BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2017080898

DECISION

The hearing in the above-captioned matter was held on December 5, 2017, in Alhambra, California, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Claimant was represented by his mother, hereafter Mom.[1] The Service Agency, Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Jacob Romero, Fair Hearing Coordinator.

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date.

In reviewing the documentary evidence in preparation of this decision, it was noted that Claimant's exhibit E comprised several distinct documents. They have been subdivided as follows, for ease of reference:

Exhibit E-1, a school status report by Kaiser Permanente (Kaiser)

[1] Titles are used in the place of the names in the interest of privacy.

Exhibit E-2, Kaiser PE Class/Sports/Exercise Status Report

Exhibit E-3, Vineland test score sheet

Exhibit E-4, Kaiser report re: June 5, 2017 visit

Exhibit E-5, Kaiser report of office visit April 21, 2017

Exhibit E-6, Kaiser report of office visit, June 8, 2017

Exhibit E-7, Kaiser report of office visit, July 27, 2017

The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders.

ISSUE PRESENTED

Is Claimant eligible for services from the Service Agency on the grounds that he suffers from autism spectrum disorder, intellectual disability, or a condition similar to intellectual disability, or which can be treated in a manner similar to intellectual disability?

As detailed below, Claimant could not establish, by the required preponderance of the evidence, that he is eligible for services from the Service Agency.

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is a 10-year-old boy (born November 27, 2007) who seeks services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.[2] based on a claim that he suffers from autism spectrum disorder.

[2] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

2. On July 27, 2017, ELARC notified Claimant's mother he was not deemed eligible for services under the Lanterman Act. ELARC asserted that Claimant did not have an eligible disability within the meaning of the Lanterman Act. (Ex. 1.)

3. On August 2, 2017, Mom submitted a Fair Hearing Request, and this proceeding ensued. (Ex. 2.) The matter was once continued, at Claimant's request. All jurisdictional requirements have been met.

CLAIMANT'S FAMILY HISTORY AND GENERAL BACKGROUND

4. Claimant is of African-American descent, and he lives with his mother and half sister within the Service Agency's catchment area. He has older siblings who live on their own. His father has not been involved with his life, since the time Claimant was an infant. Mom was 38 years old when she gave birth to Claimant, who had a twin who did not survive. (Ex. 3, p. 2.)

5. Claimant met developmental milestones as follows: he sat independently at nine months, spoke his first words at seven months, crawled at 12 months, and walked at 15 months. However, he is not yet fully toilet trained and suffers from nocturnal enuresis. (Ex. 3, p. 2.)

6. At the time of the hearing, Claimant was enrolled in a public school within ELARC's catchment area; he is in the third grade. He does not have an Individual Education Plan (IEP), but does have a "504" plan. (Ex. 3, p. 1.) Claimant previously attended schools in the Los Angeles Unified School District (LAUSD) and the Palmdale School District.

7. Claimant sought services from the Service Agency because he was referred there by Kaiser, after that health care provider made him eligible for its services due to Autism Spectrum Disorder (ASD). He was also diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). (Ex. 3, p. 1.)

DIAGNOSTIC AND ASSESSMENT HISTORY

8. There are some inconsistencies in Claimant's reported history, and information has not always been forthcoming from Mom. (Ex. 7, p. 2, 4th italicized par.; ex. E-1, p. 1; ex. E-4, p. 2 [Mom reported Claimant was diagnosed as autistic by LAUSD at age three, contrary to ex. 6, p. 1 and ex. 7, p. 2].) Documents pertaining to Claimant's prior assessments and services have not always been available. Notwithstanding such issues, much can be gleaned from the record. For example, there is evidence that Claimant received some educational services at an early age, as he was found eligible due to developmental delay, and given preschool support services, in 2011. (Ex. 6, p. 1; ex. 7, p. 2 at consultation history.)

