BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: D.M., Claimant, vs. EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2013071176

DECISION

This matter was heard by Glynda B. Gomez, Administrative Law Judge with the Office of Administrative Hearings, on March 13, 2014, in Alhambra, California. Claimant was represented by his legal guardian (Guardian)[1]. Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Felipe Hernandez, Chief of Consumer Services.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on March 13, 2014.

ISSUE

Does Claimant have a developmental disability (Autism Spectrum Disorder) entitling him to receive regional center services?

[1] Claimant's Guardian is the cousin of his biological father.

FACTUAL FINDINGS

1. Claimant is a 16-year-old male. He seeks eligibility for regional center services as a person with Autism Spectrum Disorder.

2. On May 16, 2013, ELARC sent a letter and a Notice of Proposed Action to Claimant's legal guardian, informing her that ELARC had determined Claimant is not eligible for regional center services. Claimant's legal guardian requested a fair hearing.

3. Claimant lives with his legal guardian, her husband, her grandmother, uncle, and three younger siblings.

4. Claimant has a total of 7 siblings, three of which reside with him. Claimant came to live with his Guardian, at the age of 6. Respondent and his siblings had been placed in three foster homes prior to placement with the Guardian. Before placement in foster care, Claimant and his biological family were homeless and often lived in a car. Clamant lived with each parent separately and with his maternal grandmother, on occasion. Both of his parents were drug addicted and served time in jail. Claimant was prenatally exposed to alcohol and cocaine. Claimant's father ceased contact with him in 2008 and left the country. Claimant's mother has not maintained contact with the children and her whereabouts are not known. Little is known about Claimant's early life and developmental milestones except that Claimant was subjected to abuse and neglect.

2002 SPECIAL EDUCATION ELIGIBILITY

5. Reports recited that in February of 2002, while in preschool, the Hesperia Unified School District assessed Respondent for special education and found him eligible for services as a student with speech/language impairment. There is no record of Claimant receiving special education services after preschool. Claimant attended kindergarten for less than two months in 2004 in Adelanto, California.

2004 PSYCHO-EDUCATIONAL EVALUATION

6. Claimant started first grade in the El Rancho Unified School District where he was reassessed for special education in 2004. In a report dated December 1, 2004, examiner Hipolito Murillo compiled the District's assessment data. The Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) was administered. Claimant scored in the low average range on verbal comprehension measures, superior range in perceptual reasoning, average range in working memory and the superior range in processing speed, yielding a Full Scale Intelligence Quotient (FSIQ) of 115 within the high average range. The Developmental Test of Visual Motor Integration (VMI) was administered and yielded a standard score of 111, within the high average range. The Bender Visual-Motor Gestalt Test was administered and yielded a standard score of 114 also within the high average range. The Test of Auditory Perceptual Skills-Revised (TAPS-R) yielded an auditory perceptual quotient score of 99, within the average range. The subtests revealed a range of abilities from a high standard score of 126 in auditory word memory (age equivalent of 11 years, 11 months) to lows standard scores of 75 (age equivalent of 4 years) in auditory processing and 88 (age equivalent of 4 years, four months) in auditory sentence memory when Respondent was six and a half years old.

7. The Wechsler Individual Achievement Test-II (WIAT-II) was administered to Claimant. The test yielded composite scores of 91 in Reading, 113 in Mathematics, and 106 in Written Language. The oral language subtest was not administered. The scores obtained were in the average to above average range. The school district psychologist opined that Claimant has some "language difficulties" but "does not demonstrate processing difficulties" and "a severe discrepancy does not exist between…overall cognitive ability and academic scores and work samples, which indicates that he does not qualify for special education services as a student with a specific learning disability."

8. The WIAT-II was analyzed by a school district special education teacher who opined that Claimant "ranked in the average range among other peers his age in reading

and written language" and "in the high average range among other peers his age group in math." At the December 1, 2004 Individualized Education Program (IEP) meeting, the team found that Claimant was not eligible for special education services. The IEP documents that Claimant's Guardian concerned about his "emotional issues" at that time.

2006 Department of Children's services report

9. In 2006, when Claimant was seven and a half years old, a psychological report was prepared by Rita Collins-Faulkner, Psy.D., for the Department of Child and Family Services. Only the Summary and Conclusions portion of her report was available. Neither Claimant's Guardian nor ELARC were ever provided with a copy of the full report. According to the excerpt from the report, Claimant scored in the above average range in cognitive ability and performance with average verbal skills. The report noted that Claimant was "a much stronger visual learner than verbal."

