

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2017030770

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, on July 11, 2017, and August 24, 2017, in Culver City. Claimant was present and represented by his mother and father.<sup>1</sup> Westside Regional Center (Service Agency or WRC) was represented by Lisa Basiri, Fair Hearing Coordinator.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on August 24, 2017.

ISSUE

Is Claimant eligible for services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

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<sup>1</sup> Claimant and his parents are identified by titles to protect their privacy.

## EVIDENCE

Documentary: WRC's exhibits 1-10; claimant's exhibits A-D.

Testimonial: Thompson Kelly, Ph.D.; Linda Andron-Ostrow, LCSW; Nancy A. Blum, Ph.D.; James Moye; claimant's mother; and claimant.

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a 20-year-old male. He seeks eligibility for regional center services on the basis of autism.
2. On January 17, 2017, WRC sent a letter and a Notice of Proposed Action to Claimant and his parents informing them of its determination that Claimant is not eligible for regional center services.
3. On February 6, 2017, Claimant's parents filed a Fair Hearing Request on their son's behalf which appealed the eligibility denial and requested a hearing. Claimant's mother is Claimant's authorized representative.
4. In connection with the continuance of the hearing initially scheduled for May 9, 2017, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

### DSM-5 DIAGNOSTIC CRITERIA

5. The DSM-5,<sup>2</sup> section 299.00, discusses the diagnostic criteria which must be met to provide a specific diagnosis of Autism Spectrum Disorder (ASD), as follows:

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<sup>2</sup> DSM-5 stands for Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.

- 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. [1] . . . [1]
- 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 [Exh. 9].)

6. The DSM-5 requires that, for diagnostic criteria A and B, above, the current severity must be specified "based on social communication impairments and restricted, repetitive patterns of behavior" as described in Table 2. (DSM-5, at p. 50 [Exh. 9].) Table 2 sets forth the severity levels for ASD as Level 1 (requiring support), Level 2 (requiring substantial support), and Level 3 (requiring very substantial support). (DSM-5, at p. 52 [Exh. 9].) The DSM-5 explains: "The severity specifiers (see Table 2) may be used to describe succinctly the current symptomology (which might fall below level 1), with the

recognition that severity may vary by context and fluctuate over time." (DSM-5, at p. 51 [Exh. 9].)

7. (A) Table 2 describes "social communication impairments" at Level 1 as follows: "Without supports in place, deficits in social communication cause noticeable impairments. Difficulty initiating social interactions, and clear examples of atypical or unsuccessful responses to social overtures of others. May appear to have decreased interest in social interactions. For example, a person who is able to speak in full sentences and engages in communication but whose to-and-fro conversation with others fails, and whose attempts to make friends are odd and typically unsuccessful." (DSM-5, at p. 52 [Exh. 9].)

(B) Table 2 describes "restricted, repetitive behaviors" at Level 1 as follows: "Inflexibility of behavior causes significant interference with functioning in one or more contexts. Difficulty switching between activities. Problems of organization and planning hamper independence." (*Id.*)

#### CLAIMANT'S BACKGROUND

8. Claimant currently lives at home with his parents and four younger siblings. Claimant was born in Massachusetts and attended public schools in the Boston area until the family moved to Santa Monica in 2013, at the end of Claimant's sophomore year of high school. Claimant completed his junior and senior years at Santa Monica High School and graduated with a high school diploma in June 2015.

9. Throughout his schooling in Massachusetts, Claimant received special education services and supports from the local school district. Claimant has had an individualized education program (IEP) for special education services since he was three years old. Prior to age three, Claimant qualified for early intervention services to address his language delays and sensory integration problems; he received speech therapy and occupational therapy on a weekly basis and attended a weekly social skills group. During

his high school years in the Santa Monica-Malibu Unified School District (Santa Monica USD), Claimant continued to receive special education services.

10. (A) WRC's exhibits included a Psychoeducational Triennial Evaluation Report dated March 28, 2014, (Triennial Report) from Santa Monica USD. Claimant was 17 years old at the time. As stated in the Triennial Report, Claimant continued to qualify for special education services under the eligibility category of autistic-like behaviors because he "evidences a history of inability to use oral language for appropriate communication (past reports, current teacher information), a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction (parent input, past report, current teacher input), and an obsession to maintain sameness (BASC-2 behavioral rigidity)." <sup>3</sup> (Exh. 7.)

(B) The Triennial Report recommended interventions to address Claimant's problem-solving deficits, including "DIS counseling to address social skills and problem solving techniques," and assistance with "setting realistic, short-term and long-term goals," and periodically checking in with him regarding goal progress. (Exh. 7, p. 17 of 18.) The recommended interventions to address Claimant's processing speed deficits included allowing him extra time to complete assignments and tests and when he is responding verbally, note taker assistance, and tutorial support. (Exh. 7, p. 17 of 18.)