9. Claimant was assessed for special education services, but he was found not eligible for an IEP in June 2012, March 2014, and June 2015; the assessments were conducted by LAUSD, the Palmdale School District, and the Westside Union School District. According to Rania Shanny, a school psychologist with Respondent's current school district (South Pasadena Unified School District), in the five years before December 2016, all assessments, including one provided by Kaiser Permanente, concluded that Claimant was not eligible for special education services, although he has been recommended for accommodations. (Ex. 6.) Hence, his current school district has declined to provide special education services, although it is providing accommodations to him.

10. In February 2013, when he was five years old, Claimant was diagnosed with ADHD and Behavior Problem, by Alice Lim, M.D., who is associated with Kaiser. Eleven months later, he was assessed by Dr. Deborah Gallo, Ph.D., also with Kaiser, who also diagnosed ADHD, along with Learning Difficulties. An occupational therapy assessment in April 2016 led to a diagnosis of Impulsive Control Disorder, and a physical therapy evaluation led to a diagnosis of Unsteady Gait. In August 2016, another physician, Veena

Sison, M.D. assessed Claimant and diagnosed him with ADHD Hyperactive Impulsive, Disruptive Behavior Disorder, Impulse Control Disorder, Learning Difficulties, Delayed Developmental Milestones, Encopresis, and Nocturnal Enuresis. (Ex. 7, p. 1.)

11. During her February 2013 assessment of Claimant, Dr. Lim reported that "socialization, language, and thought process are not consistent with autism spectrum disorder or Asperger's. [Claimant] has good imaginative concepts." She went on to report that "Mother was reassured that child does not have an autism spectrum disorder. Explained that children with ADHD may have social deficits, which she had not known." (Ex. 7, p. 1, quoting Dr. Lim's earlier report.)[3]

12. (A) Westside Union School District conducted a psycho-educational assessment of Claimant in May 2015, when he was seven and one-half years old, and finishing the second grade. The report was issued on June 1, 2015, and is found at exhibit 4. Mario Almazan, Ed. S., was the school psychologist who conducted the assessment. According to the report, Mom asked for the assessment to ascertain Claimant's then current levels of function, and to find appropriate classification.

(B) Mom reported that Claimant's ADHD, asthma and headaches had impacted attendance at school. She stated her belief that his not being able to focus, and his inability to concentrate had led to disruptive behaviors, leading to labeling in his schools, and causing stress. (P. 3.)

(C) The teacher did not report behaviors indicative of ASD during his first semester. Instead, she described him as wonderful, and a wonderful addition to the class. She described him as always eager to learn and contribute to classroom

[3] When Claimant was later examined by Dr. Shaw, Mom professed not to recall the exam by Dr. Lim, and was surprised that Dr. Lim said Claimant did not have ASD. (Ex. 7, p. 4.)

discussions. She reported that Claimant liked to participate in group discussions and to share ideas in class, and that he finished assignments in a timely manner. (P. 3.)

(D) During testing he was cooperative, but he appeared as a quiet boy. He made adequate eye contact and responded to all questions asked. He became "squirmy" in his chair when given tasks that called for sustained listening and verbal responses; movement breaks improved his performance. (Pp. 3-4.)

(E) Claimant's academic achievement was tested with the Woodcock-Johnson III achievement test. On that test, where the mean score is 100, Claimant scored between 101 and 104 on three main areas, reading, math, and written language. Use of the Naglieri Nonverbal Ability Test led to a finding of average to high average nonverbal reasoning and problem solving abilities. (Pp. 4-5.)

(F) The Behavior Assessment System for Children, (second edition) was administered, but neither the parent or teacher returned the ratings to the school psychologist before the IEP meeting. (P. 9.) The report did state, regarding adaptive behavior, that neither the teacher or parent provided information about adaptive problems, such as communication or social interactions. (P. 10.)

(G) No learning disorder was found, as Claimant's achievement was in the range of his ability. He had no processing problems. He was not found to be emotionally disturbed. In this regard, the report stated that Claimant is able to get along with others and use appropriate language to initiate interaction. It further stated that he was observed to have friends in class, and tended to be social with them. (P. 13.) He was not found to have inappropriate behaviors at school. Although his mother had reported depression, anxiety, and stress, which she attributed to an earlier head injury, the behaviors she reported were not observed in school. (*Id.*)

(H) Claimant was not found eligible for special education services. However, some recommendations were made to accommodate his ADHD. (P. 15.)

