autism symptoms, and it is hard to deal with his behaviors.

69. Claimant's Mother asserted Claimant engaged in repetitive behaviors like spinning around in circles and constantly repeating what he's heard. He also uses scripted language and has fixated interests. Claimant does not play with a lot of toys; he is very much into video games and nothing else. His social deficits include talking off-topic, and he either does not respond or responds inappropriately when other children speak to him. Claimant's Mother asserted that Claimant engages in aggressive behaviors if there is a sudden change in his routine and he has hit Claimant's Mother over the head. She does not feel WRC has seen the level of maladaptive behavior Claimant displays.

70. According to Claimant's Mother, he needs assistance every day in school. She has served as his support since the COVID-19 pandemic. In that capacity, she has been able to see what his issues are on a daily basis. Claimant's Mother provides

Claimant with visual aids, behavior support, and occupational therapy. Because she observes Claimant every day, she believes he does have ASD and ADHD.

71. Claimant's Behavior Intervention Plan/IPE includes supports aimed at keeping Claimant at grade level in the general education program. Claimant's Mother believes that without that support, Claimant would be in the special education program. His interventions include a one-on-one ABA aid; ABA services at home; speech/language services for 30 minutes every other week since his articulation has improved; one-on-one occupational therapy services for 30 minutes twice per month; a sensory break while other students are doing math; and additional hours for special education services, if needed.

72. Claimant's Mother explained that Claimant's maladaptive behavior impedes his learning at school. He does not always respond to instructions, which Claimant's Mother believes is linked to his ASD diagnosis, especially when there is a change in therapists and teachers. Claimant only learns with constant prompting.

73. Claimant's Mother offered an August 27, 2018 Notice of Award of Supplemental Security Income (SSI) from the Social Security Administration. The letter indicates that Claimant is eligible for SSI based on being disabled. However, the letter does not include Claimant's disability or diagnosis.

74. Claimant's Mother offered a Treatment Plan and Report of Progress written by Julio Mata, M.A., BCBA, of Star of California Behavioral and Psychological Services, which covers the period from June 2021 to November 2021. The report lists an ASD diagnosis and indicates that Claimant experienced a decrease in elopement, tantrum behavior, verbal outbursts, physical aggression, and foul language during that period. He showed improvement as to remaining on task, daily living skills, functional

communication when requesting wants and needs, and structure in and out of the session. Claimant met his goals of using appropriate language and staying on topic. It was recommended that Claimant continue with an intensive ABA program of 68 hours per month of direct intervention, eight hours per month of supervision support, and four hours total for behavior identification for reassessment.

75. Claimant offered a letter from Dr. Feldman dated January 10, 2022, requesting WRC reconsider Claimant as a client because he was diagnosed with autism using the ADOS on October 5, 2017, and falls within the moderate range of autism. Dr. Feldman also notes that Claimant has been receiving ABA with positive results and opined Claimant would benefit from receiving services from WRC.

76. Claimant also offered a November 25, 2020 letter from Kelly Schiffsky, D.O., a Developmental-Behavioral Pediatrician at Keck School of Medicine of USC, Children's Hospital of Los Angeles. Dr. Schiffsky wrote that Claimant was diagnosed with ASD and ADHD, and recommended speech and occupational therapy and ABA be provided for Claimant's care. However, Dr. Schiffsky did not indicate that Claimant was assessed for ASD at Dr. Schiffsky's facility, nor did Dr. Schiffsky include any assessment results. As Dr. Shilakes testified, WRC does not provide speech or occupational therapy services, and Claimant is already receiving ABA through insurance.

77. On January 18, 2022, Claimant was approved by the County of Los Angeles to receive 24 hours per month of In-Home Supportive Services. However, the award letter does not indicate Claimant's disability or diagnosis.

78. Madison Leber is the Clinical Supervisor of Star of California Behavior & Psychological Services. She has been a registered behavior technician for five years and has a master's degree in teaching, with an emphasis in ABA. Ms. Leber has known

Claimant for approximately three years and has worked directly with him for seven months. She is Claimant's behavior supervisor and provided behavior intervention services to Claimant via Zoom and in-person.

79. Ms. Leber is responsible for preparing Claimant's behavior intervention plan, collecting data, developing the replacement behaviors Claimant is working on in school, and preparing a progress report (Exhibit L).

80. Ms. Leber witnessed Claimant's non-compliance, physical aggression, verbal outbursts, use of inappropriate sexual language, disrobing and elopement. She also observed Claimant trying to hurt his mother. Claimant also tried to hurt Ms. Leber. According to Ms. Leber, Claimant engages in maladaptive behaviors when he is denied access to something he wants, there is an unexpected change in the ABA therapist or routine, when his demands are not met, an item is removed, and when he is sleepy. Sometimes Claimant also engages in scripted behavior to get attention.

81. Ms. Leber has observed Claimant demonstrate rigidity in his beliefs and become fixated. This occurs when Claimant wants to do this his way because he wants to have control of a situation. He becomes aggressive, engages in verbal outbursts, elope, and disrobe when situations arise. With respect to play, Claimant is limited in topics, likes to control the conversation, and go where he wants to go. He will misbehave until he gets what he wants.

82. With respect to social communication, Ms. Leber described Claimant's conversations as generally limited. He has the capability to converse but engages in off-topic talk and inappropriate behavior more often than not. When Claimant has support, he engages more appropriately. Ms. Leber does not see Claimant being successful with his peers without support.