(C) The Triennial Report summarized information from a triennial psychoeducational evaluation report completed by the Belmont Public Schools in Massachusetts in January 2011, when Claimant was a 14-year-old eighth grade student

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<sup>3</sup> BASC-2 stands for Behavior Assessment System For Children, Second Edition, which is an integrated system of rating scales designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children. (Exh. 7, p. 12 of 18.)

at Chenery Middle School. The Belmont Public Schools report indicated that Claimant's "verbal knowledge was age appropriate, but he continued to present with receptive and expressive language weakness"; he "exhibited reduced processing speed, vulnerable mental control, and organizational weaknesses, which impacted his ability to work with complex material"; he "displayed anxiety when asked to work quickly"; and he "met the criteria as a student with Autistic-like behaviors." (Exh. 7, p. 4 of 18.)

(D) The Triennial Report also summarized information from a speech and language report from May 2013, when Claimant was a 16-year-old tenth grade student at Minuteman High School in the Belmont Public Schools. The speech-language therapist reported that "informal testing was consistent with moderate social-pragmatic disability which centers primarily on the ability to take the perspective of others and use this perspective effectively"; Claimant "exhibited related difficulties in central coherence and determining relevance"; and an additional noted concern was "reduced linguistic clarity." (Exh. 7, p. 4 of 18.)<sup>4</sup>

11. (A) WRC's exhibits also included Claimant's IEP dated March 25, 2015, from Santa Monica USD (2015 IEP). At the time of the 2015 IEP, Claimant was 18 years old and in the twelfth grade. The 2015 IEP stated that Claimant's primary disability is autism and he "meets [special education] eligibility as a student with Autistic-Like Behaviors" because he "evidences a history of trouble using oral language for appropriate communication"; he has "a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction"; and he has "an obsession to maintain sameness." (Exh. 8.)

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<sup>4</sup> This speech therapist report is also summarized on pages 16 and 17 of the written report of Dr. Nancy A. Blum, admitted as Exhibit A.

(B) The 2015 IEP described Claimant's strengths and interests, in part, as follows: "[Claimant] is a very thoughtful student who enjoys sports, acting, and the theater. [He] aspires to one day be an actor but understands that he may need to have a secondary option to support his basic needs in terms of employment. [He] is a hard worker who genuinely wants to succeed in school. [His] language processing difficulties affects his ability to understand classroom material and instruction, interact with peers, and use language appropriately to express himself. Language processing also affects his ability to understand directions, track with transitions, and at times finish. [Claimant] needs to continue to work on self-advocacy skills and ask for clarification or directions when needed as this has been a major obstacle for him in the classroom." (Exh. 8, p. 17.)

(C) The 2015 IEP described Claimant's social, emotional, and behavioral functioning, in part, as follows: "[Claimant] is a cooperative and pleasant student. He had social emotional strengths in being a critical thinker and behaviorally compliant in the school environment. Concerns were reported in both home and school environments regarding atypicality, trouble with peer socializing, and behavioral rigidity. [Claimant] himself reported some atypicality, but did not rate significant levels of concern in other areas." (Exh. 8, p. 18.)

(D) The 2015 IEP provided for Claimant to receive specialized academic instruction, including a tutorial class to assist with "executive functioning skills, organization, and extra time to finish assessments and assignments"; a writing template or concept map; breaking down large tasks or assignments when needed; providing clear, concrete instructions with (repeated) focus on main task; allowing an extra day to finish assignments or projects; and allowing processing time after presenting a task or question (10 seconds). (Exh. 8, p. 14.) According to the 2015 IEP, Claimant has "fine motor perseveration with regard to handwriting" and takes his time to perfect each letter. (Exh. 8, pp. 4, 6.)



(E) The 2015 IEP described, in part, a March 2014 report regarding Claimant's communication skills by speech-language pathologist L. DiMascio, as follows:

[Claimant] is a polite and verbose 17-year-old male student whose speech and language evaluation revealed the following: [Claimant's] overall language skills are just within the average range of ability . . . as measured by the CELF-5. Strengths were noted in his receptive language skills and abilities to understand relationships between words, recall sentences of increasing length and complexity, answer listening comprehension questions and determine semantic relationships. Weaknesses were apparent in his ability to generate novel sentences when given a specified word and accompanying illustration. [Claimant] often added additional irrelevant information to his sentences and sometimes used awkward vocabulary or sentence topics. He also attempted to include all information about a given picture in one sentence. . . . In regards to social language and pragmatics, [Claimant] demonstrated varying skills via formal and informal assessments. . . . [T]he CELF-5 Pragmatic Profile, teacher report and previous report indicated difficulties with pragmatic language including following conversational rules, understanding and expressing complex intentions, taking another's perspective and developing a cohesive narrative with relevant information.

(Exh. 8, pp. 4, 17.)

12. (A) After graduating from Santa Monica High School in June 2015, Claimant enrolled as a student at Azusa Pacific University (APU) for the 2015 fall semester. He lived on campus in the dorm. Because of his IEP from high school, Claimant received support from APU's disability services center, including testing accommodations. Claimant planned to major in kinesiology.

(B) Claimant struggled academically during the fall semester at APU. He had difficulty completing his college assignments, which involved long-term projects and term papers. This was in contrast to his high school assignments, which were not as long or complex. Unlike high school, when Claimant was living at home and had his mother helping him to stay focused and to organize his school work, Claimant did not have that support in college. He had difficulty organizing his work and planning out the various tasks needed to complete the longer assignments in college. In addition, Claimant found himself unable to keep up with classroom lectures and taking notes. Claimant failed all of his college classes that fall semester. Claimant also struggled socially with making and maintaining friendships with other APU students.

