BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2018010873

DECISION

This matter was heard by Glynda B. Gomez, Administrative Law Judge with the Office of Administrative Hearings, on June 12, 2018 in Alhambra, California.

Claimant was present and represented by his mother.

Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Jacob Romero, Fair Hearings Manager.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 12, 2018.

ISSUE

Is the Claimant eligible for regional center services under the category of autism.

SUMMARY

Claimant contends that he is eligible for regional center services as a consumer with autism. ELARC contends that although Claimant has some characteristics of autism, he does not meet the criteria for an autism diagnosis and is not substantially disabled as defined by the Lanterman Act. For the reasons, set forth below, Claimant's appeal is

denied.

FACTUAL FINDINGS

1. Claimant is a 10year-old male. He seeks eligibility for regional center services as a consumer with autism.[1]

2. Claimant was first referred to ELARC in 2012 by his local school district for assessment.

3. ELARC assessed Claimant in March of 2012 when he was four years old.

Dr. Larry Gaines, a clinical psychologist assessed Claimant. Dr. Randi Bienstock, a clinical psychologist also reviewed Claimant's records and the assessment conducted by Dr. Gaines. At that time ELARC determined that Claimant was not eligible for regional center services.

DR. GAINES' ASSESSMENT

4A. Dr. Gaines conducted a clinical interview, review of records, administered the Leiter International Performance Scale-Revised (Leiter), The Beery Buktenica Test of Visual-Motor Integration (VMI), the Autism Diagnostic Observation Module 2 and aspects of Module 1 (ADOS), and the Vineland Adaptive Behavior Scale Second Edition (VABS-2). According to Dr. Gaines' March 21, 2012 assessment report, Claimant scored within the average range for intellectual ability on the Leiter, and the low average range for language skills on the VABS-2 with no signs of idiosyncratic language. Dr. Gaines reported that Claimant was able to understand and follow directions, and was cooperative during formal testing. However, Claimant showed some attention-based problems and at times refuses to respond to others. Dr. Gaines also observed that Claimant became angry when he was

[1] The parties stipulated that the only category of eligibility at issue is Autism.

told "no" and displayed some impulse control and emotional regulation problems.

4B. Dr. Gaines found Claimant's motor skills within the borderline range of performance on the VABS-2. Dr. Gaines also noted minor difficulties in fine motor skills. Claimant performed in the superior range on measures of visual, motor and perceptual skills. Dr. Gaines opined that Claimant's social skills fell within the mild range of deficiency on the VABS-2. Dr. Gaines observed Claimant to seek other's attention, reference people and asked for help with the toys. He also displayed imaginative play and domestic mimicry.

Dr. Gaines noted that Claimant's parent reported that Clamant can be irritable and will tantrum easily, prefers to be by himself and has no sense of danger.

4C. Dr. Gaines' administration of the ADOS did not provide an elevated score indicative of autism. Dr. Gaines noted that Claimant was "a very content and engaging child and showed appropriate emotional expression." Dr. Gaines found Claimant "initiated conversation and showed good emotional expression." Dr. Gaines opined that Claimant's greatest difficulty was on the demonstration task where he was not able to provide verbal instruction but was able to use gestures to show how to brush his teeth. Claimant's parent reported that Claimant engaged in stereotypical behavior such as staring at objects, jumping up and down and flapping his hands. Dr. Gaines observed Claimant to "frequently jump up and down in an odd fashion which did have autistic type connotation." Dr. Gaines also noted Claimant's parent's concerns about Claimant breaking toys and objects, tying strings around things, his impulsive behavior and placing his hands over his ears in reaction to loud noises. Dr. Gaines noted that such behaviors, though not observed during his clinical interview, would be indicative of autistic behavior and sensory integration problems.

4D. Dr. Gaines observed Claimant to have some aspects of an Attentional Deficit/Hyperactivity Disorder (ADHD) and a short attention span. Dr. Gaines' diagnosed

Claimant with ADHD, Combined Type (Provisional) and Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS) (Provisional). He expressed the following as his diagnostic impressions:

> [Claimant] is currently functioning within the average range of intellectual ability. He is described as having some aspects of an Attention Deficit/Hyperactivity Disorder. I observed his jumping behavior which may have autistic connotation. Mother described other autistic type behaviors, however these were not observed during today's testing session, and this may reflect a lack of severity, frequency, or breadth of symptoms for diagnosis of full Autistic Disorder.
>
> (Exhibit 13.)