13. (A) Intelligence tests have been administered to Claimant before and during the Service Agency's assessment. They have always indicated that Claimant is of average intelligence. For example, Kaiser Permanente performed a psychoeducational evaluation of Claimant in January 2014, when he was six years, one month old. The report, which is incomplete, is found at exhibit 13. One part of the report that is available is the page setting out Claimant's scores on the Wechsler Intelligence Scale for Children IV, or WISC-IV. It shows his Verbal Comprehension at 106, his Perceptual Reasoning at 94, and his Working Memory at 107, and Processing Speed at 100. Claimant's Full Scale IQ was 103. All of those scores are in the middle of the average range, as the median score on the WISC-IV is 100, with a standard deviation of 15. (Ex. 13, 2d page.)

(B) In February 2017, Claimant was administered the WISC-V by Alan Golian, Psy.D, of Kaiser Permanente. On that occasion, his Full Scale IQ was 99. (Ex. 7, p. 7.) It is noted that on this later occasion, his Processing Speed was rated at 86, a decline of 14 points from the January 2014 score. (*Id.*, pp. 7-8.)

(C) When Dr. Gaines assessed Claimant three months later, he also administered a WISC-V, and he found scores in the average range, with Verbal Comprehension in the above-average range. (Ex. 9, p. 2.) This rise in scoring may be attributed to administration of the WISC-V less than six months after it was administered by Kaiser.

14. Prior to June 2017, Claimant had not been diagnosed with ASD or any related malady. Mom had applied for eligibility with North Los Angeles County Regional Center in October 2010, but withdrew from the process before a social assessment could be conducted because she believed that regional center to be racist, because Claimant's older brother had not been found eligible for services there. (Ex. 8, 11/15/10

entry.) As set out in Factual Finding 11, in April 2013, Dr. Lim firmly believed that Claimant did not suffer from ASD, and he carried an ADHD diagnosis for several years.

//

THE KAISER REPORT OF JUNE 2017

15. A Kaiser Multidisciplinary Report was issued on June 1, 2017. It is found at exhibit 7. According to the report, a pediatrician in the Kaiser facility in Lancaster referred Claimant for evaluation. (P. 1.) The report quotes from Dr. Lim's report, previously referenced in Factual Finding 11.

16. (A) The report encompasses an initial evaluation by Apurva Shah, M.D., which begins at page 3 of exhibit 7. Focusing on areas relevant to diagnosing ASD, Dr. Shah reported that during the session, Claimant showed good social reciprocity and joint attention, and was able to answer questions easily and he volunteered information. Claimant initiated conversation to get his needs met, but not otherwise. Dr. Shah observed "decent" eye contact and Claimant's hand gestures were adequate. Claimant reported having friends, identified three by name, and when his mother told Dr. Shah that her child usually plays with younger children, the child disputed the statement, providing examples of how he plays with children his own age. (P. 5.) However, at one point, after describing problems with tantrums at school, Mom stated that "socially he does okay." (P.4.)

(B) Regarding restrictive patterns of behavior, and interests and activities, Dr. Shah observed no repetitive or restrictive behaviors, although Mom reported examples of such behavior at home. When Mom gave an example of how Claimant would, everyday, take his Pokemon cards out of their book, flip them over, and put them back in the book, Claimant claimed he did that because the cards tend to slip in the pocket that holds them in the book. Claimant described how he likes to play with his toys, play soccer, video games, and watch movies. Mom described him playing with his light saber

toy "for hours." Mom reported that he covers his ears when Claimant hears sirens or loud noises, and that he turns on every light in the house when it gets dark. She reported that he used to avoid certain foods due to texture issues. (Pp. 5-6.)

(C) Dr. Shah's report states that the symptoms began in the early developmental period, but no supporting detail is provided. As to whether the symptoms were causing clinically significant impairment in social functioning, occupational functioning, or other areas, Dr. Shah stated it was "unclear" as to social functioning, there was no impact on occupational function, and as to "other" he stated "multiple behavioral problems." (P. 6.)