(C) For the 2016 spring semester, Claimant decided to change his major to theater. He hoped to improve his academic performance by taking fewer units and enrolling in classes he enjoyed. Claimant reported that the spring semester started off fine with the help of tutoring, but he continued to have difficulty completing his course assignments. He spent many hours doing homework. He felt his daily life was consumed by doing homework and he did not have time for social activities unlike the other students. He continued to have difficulty with social interactions and making friends. The two roommates Claimant had at the start of the fall semester each moved out of the dorm. Claimant was living alone in the dorm and isolated himself. Claimant became depressed because of his lack of success academically and socially. He stopped going to class and doing his course assignments. Claimant went home for spring break but did

not tell his parents about his difficulties at school. He told his parents everything was fine. Not until after he returned to school following spring break did Claimant tell his parents about his problems at school. In April 2016, Claimant left school and moved back home. He began seeing a psychotherapist for depression once a week from April 2016 through the summer of 2016. The therapy helped Claimant to overcome his depression.

13. Claimant's psychotherapist recommended that Claimant participate in counseling support groups. One of the groups she suggested was FACT, which stands for Family, Adult & Child Therapies. FACT is a community-based, not-for-profit support group for persons with autism and their families. FACT provides behavior intervention services, parent support groups, counseling, community outings, and summer camp. Claimant participated in FACT's social skills group for young men. Claimant's mother participated in FACT's parent support group that was held at the same time.

14. (A) Linda Andron-Ostrow (Ms. Andron) testified on Claimant's behalf. She is a licensed clinical social worker. Since 1999, she has been the Director and President of FACT. Ms. Andron received her master of social work degree from UCLA in 1970.

(B) Ms. Andron testified that Claimant is FACT's only non-regional center client. Claimant came to FACT one year ago. In addition to the social skills group, FACT provided Claimant with individual therapy, once a week, for three sessions. The therapist reported to Ms. Andron that Claimant expressed he did not see the point of individual therapy because he did not need help and he had many friends; his mother reported that Claimant had no friends. Claimant also expressed feeling that he did not fit in with the other young men in the social skills support group.

(C) Ms. Andron referred Claimant and his mother to WRC and the Department of Rehabilitation for services. Ms. Andron referred Claimant to WRC because she observed that Claimant appeared similar to other FACT clients who were receiving

regional center services. The referral was also based on reports she received from Claimant's mother. Ms. Andron was "shocked" when she learned that Claimant was denied regional center services. Based on her observations, Ms. Andron believes Claimant has substantial impairment and meets the DSM-5 diagnostic criteria for ASD at Level 1 severity, which is why she referred Claimant and his mother to WRC for services. Ms. Andron did not conduct any assessments of Claimant. In Ms. Andron's opinion, Claimant has learned how to present himself but he appears stilted and robotic; further digging and interaction with him reveals that his presentation is "scripted" and "feels a little off." This is how, in Ms. Andron's opinion, Claimant was able to present himself well during the evaluation by WRC's psychologist, Dr. Bailey (discussed below).

15. Currently, Claimant is attending Santa Monica College (SMC) and living at home. He is taking a lighter course load. Claimant's mother assists him with his course work. She assisted him with registering for his classes. Claimant's parents provide for all of his financial and housing needs. Claimant's mother assists him with making medical appointments. Recently, and with his mother's help, Claimant found a job working part-time for Dream Dinners, which is a service that packages ingredients for meals that its customers prepare at home.

#### WRC PSYCHOSOCIAL ASSESSMENT

16. On October 20, 2016, WRC intake counselor Rafael Garcia, M.A., conducted an intake interview with Claimant and his mother. Mr. Garcia prepared a written Psychosocial Assessment report summarizing the information provided during the interview and his recommendation. At the time of the intake interview, Claimant was 19 years old and suspected of having high functioning autism. Claimant's mother reported that her main concern was to improve Claimant's independent living skills and to determine why he lacks the ability to function like his peers.

17. During the intake interview, Mr. Garcia obtained information regarding Claimant's current functioning. Among other things, it was noted that Claimant can independently complete all of his self-care and hygiene tasks, dress himself, make simple purchases and count change, order food in restaurants, make simple meals, perform simple chores, use a phone, and use public transportation on his own. Difficulty was reported in managing and budgeting his money. Mr. Garcia found that Claimant spoke in complete sentences, he could engage in simple conversation, and he could relay a simple story. Mr. Garcia noted that Claimant spoke in a low monotone and he described Claimant's speech as "rigid, calculated and intense." (Exh. 4, p. 3.) Mr. Garcia found that Claimant made eye contact. Difficulty was reported in establishing and maintaining reciprocal relationships with peers. Claimant's mother reported that, in childhood, Claimant had a number of sensory processing issues, including lining up objects and spinning objects and watching them closely; however, he never engaged in rocking or hand flapping.