10. The report noted that Claimant appeared to have some significant emotional problems and fears. The assessor diagnosed him with Anxiety and Post-Traumatic Stress Disorder (PTSD). The diagnosis was based on "alterations in behavior, the irritability, the tantrums, rough play, the sleep walking behavior and the restlessness within his sleep." The assessor noted Claimant was exposed to long-term neglect, poverty and aggression. The assessor attributed Claimant's skin-picking to anxiety and trauma and recommended both behavior intervention and psychotherapy.

11. The assessor also noted Claimant had "sexualized behavior" and surmised that it was related to inappropriate and sexual behavior he had either observed personally, seen in videos or that he had been sexually abused. The assessor also noted that Claimant has a history of retention of urine and feces causing enuresis and encopresis. The assessor opined that the root of these issues is either fear or anger. The assessor was concerned that Claimant may have been victimized in a restroom. The assessor ruled out Bipolar

Disorder, but opined that Claimant's cluster of symptoms may be the beginning of a more pervasive disorder.

2008 PSYCHOLOGICAL EVALUATION

12. Roxana Lambdin, Ph.D. of Foothill Family Services (Lambdin)[2] conducted a psychological evaluation of Claimant. Lambdin's report dated October 28, 2009 detailed her evaluation which was conducted in two sessions on August 25, 2009 and October 7, 2009. Claimant was 11 years old at the time of the assessment. The assessment was conducted at the request of Claimant's therapist, Luwin Kwan, IMFT, after his Guardian reported an increase in Claimant's symptoms of enuresis, encopresis, difficulty with interpersonal relationships, frustration, aggression, lying, stealing and bad judgment.

13. Lambdin administered the Connors' Parent Rating Scale-Revised, the Leiter-R International Performance Scale-Revised, the Revised Clinical Manifest Anxiety Scale-2, Children's Depression Inventory, the Behavior Assessment System for Children (BASC), the Vineland Scales of Adaptive Functioning-Interview Edition (VABS), and the Gilliam Autism Rating Scale –Second Edition (GARS-2). She also completed a Mental Status Examination, Review of Records, a school observation, and she consulted with Claimant's referring therapist.

14. Lambdin's report notes that Claimant's Guardian reported that he was obsessed with a handheld Nintendo DS game and picking at his skin. There was also reference to a prior 2006 psychological report that is not in evidence, but which was reviewed by Lambdin and had indications that Claimant was hyper-vigilant and spent his time drawing pictures of naked women. His guardian reported that Claimant has to be reminded to comb his hair, shower and brush his teeth. Once he is in the shower, he still

[2] Lambdin is no longer affiliated with Foothill Family Services and Claimant was unable to locate her to testify at the administrative hearing.

needed instruction on what to do. Claimant also has a limited food repertoire. His guardian also reported that Claimant continued to have daytime enuresis and encopresis and seemed unbothered by his soiled under garments. Claimant refused to use any bathroom except at home or school. Claimant's guardian also expressed concerns about his aloofness and lack of attachment to the family and lack of friends.

15. In Lambdin's testing, Claimant obtained a FSIQ of 132, within the very high/gifted range. On measures of anxiety, Claimant's overall score was within the average range. However, his scores on the subtests were variable including scores of average in Negative Self Esteem and Interpersonal Problems to below average in negative mood. On the BASC, a measure of adaptive skills and functioning, Claimant received a standard score of 52, within the low range.

16. The GARS-2 is a screening tool for diagnosis of Autism. It consists of four sections: Stereotyped Behaviors, Communication, Social Interaction, and Parent Interview. The first section measures an individual's tendency to engage in stereotyped behaviors, motility disorders, and other unique and atypical behaviors (e.g. hand flapping). The Communication section measures an individual's verbal and non-verbal behavior that is symptomatic of Autism. The Social Interaction section measures the individual's ability to relate appropriately to people, events and objects. The Parent Interview consists of several questions that are intended to obtain information about the child's social development and about developmental milestones. The GARS-2 yields a total score that is referred to as the Autism Index and is an estimate of an individual's autistic behavior. Claimant received an overall Autism Index score of 70. According to Lambdin, this score falls at the bottom of the "Possibly" category. Claimant received a scaled score of 4 on the Stereotyped Behaviors and Communications subtests. These scores fell within the "Possibly" range for Autism. Claimant's score on the Social Interaction subtest fell within the "very likely" range. Lambdin was not able to complete the Parent Interview because Claimant's Guardian did not have the necessary information about his development before age three.