(D) Dr. Shah diagnosed "screening for autism spectrum disorder," ADHD, combined presentation, anxiety, encopresis, and functional enuresis. He recommended referral to the multidisciplinary team for further evaluation. (P. 6.)

17. (A) Dr. Golian, who administered the IQ test to Claimant (Factual Finding 13(B)) also administered the ADOS-II, module 3. He describes the test as a semi-structured standardized assessment instrument designed to assess communication, social interactions, and play (or imaginative use of materials).

(B) In the area of communication, Dr. Golian noted that Claimant spoke in complete sentences without the types of speech abnormalities associated with ASD, and there was no echolalia or stereotyped/idiosyncratic language. As to social communication, Claimant made spontaneous comments and overtures throughout the observation. He offered "some" information about himself and made "some" efforts to inquire about Dr. Golian "by picking up on the examiner's cues." But, he had some difficulty sustaining conversation, at times due to difficulty remaining on topic. In terms of non-verbal communication, he directed appropriate eye contact and gestures, integrating them with vocalizations. (P. 8.)

(C) In the area of reciprocal social interaction, Dr. Golian reported the ability to build rapport with Claimant, but had some difficulty sustaining it. The child showed some enjoyment in activities and topics presented by Dr. Golian, but only played with a few of the many available toys. He demonstrated "limited" imaginative play and mostly played by organizing the toys and moving them around so that the space shuttle toy could take off. He would follow ideas for play provided by the examiner, but would revert back to his preferred play. He took turns identifying the events in a storybook, and showed age-expected ability to report events and objects that elicit different emotions, but had a limited understanding of typical social relationships. (P. 8.)

(D) Dr. Golian observed that Claimant showed a fixated interest in two of the toys, the space shuttle and fire truck, and he did not play with the other toys or objects. He also lined up the play materials on the table. (P. 8.)

(E) Dr. Golian reported that the ADOS-2 yielded a classification of autism spectrum, but he noted that such did not alone provide a clinical diagnosis. (P. 8.)

18. Kaiser conducted a speech assessment, which found average performance on the Comprehensive Assessment of Spoken Language (CASL). In the area of Behavior/Pragmatics, it was noted under the heading "conversation," that Claimant did not give enough information to the listener, but would take conversational turns, and while conversation was initiated by the therapist, the conversation was relevant. As to "social language," it was noted that Claimant didn't notice when the speaking partner was listening, bored or confused. His limited attention was noted, and Claimant needed to take breaks, or to stand up while playing with a balloon, to finish the 45-minute assessment. He was able to ask questions of information or to clarify something, and his questions were appropriate for adults. In the area of nonverbal pragmatics, Claimant was described as not interpreting facial expressions correctly, and he did not maintain eye contact long enough "due to high activity level." (P. 11.) The report went on to state

that when called Claimant could maintain eye contact, and he could physically enter a group appropriately.

19. Claimant has been receiving occupational therapy (OT) since October 2016. The report, based primarily on Mom's reports, indicates that Claimant has problems completing self-care tasks, such as fastening clothing, or cutting food. He has trouble navigating wet surfaces and orienting his clothing properly. A recommendation to continue OT was given. (Pp. 11-16.)

20. The report contains a chart showing that Claimant showed persistent deficits in social communication and social interaction, either by observation or by history. Likewise, signs of restricted, repetitive patterns of behavior, interests or activities were found in three of four areas. (Pp. 16-17.) Only one of the four factors that come under this area were observed: restricted interests of abnormal intensity or focus. The Kaiser team made a diagnosis of ASD, along with ADHD, anxiety, encopresis, and Functional Enuresis. (P. 17.)

ASSESSMENT BY LARRY E. GAINES, PH.D.

21. Larry E. Gaines is a licensed psychologist who conducted a psychological evaluation of Claimant at the request of the Service Agency on May 4, 2017. He had reviewed an incomplete psychoeducational assessment by Kaiser, a Kaiser OT assessment from October 2016, and the Kaiser authorization of services issued in April 2017. Dr. Gaines report is found at exhibit 9.