18. Based on the intake interview, Mr. Garcia recommended that Claimant undergo a psychological assessment to rule out autism. This recommendation was based on Mr. Garcia's clinical impressions of Claimant, which are summarized in his written report as follows:

[Claimant] had been in special education since 3 years of age until graduation from high school. He then attended a private University and lived on campus. He could not keep up with the workload and failed all of his classes. He had received early intervention services in early childhood due to sensory processing issues. He is willing to socialize but does not maintain lasting relationships. Although [Claimant] is able to care for most of his self-care he has significant delays

in his money management skills. He also exhibits significant delays in his executive functioning. His parents are concerned that [Claimant] will be unable to maintain employment due to his lack of executive functioning. The family would like support from the regional center. A psychological assessment to rule out autism is recommended.

(Exh. 4, p. 4.)

#### PSYCHOLOGICAL EVALUATION BY DR. BAILEY

19. Melissa Bailey, Psy.D., a licensed clinical psychologist, performed a psychological evaluation of Claimant on November 10 and 11, 2016. Dr. Bailey prepared a written report of her findings and conclusions. Claimant was referred to Dr. Bailey for evaluation by WRC intake counselor Garcia "for the purpose of diagnostic clarification, eligibility, and treatment planning." (Exh. 5.) Dr. Bailey conducted a clinical interview, made behavioral observations, reviewed records (i.e., the Triennial Report and the 2015 IEP from Santa Monica USD), and administered the Wechsler Abbreviated Scale of Intelligence, Second Edition (WAIS-2), the Vineland Adaptive Behavior Scales, Second Edition (VABS-2), and the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), Module 4.

20. (A) Dr. Bailey made behavioral observations of Claimant. He greeted Dr. Bailey right away and made social eye contact. He spoke in full sentences and was also able to answer questions. He walked without any problems and sat down appropriately. Occasionally, Claimant had some fleeting eye contact. He was engaged as Dr. Bailey asked him and his mother questions. When asked about his recent college experience,

Claimant said it was "an absolute failure" and admitted he was "severely depressed."  
(Exh. 5, p. 3.)

(B) Dr. Bailey found that Claimant's thinking was "somewhat circular" and, at times, "it was difficult to understand the message he was trying to get across." (Exh. 5, p. 3.) Dr. Bailey observed that when Claimant answered her questions, "he oftentimes gave a super long answer and was very tangential" and it was "hard to get him to stay on points." (*Id.*) At no time did Dr. Bailey observe Claimant engaging in any stereotypical or repetitive behaviors. Claimant smiled and showed a wide range of affect. He spoke in full sentences and made gestures with his arms as he spoke. His tone of voice was within normal limits. He was able to have a back-and-forth age-appropriate conversation. He was able to sustain eye contact. Dr. Bailey found that Claimant was "very verbose," he used gestures when speaking, and he often used metaphors. He also joked about things he enjoyed doing. When asked if he had problems getting along with others, Claimant responded that he got along fine with most people, but acknowledged that he occasionally has a lack of social skills. Dr. Bailey found that he showed good insight into the reasons why he does not necessarily connect with his peers. He was able to describe various emotions (e.g., what it feels like when he is happy) and describe himself, and he offered information about parts of his life.

21. Dr. Bailey diagnosed Claimant with "Major Depression, recurrent, moderate, rule out learning disability." She opined that Claimant "most likely suffered a major depressive incident while he was in college which led him to come home." (Exh. 5, p. 9.) Major depression is not a qualifying diagnosis for services under the Lanterman Act.

22. (A) Dr. Bailey considered ASD as a possible diagnosis and concluded that Claimant did not meet the DSM-5 diagnostic criteria for ASD, which she specifically referred to in her written report. (Exh. 5, pp. 7-8.)

(B) Dr. Bailey opined that Claimant did not have persistent deficits in social communication and social interaction across multiple contexts (criteria A). Dr. Bailey found that Claimant did not have deficits in social-emotional reciprocity because, during her interview with him, Claimant was able to have a back-and-forth conversation; he showed a wide range of emotions; and he initiated responses with her. Dr. Bailey found that Claimant did not have deficits in nonverbal communicative behaviors used for social interaction because, during the evaluation, Claimant was able to sustain social eye contact; he showed a wide range of emotions and both his affect and mood were congruent; and he used a wide range of gestures. Finally, Dr. Bailey found that Claimant did not have deficits in developing, maintaining, and understanding relationships because Claimant himself admitted that he did seem to have some social skills problems.

(C) Dr. Bailey opined that Claimant did not have any restricted, repetitive patterns of behavior, interests, activities (criteria B). During the evaluation, she did not observe Claimant showing any stereotypical or repetitive behaviors, there were no sensory issues, and she did not find any ritualized pattern of verbal or nonverbal behavior.