BIENSTOCK 2012 RECORDS REVIEW

5A. Dr. Randi Bienstock, a Service Agency contract psychologist, conducted a records review on June 12, 2012. Dr. Bienstock did not conduct a clinical observation of Claimant and had not met Claimant prior to the hearing. Dr. Bienstock reviewed the ELARC file, and Dr. Gaines' report. After consideration of all documentation, Dr. Bienstock opined that Claimant's "[o]verall diagnostic profile does not indicate a substantially handicapping condition that would warrant ELARC eligibility.

5B. Dr. Beinstock recommended that Claimant:

(1) Participation in a structured preschool program is recommended. Family may wish to share Dr. Gaines' findings with the school district.

(2) Behavior Interventions also recommended.

(3) Monitor overall functioning with regard to aspects of ADHD versus autistic like characteristics. Re-evaluate if future school reports indicate concerns related to Autism.

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2014 SCHOOL ASSESSMENT

6A. In October of 2014, Claimant's local school district conducted apsycho-educational assessment to assist in determining whether he was eligible for special education. The assessment included a review of family history, health and developmental history, school history, review of the cumulative file and previous testing from ELARC by a school psychologist. As assessment procedures and instruments, the psycho-educational assessment report lists: interview with student, interview with teacher/parent, nurse information, Wechsler Intelligence Scale for Children (WISC-IV), Test of Auditory Processing Skills-3 (TAPS-3), Test of Visual Perceptual Skills-3 (TVPS-3), Test of Visual Motor Integration-VI (VMI-VI), Woodcock Johnson Tests of Achievement-IV(WJ-IV), Behavior Assessment System for Children, Second Edition (BASC-2), The Autism Spectrum Rating Scales (ASRS), Gilliam Autism Rating Scales-Third Edition (GARS-3), and Vineland Adaptive Behavior Scales-Second Edition (Vineland-II).

6B. Claimant earned a Global Ability Index (GAI) of 103 which placed him within the average range for general intelligence. Claimant performed in the low average range with a standard score of 81 on the verbal comprehension index, a standard score of 125, within the superior range in the perceptual reasoning index, a standard score of 88, within the average range in the working memory index and a 136 with the extremely high range on the processing speed index.

6C. Claimant received a 93, within the average range on the TAPS-3, a measure of auditory skills necessary for the development, use and understanding of language

commonly utilized in academic and everyday activities. Claimant performed within the average range on the phonological and memory subtests of the TAPS-3. Claimant scored within the low average range on the cohesions subtests of auditory comprehension and auditory reasoning of the TAPS-3. The psychologist opined that the scores indicate that "he struggles more than his peers to understand concrete and abstract verbal information that he hears." While he received an overall standard score of 85 within the low average range on the cohesion subtests, his auditory comprehension score was 4, within the borderline range.

6D. Claimant received a standard score of 123 on the TVPS-3, a measure of visual perceptual skills demonstrating the ability of the brain to understand and interpret what the eyes see. Claimant received a standard score of 101, within the average range on the VMI-VI, a measure designed to assess the extent to which individuals can integrate their visual and motor abilities. On the WJ-IV, an academic assessment, Claimant received a standard score of 83, within the low average range in the broad reading, 97 within the average range in the broad math segment and a 94 within the average range of the broad written language segment.

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6E. To assess Social/ Emotional domain and screen for autism, the assessor used the sentence completion tasks, the BASC-2, ASRS and GARS-3 rating scales to assess Claimant. The ratings scales for these instruments were completed by his teacher and mother. The assessor opined that mother's responses indicated lower adaptive functioning and communication ability and the presence of stereotypical behaviors while Claimant's teacher rated him in the average range. The responses from both raters indicated the presence of hyperactive behaviors.

6F. Mother's responses indicated that Claimant engaged in repetitive activities

and stereotyped movements, demonstrated resistance to changes in his environmental and daily routines, and that he has unusual responses to sensory experiences. Claimant's teacher rated him in the average range on each of these areas. Because those characteristics were not seen across all settings, and were not seen in the clinical interview, the assessor opined that Claimant did not meet the criteria for special education eligibility as a child with autism. The assessor also opined that Claimant's academic performance on standardized tests was consistent with his measured cognitive ability and inconsistent with a diagnosis of a learning disability. To address his ADHD-related challenges in the area of impulsivity and attention deficits the assessor recommended that the school district modify Claimant's curriculum and that he be given immediate feedback, a structured environment and short instructions.
(Exhibit 6.)