83. Ms. Leber described Claimant as desiring to be interactive socially prior to the COVID-19 pandemic. However, she opined that Claimant does not know how to interact socially with his peers unless the child is younger or has the same interests as Claimant. Ms. Leber testified that it is difficult for Claimant to initiate and sustain conversations for long durations, and Claimant has difficulty sitting for virtual classes. When Claimant attended in-person classes, he struggled because of his non-compliance and verbal aggression. Ms. Leber has seen Claimant reciprocate and maintain conversations of short duration with his peers. Because Claimant's classes are virtual, it is difficult for him to make connections with the kids in his class. In sum, Ms. Leber believes Claimant does not have the skills to engage with his peers appropriately, read body language, or understand sarcasm.

84. Ms. Leber has seen a spike in Claimant's maladaptive behaviors including non-compliance and use of sexual language and profanity since November 2021 due to changes at school and because a new ABA therapist was assigned to him.

85. Ms. Leber has worked with children with ASD for 12 or 13 years. She has seen Claimant engage in behavior similar to those diagnosed with ASD including non-compliance, intolerance for change, verbal outbursts, repetitive behavior, scripting, lack of social connection with other kids, and language. However, Ms. Leber acknowledged that she is not a diagnostician and that some of Claimant's behavior could be caused by other conditions.

86. Ms. Leber acknowledged that Claimant has the capacity and skills to use social communication and the capacity to know when he is doing something wrong in some situations but not across all environments.

LEGAL CONCLUSIONS

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant requested a hearing to contest Service Agency's denial of Claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-5.)

2. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him to prove by a preponderance of the evidence that he meets the criteria for eligibility. (*Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; Evid. Code, §§ 115, 500.)

"Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations] . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. 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. . . . [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, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a qualifying developmental disability within the meaning of Welfare and Institutions Code section 4512, Claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (h)(1):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

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

(a) "Substantial disability" means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

6. California Code of Regulations, title 17, section 54001, subdivision (b), provides, in pertinent part, that the "assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines," and the "group shall include as a minimum a program coordinator, a physician, and a psychologist."

7. In addition to proving that he suffers from a “substantial disability,” Claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: Intellectual Disability, Epilepsy, Autism, and Cerebral Palsy. The fifth and last category of eligibility is listed as “[d]isabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability.” (Welf. & Inst. Code, § 4512.)

8. The evidence did not establish that Claimant has a “substantial disability” (as defined in the Lanterman Act and Title 17 of the regulations) resulting from one of the five qualifying conditions specified in Welfare and Institutions Code section 4512, specifically, Autism, Intellectual Disability, Cerebral Palsy, Epilepsy, or a condition closely related to Intellectual Disability or requiring treatment similar to that required for individuals with Intellectual Disability. The evidence presented established, through the testimony of Dr. Shilakes, that Claimant does not have ASD, and the evidence did not demonstrate that Claimant suffers from an Intellectual Disability, Cerebral Palsy or Epilepsy. Nor did the evidence establish that Claimant has significant functional limitations in at least three areas of major life activity.

9. Claimant failed to present sufficient evidence to establish that Claimant has ASD, although both Dr. Pal and Dr. Mathur diagnosed Claimant with ASD, and Claimant’s Mother and Ms. Leber proffered testimony setting forth their belief that Claimant suffers from ASD. Dr. Shilakes persuasively discredited the reports of Dr. Pal and Dr. Mathur. Specifically, Dr. Mathur found that Claimant did not meet all of the criterion of part A of the DSM-5’s diagnostic criteria, which is required for a diagnosis of ASD. In addition, Dr. Pal did not even refer to the DSM-5 in finding that Claimant has ASD, nor did she conduct any testing beside the ADOS. In addition, Dr. Dubner,

WRC's consulting psychiatrist, relied mostly on the report of Claimant's Mother in arriving at her diagnosis of ASD. Dr. Feldman and Dr. Holt did not include any assessments, or the results of assessments, in their letters stating Claimant has ASD.

10. The Service Agency, on the other hand, proffered evidence from Dr. Shilakes and the determination of the multi-disciplinary team, made up of multiple professionals, including licensed psychologists, a mental health specialist and an autism/behavior BCBA. Their observations were most recent and their second observation included Claimant's ABA provider. When examined in the context of all the evidence, the conclusion of the multidisciplinary eligibility team is persuasive that Claimant does not meet the DSM-5 criteria for any developmental disability, including ASD and ID (Factual Findings 6 through 67.)

11. Claimant proffered no evidence, nor did he assert, that he suffers from Cerebral Palsy, Epilepsy, or an Intellectual Disability, or a fifth category condition, i.e., a disabling condition found to be closely related to Intellectual Disability or requires treatment similar to that required for individuals with Intellectual Disability (Welf. & Inst. Code, § 4512, subd. (a).)

12. Based on the foregoing, Claimant failed to establish by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act under the qualifying category of ASD, or under any other qualifying category. As such, Claimant's appeal shall be denied. (Factual Findings 6 through 67; Legal Conclusions 1 through 11.)

ORDER

Claimant's appeal is denied. Service Agency's determination that Claimant is not eligible for services under the Lanterman Act is upheld.

DATE:

CARMEN D. SNUGGS-SPRAGGINS
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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