23. Thompson Kelly, Ph.D., is the WRC Chief Psychologist and Manager of Intake and Eligibility Services. As Chief Psychologist, his duties include reviewing the evaluations performed by WRC's contracting psychologists, including Dr. Bailey. Dr. Kelly testified credibly that Dr. Bailey is qualified and competent to perform psychological evaluations. Dr. Kelly was familiar with Dr. Bailey's report regarding Claimant, and that it followed the typical construct for that type of report. Dr. Kelly found that the descriptions of Claimant contained in Dr. Bailey's report were not indicative of a diagnosis of autism or ASD. Dr. Kelly opined that even assuming Claimant's presentation warranted a diagnosis of ASD, the severity of the condition would be at "Level 1" and



would not constitute a substantial disability that would qualify him for regional center services. In Dr. Kelly's opinion, Claimant's disability, if any, was "negligible." Dr. Kelly opined that Claimant's difficulties during his first year of college were due to the stress that typically occurs when adolescents start college and have to deal with the academic, emotional, and social issues associated with the transition to college life.

#### NEUROPSYCHOLOGICAL EVALUATION BY DR. BLUM

24. Nancy A. Blum, Ph.D., is a licensed clinical psychologist and neuropsychologist. She received her master's degree in clinical psychology in 1983 and her doctorate degree in clinical psychology in 1993. She has been licensed in California as psychologist since 1995. Dr. Blum testified at the hearing on Claimant's behalf.

25. In February-March 2017, Dr. Blum completed a neuropsychological evaluation of Claimant. The purpose of the evaluation was to ascertain, among other things, whether Claimant had a DSM-5 diagnosis of ASD. Dr. Blum is familiar with the eligibility requirements for services under the Lanterman Act, as she conducted evaluations for regional centers many years ago working as an independent contractor. She understands the limitations on regional center clinicians in conducting evaluations, such as time deadlines and the lack of complete information.

26. For her evaluation of Claimant regarding ASD, Dr. Blum conducted six hours of interviews with Claimant and his parents, including administration of the Autism Diagnostic Interview, Revised (ADI-R). Dr. Blum conducted a total of 9.5 hours of neuropsychological testing with Claimant, over two testing sessions, including administration of the ADOS-2, Module 4. Dr. Blum also reviewed available academic and assessment records, and had telephone consultations with Claimant's psychotherapist and three mental health professionals that have worked with Claimant in his social skills/support groups for young men with ASD. Dr. Blum prepared a 99-page written report of her findings and conclusions.

27. Based on her evaluation of Claimant, Dr. Blum's opinion is that Claimant "met the criteria for a DSM-IV diagnosis of Autistic Disorder and currently meets the . . . criteria for a DSM-5 diagnosis of [ASD]." (Exh. A, p. 69.) Dr. Blum's opinion is that Claimant's history and/or current functioning shows persistent deficits in social communication and social interaction (criteria A), and restricted, repetitive patterns of behavior, interests, or activities (criteria B). The symptoms have been present in Claimant's early developmental period and cause clinically significant impairment in social, occupational, and other important areas of functioning. They are not better explained by intellectual disability or global developmental delay. Dr. Blum noted that Claimant is not currently exhibiting stereotyped and repetitive motor movements, but he did as a young child. The DSM-5 diagnostic criterion may be manifested "currently or by history." (Exh. 9.)

28. The first 29 pages of Dr. Blum's written report is a detailed review of Claimant's developmental history. Items pertaining to her opinion that Claimant meets the DSM-5 diagnostic criteria for ASD include the following:

- (A) When Claimant was two years old, he had fewer than 10 words and spoke in his own idiosyncratic language which sounded like English words but were not. Because of Claimant's language delays and sensory integration problems, Claimant qualified for early intervention services. He received weekly speech therapy and occupational therapy, and a weekly social skills group. When he turned three years old, Claimant began receiving services from the local school district.
- (B) Claimant has a long history of problems with social communication and social interaction. As a result, Claimant historically has difficulty making and maintaining friendships with peers. Occasionally, a peer would choose Claimant as a friend but would soon drop him, which was painful for Claimant.

He tended to end up playing alone most of the time. Claimant currently has no friends.

- (C) When Claimant was three years old, he began attending a mixed preschool class that focused on helping students with their social skills, such as making eye contact and shaking hands. Claimant was weak at imaginative play and his language skills were still quite delayed. Claimant attended this mixed preschool class for two full school years and received speech therapy through the school district.
- (D) As a young child, Claimant was preoccupied with Thomas the Tank Engine. He enjoyed turning the train cars upside down and spinning the wheels. He would then line up the train cars and manually advance them, car by car. Later, Claimant's preoccupation switched to Star Wars. Today, he has a preoccupation with professional wrestling and World Wrestling Entertainment (WWE).
- (E) When Claimant was in the second grade, the school psychologist referred him for a neuropsychological evaluation due to concerns about a pervasive developmental disorder. The school psychologist described Claimant as a bright and verbal child with excellent vocabulary skills, but noted he had "quirky" behaviors. For example, Claimant did not always answer questions and seemed to focus more on his internal thought process instead of what was going on around him. Claimant's parents at this time reported that Claimant missed nuances in spoken language; he did not seem to be connecting with peers; he demonstrated concrete thinking and became "locked in" to ideas; and he engaged in repetitive behaviors (e.g., flipping books, playing with a plane in a circular motion).