17. Based upon her testing, and interviews of Claimant and his legal guardian, Lambdin opined that Claimant demonstrated the symptoms of Autism including deficits in the use of interpersonal communication; deficits in the development of speech; episodes of anxiety and inflexibility; preoccupation with a restricted are of interest that is unusual in its intensity or focus (Nintendo DS game); self-stimulatory behavior; sensory defensiveness, including oral and tactile senses; inappropriate affect; stronger visual processing than auditory processing; and difficulty with abstract thought. Based on all of the above, Lambdin diagnosed Claimant with Anxiety Disorder, Autistic Disorder, Communication Disorder, Enuresis and Encopresis.

ELARC'S AUGUST 31, 2010 PSYCHOLOGICAL ASSESSMENT

18. Heike Ballmaier, Psy.D., BCBA (Ballmaier), an ELARC vendor psychologist, conducted an assessment of Claimant on August 31, 2010. Ballmaier administered the Wechsler Abbreviated Scale of Intelligence (WASI), the Wide Range Achievement Test-Revision Four (WRAT4), the Adaptive Behavior Assessment System, Second Edition (ABAS-II), the Autism Diagnostic Observation Schedule Generic (ADOS-G)-Module 3, GARS-2 and the VMI. She also conducted a clinical interview and a records review.

19. Consistent with previous cognitive testing, Claimant performed in the average range with a standard score of 93 on the Verbal Intellectual Quotient (VIQ) and in the very superior range with a standard score of 134 on the Performance Intellectual Quotient (PIQ). Ballmaier did not compute a FSIQ because there were more than two standard deviations between the VIQ and PIQ. Accordingly, to Ballmaier's report, under these circumstances, the FSIQ is not considered a valid measure of Claimant's cognitive ability. Ballmaier determined that Claimant:

> demonstrated superior to very superior performance on tasks that involved concrete visual-perceptual abilities, as well as tasks that required non-verbal abstract reasoning skills. On the

> other hand, his level of expressive language development and word knowledge, and his verbal reasoning abilities reflected average function. The current results are consistent with previous test results indicating a significant discrepancy between verbal and nonverbal cognitive skills which is considered to be a function of communication difficulties, acting out tendencies, and interaction patterns all of which appear to hinder his ability to respond in a socially accepted manner.

20. Claimant scored in the average to very superior range on the WRAT-4 academic achievement tests. He also scored in the extremely low range for adaptive skills on the ABBAS-II with a standard score of 55 indicating significant deficits. Claimant demonstrated visual motor integration skills in the superior range on the VMI, a visual motor integration measure.

21. On the GARS-2, an Autism screening tool, Claimant received a Standard Score of 6 in the Stereotyped Behaviors subtest within the "Very Likely" range for Autism; a Standard Score of 5 on the Communication subtest within the "Possibly" range Autism; and a Standard Score of 11 within the "Very Likely" range for Autism. Overall, Claimant Received a stand score of 83 within the range of "Possibly" for Autism classification.

22. On the ADOS-G, Claimant received a 4 on the communication module, a 7 on the social interaction module, and a 0 on the stereotyped behavior and restricted interest module for a total score of 11 slightly above the Autism Cut-Off of 10.

23. Ballmaier diagnosed Claimant with Encopresis, Enuresis, Anxiety Disorder Not Otherwise Specified and Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS). Ballmaier concluded that Claimant did not meet the criteria for a full diagnosis of Autistic Disorder. She noted that:

> He demonstrates developmentally inappropriate peer relationships, does not seek out others to share his interests and achievements, and lacks social and emotional reciprocity. He further demonstrates significant difficulty with initiating and sustaining a conversation with others and is reportedly preoccupied with hand-held devices, such as his DS. No impairment in nonverbal behaviors and no significant communication abnormalities were observed during this assessment.

APRIL 5, 2013 PSYCHOLOGICAL EVALUATION

24. ELARC vendor psychologist Larry E. Gaines, PH.D. (Gaines), conducted a psychological evaluation of Claimant on April 5, 2013 to determine his then current levels of cognitive and adaptive function. Claimant was 14 years and 1 month old at the time. The evaluation was specifically limited to the assessment of developmental disabilities.

25. Gaines conducted a clinical interview, reviewed available records, and administered the WISC-IV, the ADOS-G-Module Three and the VABS-II. Gaines observed Claimant to make appropriate eye contact and greeting. Gaines reported that he was able to develop rapport with Claimant and Claimant participated in a conversation, albeit offering little detail. Gaines opined that Claimant demonstrated good attention, did not present with any obvious behavioral, affective or thought process problems and was able to maintain a conversation without any idiosyncratic aspects of language.