22. As noted in Factual Finding 13(C), Dr. Gaines administered an IQ test and found average intelligence. He administered the ADOS-II, module 3. Claimant scored only a 4, in the area of social affect. Dr. Gaines did not find restricted and repetitive behavior during the assessment, though Mom reported some behaviors of that type. Dr. Gaines described Claimant's communication skills as "excellent." (P. 4.) Claimant did not initiate a social conversation but contributed to one. He was able to describe aspects of

a picture, to label emotion and he "perfectly" mimicked emotion and gesture. He was able to demonstrate how to brush his teeth, which was "well-coordinated with eye contact and gesture." (*Id.*)

23. Dr. Gaines also administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland). He scored a 77 on the communication domain, but a 61 and 66 on daily living skills and socialization, respectively. (P. 7.)

24. Dr. Gaines described Claimant as making good eye contact and greeting. However, he was "constantly fidgeting." He showed better attention during testing structure, but in pauses would begin to fidget or rock in his chair. (P. 2.) He could talk in sentences, and was able to maintain a conversation, contributing to aspects of a conversation about himself. (P. 3.)

25. (A) Dr. Gaines did not diagnose Claimant with ASD or intellectual disability. In regards to the latter area, he found that Claimant's IQ was higher than the usual criteria, and while he had deficits in adaptive functioning, Dr. Gaines attributed them to behavior-related issues. Regarding ASD, Dr. Gaines did not find deficits in social-emotional reciprocity, nor in non-verbal communication. He believed that the criteria pertaining to developing, maintaining, and understanding relationships was partially met, but he did not find stereotyped or repetitive motor movements. He noted that Mom had referred to playing with some toys in a certain way, but that Mom had qualified the statements by saying the behavior was not abnormal, and she qualified the description of his putting things in a certain way as "normal, like other kids." (P. 5.) Thus, Dr. Gaines did not find Claimant insisted on sameness, or had highly restricted, fixated interests. Dr. Gaines did find, on Mom's report, that Claimant demonstrated hyper or hyporeactivity to sensory input. (*Id.*)

(B) Dr. Gaines described Claimant's presentation as being primarily that of a child with ADHD.

26. (A) After his May 2017 assessment, Dr. Gaines had the opportunity to review further reports, including the Kaiser June 2017 team report. In summary, the information provided to him by those reports have not convinced him that Claimant suffers from ASD. For example, the speech and OT reports do not indicate ASD; for example, he pointed out that the speech and language report indicated poor eye contact, but attributed it to Claimant's high activity level. (Ex. 10, p. 1.) He believes that the level of severity of verbal and non-verbal communication issues is not to the level justifying an ASD diagnosis, and that the issues are equally explained by other conditions, including ADHD.

(B) Dr. Gaines pointed out that in the Kaiser Developmental Consultation in February 2017, Claimant showed communication skills inconsistent with ASD, and that earlier report showed behaviors consistent with Impulse Control Orders. There was no report of idiosyncratic language. There were mixed reports of behavior, such as developing rapport but being able to report on emotional issues, but with limited social understanding. Dr. Gaines asserted that mood disorders or ADHD could explain such social problems. (Ex. 10, p. 1-2.)

(C) Dr. Gaines pointed out that the December 2016 psychiatric evaluation noted behaviors inconsistent with ASD, including normal socialization, and Mom's statement that Claimant did not have behavior issues. (Ex. 10, p. 2.)

(D) Dr. Gaines reviewed the June 2015 psychoeducational evaluation, and pointed to the information from the first grade teacher that Claimant participated and shared ideas in the classroom, and the lack of behavior problems in class. In Dr. Gaines opinion the report does not represent "the trajectory of a child with autistic disorder, and suggests . . . [ADHD]." (Ex. 11.)