2017 ELARC REASSESSMENT

7. As part of a comprehensive re-assessment, ELARC counselor Maria Garcia conducted a social assessment and prepared a report dated March 27, 2017. Ms. Garcia relied upon reports from Claimant's mother and his day care provider. They reported that Claimant flapped his hands, jumped up and down, had transition difficulties, behavior deficits, sensory issues and tantrums. Claimant's mother also reported that he was aggressive if another child wanted to join him in play, was easily distracted by his surroundings, had a hard time following directions during group activities, "likes to tie strings around strings, "likes to play with his shoe laces" and "has no sense of danger." (Exhibit 12.)

8. On September 12, 2017, Psychologist Renee Kim prepared a report of her limited assessment of Claimant. Dr. Kim reviewed ELARC's client records, interviewed Claimant's mother, conducted a clinical observation and administered the Wechsler Abbreviated Intelligence Scales, Second Edition (WASI-II), Vineland Adaptive Behavior

Scales, Second Edition, Module 3 (VABS-III), Autism Diagnostic Interview-Revised (ADI-R), Autism Diagnostic Observation Schedules, Second Edition, Module 3, (ADOS-II).

9. Dr. Kim acknowledged Claimant's history of self-stimulating behaviors including shaking his hands and flapping his hands. She also acknowledged his history of distractibility and repetitive play including the lining up of objects in a certain way, not wanting his foods to be touched and sensitivities to sound. However, per her assessment, Claimant did not meet the diagnostic criteria for Autism. Dr. Kim recorded the following as her diagnostic impressions:

> The results of the assessment indicate that [Claimant] does not meet the criteria for an autism spectrum disorder. The results of the ADOS-II indicate normal functioning in the areas of social interaction and communication, and some but not sufficient evidence of repetitive or stereotyped interests or behaviors (only brief hand shaking behaviors were observed.) Results of the ADI-R indicated elevations in scores as [Claimant] is reported to present with social difficulties, secondary to regulatory behavioral difficulty. He also presents with difficulties with transitions and sensory processing difficulties.
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> At this time [Claimant's] presenting symptoms appear to be attributed to his history of social anxiety, as well as regulatory, behavior, and sensory processing difficulty. He does appear to present with clear social and communicative intent, which was observed in session and have been documented in prior evaluations. He does not have history

> of speech and language delays and does appear to present with fluent speech for his age. Given the aforementioned information, diagnostic criteria for autism spectrum disorder cannot be met. It is recommended that [Claimant] continue to participate in mental health services to address his presenting symptoms.
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> In addition, while [Claimant] does have a prior diagnosis of PDD-NOS, this diagnosis does not appear to be well established enough to move [Claimant], to the current DSM-V autism spectrum disorder category as there has not been sufficient documentation of qualitative impairments in social communication functioning.
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> (Exhibit 9.)

DR. HEIKE BALLMAIER RECORDS REVIEW

10A. On December 8, 2017, Dr. Heike Ballmaier, an ELARC psychologist, performed a review of Claimant's psychological records. Dr. Ballmaier opined that Claimant was "not eligible for Regional Center services as he does not present with a developmental disability. Instead he appears to have mental health issues related to ADHD symptoms and anxiety." She recommended that Claimant continue with mental health services, medication management, engage in extracurricular activities and seek re-evaluation by the school district to assess potential learning disabilities.

10B. In her report, Dr. Ballmaier wrote:

> [Claimant] was evaluated by Renee Kim, Psy. D. on September 12, 2017 and received diagnosis of "Prior History

> of ADHD" and "History of anxiety and regulatory and behavioral difficulty." Autism Spectrum Disorder was ruled out. On the Autism Diagnostic Observation Schedule-2 Module 3 (ADOS-2), and the Autism Diagnostic Interview-Revised (ADI-R) results were below cut-off levels and showed little to no evidence of ASD related symptoms, with the exception of the Restricted Repetitive Behaviors section on the ADI-R that showed a score above cut-off levels. [Claimant] showed no transition difficulties and was attentive and cooperative. He displayed good eye contact and social awareness but looked down when he was nervous. He shook his hands briefly but no other restricted repetitive behaviors were observed during session. His mother reported that [Claimant] does not like change and he displays flapping behaviors at home. He is also sensitive to sounds and likes a special order when he plays. These behaviors have not been observed by his school district and are only reported by his mother. Overall, normal social interactions and communication were reported by Dr. Kim and reported concerns were attributed to social anxiety and behavioral and sensory processing difficulties.

10C. Dr. Ballmaier also noted that Claimant received a full scale IQ score of 112, within the high range and a standard score of 75, within the borderline range in adaptive functioning. She noted that Claimant "can follow 2 step directions, listen to a story for at least 15 minutes, and engage in conversation but not always stay on topic. In the area of Daily Living he is able to care for his daily hygiene and pick up after himself but does not

yet use electric appliances. He is able to use a computer, discriminate currency, and count change."