26. Gaines opined that Claimant demonstrated gifted intellectual ability on nonverbal problem-solving tasks and average ability on verbal tasks. According to Gaines, the "highly significant" discrepancy between verbal and non-verbal abilities "reflects clear language processing difficulties." He also opined that Claimant's average performance in

verbal tasks did not suggest the severe impairments associated with Autistic Disorder. Gaines diagnosed Claimant with PDD-NOS.

2013 PSYCHO-SOCIAL ASSESSMENT

27. Cindy Bui (Bui), Assessment Coordinator, prepared a psychosocial assessment on March 21, 2013. At the time, Claimant was 14 years and 11 month old and attending a private general education school. According to Bui, Claimant is able to speak clear and complete sentences, but has difficulties expressing his emotions and experiences. He is able to understand/follow instructions and engage in conversation. Claimant is not affectionate, is aggressive and has poor judgment and no remorse. He is obsessed with X Box games, pornography and drawing naked figures.

ELARC DETERMINATION

28. On May 15, 2013, the ELARC Assessment team consisting of Randi Bienstock, Psychologist (Bienstock), Dr. May Lau, Physician, Elin Nozaki, Supervisor, Patricia Melendez, Assistant Supervisor and Bui held a staffing meeting and reviewed Claimant's file. The team determined that Claimant did not qualify for services and concluded that Claimant did not have "mental retardation or any other developmental disabilities."

JULY 23, 2013 RECORDS REVIEW/CONSULTATION

29. On July 23, 2013 Randi E.Bienstock, Psy. D. conducted a records review of Claimant's records and consulted with Gaines to determine whether Claimant qualified for the diagnosis of Autism Spectrum Disorder within the newly introduced Diagnostic and Statistical Manual of Mental Disorders-5th Editions (DSM-5) or as a person who required a treatment similar to that required for a person with mental retardation. After consultation with Gaines and reviewing Claimant's records, Bienstock opined that Claimant "does not present with a substantially disabling condition which would require interventions that

would be similar to or closely related to individuals with mental retardation. Therefore, he is not eligible for Regional Center services."

30. Bienstock reviewed the reports of assessment prepared by Ballmaier and Gaines. Thereafter, she contacted Gaines, the most recent assessor, and consulted with him about Claimant's diagnosis. She reported that on July 23, 2011, Gaines reviewed his report and testing data in light of the May 2013 introduction of the DSM-5. Gaines opined that Claimant did not meet criteria for a diagnosis of an Autism Spectrum Disorder because there was no evidence of any restrictive or repetitive behaviors. Gaines opined that Claimant's "elevated scores on the ADOS are best explained by his social communication difficulties that seem to be related mostly to his other mental health issues." Gaines advised Bienstock t that under the DSM-5, Claimant would be best diagnosed as having a Social-Communication Disorder.

31. Claimant has a well-established diagnosis of PDD-NOS, having been diagnosed as such by two ELARC psychologists in 2010 and 2013. Additionally, an outside psychologist diagnosed him with Autism in 2009.

32. Lambdin also documented evidence of restrictive and repetitive behaviors such as fixation on a Nintendo DS and drawing naked figures in 2009. ELARC psychologist Ballmaier also noted the fixation in 2010 and Claimant received elevated scores in this area on her administration of the GARS-2. At hearing, ELARC offered only reports of the various assessors and no testimony concerning the analysis contained therein. Slightly more weight was afforded Lambdin's report because she observed Claimant in multiple settings over multiple days thereby gaining a more comprehensive picture of Claimant.

GUARDIAN'S TESTIMONY

33. Claimant's guardian credibly testified that Claimant was fixated on the Nintendo DS, pornography, and drawing naked women. Claimant will risk any consequence to access the Nintendo DS and is unfazed by discipline. Similarly, Claimant

searches for ways to obtain pornography. He has obtained pornography by stealing his Guardian's smartphone and accessing the internet, through internet based games, and at the homes of friends and relatives through unauthorized internet access. She also testified that Claimant had trouble tolerating noise, did not make eye contact, did not seem bothered by soiled under garments, was incapable of taking a shower without direction, had no friends and made no emotional attachments or connections with other members of the household including his siblings. She also testified that he had problems communicating his thoughts to others and experienced significant frustration, tantrums, and violent outbursts and had a history of difficulty transitioning from one activity to another.

LEGAL CONCLUSIONS

1. Claimant established that he suffers from Autistic Spectrum Disorder which would entitle him to regional center services. (Factual Findings 1 through 33.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing Claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has met his burden of proof in this case.

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

> a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual….This [includes] mental retardation, cerebral palsy, epilepsy and

> autism. [It also includes] disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

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

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

(1) Self-care.