27. Regarding the June 2017 Kaiser team report, Dr. Gaines did not find it compelling, in part because he doubted the analysis. He pointed out that there was a

lack of history supporting an ASD diagnosis. He stated that he "found no history or trajectory of behavioral problems that would be suggestive of an Autistic Condition." (Ex. 12, p. 2.)

OTHER MATTERS

28. At the time of the hearing Mom produced copies of several Kaiser reports, identified in the preamble as Exhibit E. She also produced copies of articles, or extracts, pertaining to late diagnosis of ASD in African American and other minority children. And, she produced a copy of a letter from UCLA's Semel Institute.

29. (A) The letter from the Semel Institute, exhibit F, states that Claimant had been assessed for part of a genetics study for individuals with ASD. He was described as having positive behaviors, such as speaking spontaneously and fluidly without any stereotyped speech, complimenting his speech with gestures. On the other hand, he was deemed to have inconsistencies in his social communicative behaviors. He did not maintain reciprocal play, preferring to play on his own. His eye contact was deemed inconsistent and he displayed a "somewhat limited" range of facial expression, and he made repetitive off-topic references to video games. He was administered the ADOS II, module three, and met cutoff scores for a classification of autism.

(B) The letter noted that the diagnostic requirements for research studies may be different than those needed for a clinical diagnosis for intervention planning.

30. The reports found in Exhibit E indicate that Mom was reporting to Kaiser staff that Claimant was diagnosed with ASD at age three, something that had never been reported before, and was contrary to the conclusion of LAUSD that he suffered developmental delay. (E.g., ex. E-1, p. 1.) Of further concern is the June 5, 2017 report, exhibit E-4, where Mom stated that Claimant had been improperly diagnosed in the past, and she effectively denied that Claimant had ADHD, only admitting that the child has ASD, Enuresis, and mild anxiety as accurate diagnoses. She further asserted that

symptoms are usually minimized by teachers or medical professionals who have evaluated him. (Ex. E-4, p. 2, in bold print.)[4]

31. The articles submitted by Mom assert that African-American children are often not diagnosed with ASD as soon as white children. But, one of the leading researchers on the issue stated that the differences can be largely explained by socio-economic status. (Ex. C, p. 2.) It was pointed out that black and white children from families in the top one-third of income earners have roughly equivalent rates of autism diagnosis. Since only 18 percent of black children fall into that higher income group, black children over all have a lower diagnosis rate. (*Id.*)

CLAIMANT DOES NOT SUFFER FROM AUTISM SPECTRUM DISORDER

The DSM-5 and autism

32. (A) The Diagnostic and Statistical Manual, Fifth Edition, commonly known as the DSM-5, is a standard reference manual used by mental health professionals to diagnose developmental disabilities, and various mental disorders. It is utilized by the Service Agency and other regional centers to determine if a person suffers from one of the developmental disabilities that might establish eligibility. A copy of the portion of the DSM-5 that pertains to Neurodevelopmental Disorders, which includes ASD, Intellectual Disability, and ADHD, was received as exhibit 20. Citations to the DSM-5 shall be to its page numbers.

[4] The Kaiser report of June 2017 clearly left ADHD in the diagnosis. (Ex. 7, p. 17.) Further, in a letter to Claimant's school district, dated November 30, 2016, Mom stated that "current school is aware of the medical diagnosis for both ADHD and developmental delay." (Ex. G.)

(B) The Lanterman Act defines autism as one of the developmental disabilities that makes a person potentially eligible for services from the regional centers. (See Legal Conclusion 2, below.) That is the term that has been used for many years in the applicable statute. However, the definition of autism, and indeed, the name for that disorder, was substantially revised with the May 2013 publication of the DSM-5. "Autism Spectrum Disorder" is now the diagnostic nomenclature, and it encompasses several diagnostic criteria previously used in the prior version of the Diagnostic and Statistical Manual, the DSM-IV-TR. Thus, individuals who in the past might receive a diagnosis of autistic disorder, Asperger's disorder, or PDD-NOS, might now receive the diagnosis of Autism Spectrum Disorder, if the new criteria are otherwise met. (DSM-5, at 51.)