(Exhibit 10.)

DR. ABBOT/BIENVENIDOS MENTAL HEALTH SERVICES

11. Claimant has been a client of Bienvenidos Mental Health Services since 2012. He received behavior intervention and psychiatric services. Bruce Abbott, M.D., a Psychiatrist with Bienvenidos, who has treated Claimant since 2012, wrote a letter concerning Claimant's health dated July 27, 2017. In his letter he wrote:

> [Claimant] is presently being treated for Attention Deficit Hyperactivity Disorder, Combined Type, with Concerta 54mg qam & Clonidine O.1 mg qhs.
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> [Claimant] has also chronically displayed characteristics of Autistic Spectrum Disorder, including poor peer relations, stereotyped/repetitive motor movements (including "flapping"), inflexibility in his routines and ways of doing things (e.g. toys must be lined up symmetrically, foods can't touch on his plate, crayons must be arranged by color), social anxiety & sense-sensitivity (e.g. covers ears in class—too loud, oversensitive to clothing, frequent washes hands if "sticky").
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> (Exhibits 5 and 8.)

12. Claimant's mother credibly testified about Claimant's struggles with behavior, transitions, lining up of toys and inability to play well with others. Mother also provided video clips which showed Claimant in several settings. Generally, the video clips

showed Claimant's impulsive behavior and refusal to follow directions. Dr. Bienstock reviewed the video clips and her opinion of Claimant's diagnosis remained unchanged.

13. Claimant remained in the hearing room throughout the administrative hearing. He played with a cell phone, avoided eye contact and was generally well-behaved. He engaged with his mother, occasionally interrupting her to get her attention or show her something on the cell phone.

LEGAL CONCLUSIONS

1. Claimant did not establish that he suffers from a developmental disability which would entitle him to regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act)[2], by reason of Findings 1-13 and Legal Conclusions 1-8.)

2A. The applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), refer to the state level fair hearing as an appeal of the Service Agency's decision. A claimant seeking to establish eligibility for government benefits or services has the burden of proving by a preponderance of the evidence that he has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.) Where a claimant seeks to establish eligibility for regional center services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect and that the appealing claimant meets the eligibility criteria.

2B. The preponderance of the evidence did not establish that Claimant is eligible to receive regional center services at this time.

3. In order to be eligible for regional center services, a claimant must have a

[2] Welfare and Institutions Code section 4500 et seq.

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.

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

4B. 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.

5. In addition to proving that he suffers from a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: intellectual disability, epilepsy, autism, and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual

disability." (Welf. & Inst. Code, § 4512.) Here, the parties stipulated that autism is the only eligible diagnosis at issue.

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

7. The DSM-5, section 299.00 discusses the diagnostic criteria which must be met to provide a specific diagnosis of Autism Spectrum Disorder, as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits

in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. [¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement). [¶] . . . [¶]

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

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

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5, at pp. 50-51.)

8. Claimant does not meet the criteria under the DSM-5 for a diagnosis of Autism Spectrum Disorder by reason of the Factual Findings and Legal conclusions. Claimant's assessments were comprehensive and valid, and the opinions of the assessors were derived from a variety of standardized assessment tools, interviews, and observations. After conducting psychological testing, Dr. Kim, found that Claimant does not qualify for a diagnosis of Autism Spectrum Disorder. The school district assessments corroborate Dr. Kim's assessment and also ruled out Autistic-Like Behaviors. Although there is indication that Dr. Abbot and Dr. Gaines suspected that Claimant was on the Autism Spectrum or demonstrated characteristics associated with autism, the evidence did not establish that Claimant has Autism Spectrum Disorder. Dr. Gaines provisionally diagnosed Claimant with PDD-NOS and ADHD in 2012. His earlier diagnosis of PDD-NOS under the DSM-IV does not provide a well-founded basis for a diagnosis of Autism under the DSM-5, by reason of Dr. Kim's assessment in Finding 9. Neither Dr. Abbot, Dr. Kim, Dr. Bienstock nor Dr. Ballmaier diagnosed Claimant with Autism. Claimant's deficits are better explained by his diagnosis of ADHD and Anxiety. Consequently, Claimant has not established that he is eligible for regional center services under the diagnosis of autism or that he is substantially disabled within the meaning of the Lanterman Act.

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ORDER

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

DATED:

GLYNDA B. GOMEZ
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.