- (F) Claimant's IEP dated January 21, 2005, when Claimant was in the second grade, included communication goals involving pragmatic language. He was noted to have difficulty facing and looking at a communication partner during a social exchange; he needed assistance conversing about a new topic and maintaining a conversation; and his ability to interpret and use nonverbal social language was an area of need. Claimant received intensive speech therapy services.
- (G) Claimant's IEP dated February 7, 2007, when Claimant was in the fourth grade, noted that, although Claimant seemed to be accepted by his peers, he was not always chosen as a friend. Difficulties in maintaining a conversation and using and interpreting nonverbal social language were noted. Claimant received speech and language therapy, as well as pragmatics training.
- (H) For the fourth through eighth grades, Claimant received speech and language therapy focused on working on his receptive and expressive language skills. He also attended a weekly social pragmatics group led by the speech-language pathologist and the school psychologist. Claimant's teachers noted he had few close friends in school and struggled socially. In addition, Claimant had difficulties managing his internal distractibility and rigid thinking; once he formulated a thought or way of doing something, it was difficult for him to shift gears. He exhibited many inappropriate pragmatic skills and struggled with nonverbal communication, appropriately entering and maintaining a conversation, and maintaining eye contact.
- (I) In the seventh grade, Claimant's educational weaknesses included social connections, processing speed, attention and staying on task during classroom lessons, and organizing his writing. The IEP team wanted Claimant to further develop his peer friendships. One of his IEP goals was to increase

and independently use learned social pragmatic skills, by demonstrating the ability to use active listening skills, interpret body language, and maintain a conversation with a peer by asking relevant questions and making appropriate comments.

- (J) In the eighth grade, Claimant was noted to have difficulties maintaining eye contact and body position, refraining from interrupting others, and using nonverbal cues to support his communication. His language was noteworthy for a pedantic style which sometimes inhibited the precision of his responses. His teachers noted difficulties in the areas of rituals and conversational skills, as well as nonverbal communication skills. His higher-level reasoning skills and pragmatic language skills remained areas of weakness.
- (K) While still living in Massachusetts, Claimant opted to attend a regional public vocational high school, where many of the students had IEPs and there was much less homework than Claimant's high school of residence, which was extremely academically rigorous. Four of Claimant's instructors reported that Claimant did not always notice if his audience was listening to him and adjust his communication to that audience. The four instructors noted that Claimant seemed to prefer being alone and did not seem to have friends at school. The four instructors felt that Claimant stood out in terms of his interpersonal skills because of "his halting yet mature spoken language, his tendency to be perfectionistic in his work, his difficulty interacting with peers, and some atypical behaviors, such as talking to himself while he is working." (Exh. A, p. 16.) The four instructors anticipated that Claimant would have challenges in the future because of "his anxiety around completing his work perfectly, his isolation from peers, and [his] struggles completing work independently." (*Id.*)

29. Dr. Blum opined that Claimant has a developmental disability attributable to autism that manifested when he was a young child and can be expected to continue indefinitely. Dr. Blum further opined that Claimant's disability constitutes a "substantial disability" which results in significant functional limitations in at least three areas of major life activity, as follows:

- (A) Receptive and Expressive Language. Claimant has had language delays and received intensive speech and language therapy from age two through middle school. He has shown much improvement as a result of intensive and prolonged intervention. Yet he continues to have substantial functional limitations in receptive and expressive language. He has marked impairment in his ability to initiate and sustain a conversation with others, and his conversations are very one-sided and lack reciprocity. His pragmatic language is deficient despite having received many years of intensive remediation.
- (B) Learning. Dr. Blum opined that Claimant has significant functional limitations in the area of learning. He has substantial problems with auditory and visual selective attention, attentional control, and working memory. Claimant's problems with cognitive regulation are so substantial that he failed every class during his first semester of college and gave up on his classes mid-way through the second semester. He was not able to learn subjects when placed in a learning situation absent the close coaching of his mother, as he had in high school. His ability to solve problems with insight, adapt to new situations, and think abstractly and profit from experience is deficient.
- (C) Self-Direction. In Dr. Blum's opinion, Claimant has very poor theory of mind associated with his ASD, as well as external locus control. When he encounters difficulties, he has not shown a capacity to change behaviors. Instead, he gives up and isolates himself. Claimant also lacks a realistic appraisal of his

strengths and abilities, which results in his making some very poor independent choices. Even when he makes a good choice, with his deficient cognitive regulation, he is unable to follow through independently. For example, when coached by his psychotherapist last summer to search for jobs, Claimant had difficulty following through to make the needed telephone calls to contact potential employers. (Claimant's mother testified similarly that she had to remind him to contact potential employers.)

(D) Capacity for Independent Living. Dr. Blum's opinion is that this is an area of substantial disability. Claimant is fully dependent on his parents to provide food, entertainment, and a roof over his head. While attending APU, Claimant did not need to cook or clean; he just needed to attend class and complete his assignments. Claimant quickly became overwhelmed and gave up. Dr. Blum also feels that, because Claimant is so eager to be accepted and liked by peers, he is very vulnerable to being taken advantage of by others.