(2) Receptive and expressive language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

4(b). 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 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: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility, also known as the "fifth category," is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).)

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 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are *solely* physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled with a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just

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

7. The Lanterman Act and its implementing regulations contain no definition of the neurodevelopmental condition autism. The customary practice has been to import the American Psychiatric Association's (APA) definition of "autistic disorder" into the Lanterman Act and its implementing regulations when determining eligibility for services and supports on the basis of autism. That definition has been revised with the May 2013 publication of the DSM-5. "Autism Spectrum Disorder" is the new diagnosis which encompasses the former diagnoses of Autistic Disorder, Asperger's Disorder, Childhood Disintegrative Disorder, Rett's Syndrome, and PDD-NOS. (DSM-5 at p. 809.) Thus, individuals with a well-established diagnosis of Autistic Disorder, Asperger's Disorder, or PDD-NOS are now given the diagnosis of Autism Spectrum Disorder. (*Id.* at 51.)

8. 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.)

9. The DSM-5 also provides a diagnostic note which states with respect to Autism Spectrum Disorder. The note states:

> Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. Individuals who have marked deficits in social communication, but whose symptoms do not otherwise meet criteria for autism spectrum disorder, should be evaluated for social (pragmatic) communication disorder. (DSM-5 p. 51)

10. The diagnostic criteria for PDD-NOS provided:

> This category should be used when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotyped behavior, interests, and activities, but the criteria are not met for a specific Pervasive Developmental Disorder, Schizophrenia, Schizotypal Personality Disorder, or Avoidant

> Personality Disorder. For example, this category includes "atypical autism"-presentation that do not meet the criteria for Autistic Disorder because of late age at onset, atypical symptomatology, or subthreshold symptomatolgy, or all of these. (DSM IV, p. 84)

11. Lamkin from Foothill Family Services diagnosed Claimant with Autism in 2009. Subsequently ELARC vendor psychologist Heike Ballmaier in 2010 and Larry Gaines in April of 2013, diagnosed Claimant with PDD-NOS. The diagnosis is thus, a well-established diagnosis. (Factual Findings 17, 23 and 26) This is not altered by Gaines later opinion that Claimant is better characterized as having "Social Communication Disorder" than "Autism Spectrum Disorder." The sole reason given for Gaines conclusion is the absence of "restrictive or repetitive behaviors" which is not consistent with the evidence admitted at the administrative hearing including the assessments (Exhibits 5, 10 and 11) and the testimony of Claimant's Guardian. Gaines opinion unduly minimizes the symptoms of Autistic Spectrum Disorder presented by Claimant because of his early childhood history of neglect and abuse. The preponderance of the evidence in this matter establishes that Claimant suffers from psychological problems co-morbid with Autism Spectrum Disorder. Furthermore, Claimant's deficits are not just in the area of social communication.

12. The Diagnostic Note to the DSM-5 clearly provides that persons such as Claimant who have a well-established diagnoses of PDD-NOS are now classified as having Autism Spectrum Disorder under the new criterion of the DSM-5. There was no evidence that ELARC's previous diagnosis of PDD-NOS (made as late as April 2013) after extensive testing and observation was in error.

13. Claimant has established that his Autism Spectrum Disorder has resulted in a substantial disability. By reason of factual findings 1-33 and Legal Conclusions 1-12, Claimant has shown significant functional limitations in at least three areas of major life activity including self-care (showering, bladder and bowel control), receptive and

expressive language (unable to express his thoughts), self-direction (must have direction for toileting, changing soiled clothes and showering) and capacity for independent living (requires assistance with basic tasks of self-care).

14. Claimant has met his burden of establishing by a preponderance of the evidence his eligibility for Lantrman Act services and supports under the qualifying category of autism as provided for in section 4512, subdivision (a) of the Welfare and Institutions Code. Claimant had a well-established diagnosis of PDD-NOS. There was no evidence that the diagnosis had been made in error. Applying the DSM-5, Claimant's PDD-NOS diagnosis is reclassified as Autism Spectrum Disorder, which is a developmental disability under the Lanterman Act and he is substantially disabled as a result thereof. Moreover, contrary to Gaines' assertion, the record contains substantial evidence of restrictive behaviors including fixation on the Nintendo DS, pornography, and drawing nude women over a long period of time and Claimant's Autism Spectrum Disorder presents a substantial disability by limiting him in the major life activities of self-care, receptive and expressive language, self-direction and capacity for independent living (Factual Findings 1-33 and Legal Conclusions 1-13)

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made: Claimant's appeal is granted.

DATED: March 28, 2014

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.