(E) Economic Self-Sufficiency. Dr. Blum's opinion is that this is an area of substantial disability for Claimant. Claimant exhibits poor social judgment and lacks a realistic appraisal of his strengths and abilities. Claimant wants to become a professional wrestling manager, even though he does not have the necessary skills for such a career. Claimant has very weak cognitive regulation and theory of mind, which would interfere with his ability to hold down a paying job. Claimant requires much remediation and intervention to develop skills that will enable him to hold down a job and pay his bills.

30. Dr. Blum disagrees with Dr. Bailey's conclusion that Claimant does not meet the DSM-5 diagnostic criteria for ASD. Dr. Bailey's conclusion is based mainly on her observations of and interactions with Claimant during the two sessions of her psychological evaluation. Dr. Blum's concern is that the lack of sufficient information

regarding Claimant's history in Dr. Bailey's report caused Dr. Bailey to reach a conclusion that does not fit Claimant's situation. In Dr. Blum's opinion, to give an ASD diagnosis or to rule it out, the examiner must look at the person's history, i.e., what he was like a child, and not just how the person currently functions. Claimant has outgrown some of his symptoms, but some he has not.

31. Dr. Blum testified credibly that Claimant is great at "fitting in." He has had intense coaching since he was a child. Thus, in a structured setting, one-on-one with a clinician, as Claimant was during the evaluation with Dr. Bailey, Claimant knows how to fit in. Dr. Bailey noted that Claimant did not show repetitive behavior, but that is what Dr. Blum would expect given Claimant's years of interventions and coaching. Dr. Blum herself did not observe Claimant engaging in repetitive behaviors when she administered the ADOS-2. According to Dr. Blum, it is when Claimant is in an unstructured setting and with peers that he struggles with how he should behave.

32. Dr. Blum disagrees with Dr. Bailey's diagnosis of recurrent major depression. Claimant had a single episode of major depression that occurred during his first year of college at APU. Claimant recovered from the depression by completing treatment with a psychotherapist. No evidence was presented of Claimant having any prior or subsequent episodes of depression.

#### OTHER TESTIMONY AND EVIDENCE

33. (A) James (J.T.) Moyer testified on behalf of Claimant. Mr. Moyer has been the manager of Broadway Gymnastics School for 25 years. He is experienced working with persons with special needs. He has worked with WRC's regional center clients and the Special Olympics. In addition, Mr. Moyer operates a fitness and nutrition business that teaches sports and sports fitness to children. Mr. Moyer has known Claimant for two years. He hired Claimant to work as an assistant coach for campers at the winter camp at Broadway Gymnastics School. He also employed Claimant to work as a sports fitness



Broadway Gymnastics School. He also employed Claimant to work as a sports fitness instructor. Claimant's employment with Mr. Moyer ended due to Mr. Moyer not having enough work hours to offer Claimant.

(B) As Claimant's employer, Mr. Moyer found that Claimant came to work on time and was eager to work. He observed Claimant to be socially awkward when speaking with parents and other adults, but he was more comfortable speaking and interacting with children. Claimant had positive interactions with children. Mr. Moyer found there were some challenges working with Claimant. Claimant sometimes had difficulty following instructions, which then required the instructions to be repeated. Claimant's tasks also had to be broken down into smaller parts. Mr. Moyer found that Claimant was "quick to react" and would start taking action on a task before he was given all of the required instructions. Mr. Moyer feels that Claimant requires some monitoring and coaching in order to complete tasks correctly. At times, Mr. Moyer or other staff had to re-do things that Claimant was asked to do. Other times, Claimant would be asked multiple times to complete a task when Mr. Moyer or other staff did not have time to monitor his work. Mr. Moyer feels that Claimant needs to learn how to slow down, because his eagerness gets in the way of completing tasks accurately. Mr. Moyer feels that any future employer will need to plan out the steps that are required for tasks that are given to Claimant to complete.

34. (A) Claimant's mother testified at the hearing. She believes that ASD is the correct diagnosis for Claimant. Claimant has always struggled with language, but that did not explain his social awkwardness and difficulty making friends. She believes that ASD provides the explanation. She felt relieved after reading Dr. Blum's report. Dr. Blum had advised that Claimant received a significant amount of services over the years that were the type of services given to children on the autism spectrum. Claimant's mother felt frustrated after reading Dr. Bailey's report. She felt that Dr. Bailey was minimizing his

difficulties. Dr. Bailey spent only two hours with Claimant and did not contact the persons familiar with Claimant, whose names and contact information Claimant's mother provided. Claimant's mother disagreed with Dr. Bailey's diagnosis of recurrent major depression. She testified that Claimant did not have depression until he went to college. Prior to college, Claimant was engaged in his life and was not depressed. In her view, depression does not explain Claimant's life struggles and his difficulty making and keeping friends.

(B) Claimant's mother testified that Claimant does well in structured settings and with structured activities where there are clear instructions. If a situation or activity is too open-ended, Claimant does not do well. For example, when Claimant was in the process of looking for a job, it was his mother who took it upon herself to figure out where he could apply and how to get an application. Without her prompting and reminders to work on his job search, Claimant would spend the day in his room on the phone, playing video games, or watching wrestling. Claimant applied for jobs, he had some interviews, but he was not hired. Claimant's mother was involved in locating Claimant's current job with Dream Dinners, as well as locating his previous job at Broadway Gymnastics School. Since Claimant returned home from APU, Claimant's mother helps him with his medical appointments, registering for classes at SMC, submitting paper work for his services through the Department of Rehabilitation and SMC's disability office, and buying clothes for work and school. She gives prompts and reminders to Claimant about completing his homework and upcoming assignments, and helps him plan the steps for completing his assignments. In short, Claimant's mother monitors everything Claimant does to be successful at school and at work.

(C) Claimant's mother also testified about Claimant's preoccupation with professional wrestling and WWE. Claimant's career goals are dominated by his

obsession with wrestling, even though his parents have tried to explain that wrestling is a hobby and not a realistic way to earn a living to support himself.

(D) Claimant's mother believes Claimant has significant functional limitations in major life areas, as defined in the Lanterman Act regulations. Claimant has a large vocabulary but he uses words oddly and awkwardly, which makes it hard for him to connect with peers because he does not realize how his language is coming across to others. Claimant has a strong desire to appear "normal," which results in his reluctance to ask questions when he does not understanding something. Claimant is "pretty good" with his self-care. Claimant's mother feels that self-direction is a big challenge for Claimant. She feels that Claimant is capable of living independently but he needs supports; she worries that he tends to isolate himself when he becomes overwhelmed by a situation. Similarly, she feels that Claimant is capable of being economically self-sufficient but he needs assistance and coaching to maintain a job to support himself.

35. Claimant testified at the hearing. His demeanor and testimony were consistent with the descriptions of his current and past functioning established by the documentary evidence and other witness testimony.

## 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's parents requested a hearing, on Claimant's behalf, to contest WRC's proposed denial of Claimant eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established. (Factual Findings 1-4.)

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 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. Regarding eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the applicant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that the applicant was not eligible. (*Id.* at p. 1137.)

4. 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.

5. 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 (j)(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.

6. 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.

7. 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.)

8. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "autism." Consequently, when determining eligibility for services and supports on the basis of autism, that qualifying disability has been defined as congruent to the DSM-5 definition of "Autism Spectrum Disorder." (See Factual Finding 5.)

9. (A) In this case, the preponderance of the evidence established that Claimant has the qualifying developmental disability of autism. Claimant was diagnosed by Dr. Blum as meeting the DSM-5 diagnostic criteria for ASD. Dr. Blum's diagnosis was supported by her credible and persuasive testimony at the hearing and her detailed written report. The ASD diagnosis for Claimant was supported by sufficient anecdotal evidence of his behaviors and deficits consistent with autism since early in his developmental history, and some of which continue to the present day. The diagnosis of recurrent major depression by WRC's psychologist, Dr. Bailey, was not persuasive.

Claimant had only one episode of depression, which occurred during his first year of college at APU. No evidence was presented of any prior or subsequent episodes of depression.

(B) Further, Dr. Bailey's opinion that Claimant did not meet the DSM-5 diagnostic criteria for ASD was not persuasive. As established by her written report, Dr. Bailey's opinion that Claimant did not meet the DSM-5 diagnostic criteria for ASD was based primarily on her observations of Claimant during two evaluation sessions and did not consider whether he met the criteria "by history" as the DSM-5 allows. By contrast, Dr. Blum's diagnosis was based on Claimant's developmental history prior to age 17 as well as his current functioning. Dr. Kelly testified as WRC's expert witness at the hearing. His testimony was not sufficient to refute Dr. Blum's opinions and diagnosis of ASD for Claimant. Dr. Kelly, in his testimony, acknowledged ASD to be a potential valid diagnosis for Claimant, but the severity of the condition was not substantially disabling to qualify him for regional center services. Dr. Kelly's opinion was not persuasive, given Claimant's past and current level of functioning. Dr. Kelley conceded that "receptive and expressive language" was potentially an area of substantial disability for Claimant.

10. Claimant established by a preponderance of the evidence that his condition results in major impairment of his social functioning, which requires interdisciplinary planning and coordination of special and generic services. (Cal. Code Regs., tit. 17, § 54001, subd. (a)(1).) Claimant, in the past, has received services commonly received by persons diagnosed with ASD. It is clear that Claimant will require, and benefit from, a coordination of special and generic services. (Factual Findings 1-35.)

11. Claimant also established by preponderance of the evidence that he has significant functional limitations in at least three areas of major life activity, as appropriate to his age, specifically, receptive and expressive language, learning, self-direction, capacity for independent living, and economic self-sufficiency. (Cal. Code

Regs., tit. 17, § 54001, subd. (a)(2).) By doing so, he established that his eligible condition is substantially disabling. (Factual Findings 1-35.)

12. Claimant established he has the qualifying developmental disability of autism, and that his condition is substantially disabling. It was established by a preponderance of the evidence that he is eligible for regional center services under the Lanterman Act. (Factual Findings 1-35; Legal Conclusions 1-11.)

## ORDER

Claimant's appeal is granted. Claimant is eligible for regional center services under the category of autism pursuant to the Lanterman Developmental Disabilities Services Act.

DATED:

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ERLINDA G. SHRENGER

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.