33. The DSM-5 provides a summary description of ASD, stating that it "is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships. In addition to the social communication deficits, the diagnosis of autism spectrum disorder requires the presence of restricted, repetitive patterns of behavior, interests, or activities. Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met historical information, although the current presentation must suggest significant impairment."

(DSM-5, pp. 31-32.)

34. The DMS-5 diagnostic criteria for Autism Spectrum Disorder are as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:

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:

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 interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature,

adverse response to specific sound or textures, excessive smelling or touching of objects, visual fascination with lights or movement).

C. Symptoms must be present in 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.

35. Notwithstanding the diagnosis made by the Kaiser team, it has not been established by a preponderance of the evidence that Claimant suffers from autism. There are inconsistencies in the child's history as reported by Mom. But, consistent for many years was a diagnosis of ADHD, a diagnosis he still carries, despite Mom's more recent statements to Kaiser staff. One professional, Dr. Lim, took the position that the child had good imaginative concepts, and that his socialization, language and thought processes were not consistent with ASD or Asperger's. The reports about the child's early years, such as they are, do not support a finding of ASD, and in this regard, Dr. Gaines' analysis is credited. When Kaiser performed a psychoeducational evaluation in January 2014, it does not appear that they found ASD as a basis for education supports.[5] Likewise, the June 2015 psychoeducational evaluation did not hint at ASD; the description of Claimant does not appear consistent with the description of a child with ASD. The available reports from school, to the effect that Claimant participates in class

[5] The report, found at exhibit 13, is incomplete for some reason, and it was when it was reviewed by Dr. Gaines. The last page in the exhibit lists things that might be done to improve Claimant's education, such as having extra time to take a test, seating the child near the front of the classroom, or using peer tutors. None of the items listed appear to be geared to assist a child with ASD.

do not support a finding that autistic symptoms, and their resulting deficits, are consistently found across different settings.[6]

CLAIMANT DOES NOT SUFFER FROM INTELLECTUAL DISABILITY

Intellectual Disability Under The Diagnostic And Statistical Manual, Fifth Edition

36. (A) The DSM-5 defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." (DSM-5, p. 33.) The following three criteria must be met to establish that a person suffers from intellectual disability:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

(B) Thus, the definitive characteristics of intellectual disability include deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socio-culturally matched peers (Criterion B). To meet the diagnostic criteria for intellectual disability, the deficits in

[6] Neither Kaiser or the Service Agency assessed Claimant in the classroom.

adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Onset is during the developmental period (Criterion C). A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition. Any genetic or medical diagnosis is a concurrent diagnosis when Intellectual Disability is present. (DSM-5, pp. 39-40.)

37. The authors of the DSM-5 have indicated that "[i]ntellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the general population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 $\pm$ 5)." (DSM-5, p. 37.) At the same time, the authors of the DSM-5 recognize that "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." Thus, "a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." (*Id.*)

38. According to the DSM-5, "[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations." (*Id.*) Whether it is intellectual functioning or adaptive functioning, clinical training and judgment are required to interpret standardized measures, test results and assessments, and interview sources.

39. Claimant has not been shown to suffer from intellectual disability. His IQ has been found in the average range more than once. His academic achievement has been in the average range. Despite low scores on the Vineland, his adaptive problems do not have the type of global reach expected in a 10-year-old who suffers from Intellectual Disability.

CLAIMANT IS NOT ELIGIBLE UNDER THE FIFTH CATEGORY

40. Claimant has not established that he suffers from a condition similar to Intellectual Disability, or can be treated in a manner similar to how a person with Intellectual Disability is treated. As found above, his overall IQ results do not place him in the bottom two percent of the population. Instead, he belongs in the average range. No evidence was submitted to the effect that he should receive treatment similar to that provided to a person with Intellectual Disability.

//

//

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

LEGAL CONCLUSIONS PERTAINING TO ELIGIBILITY GENERALLY

2. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

> "Developmental disability" means a disability which originates before an individual attains age 18 years,

> continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.
>
> . . . this 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.
>
> This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in title 17 of the California Code of Regulations (CCR).[7] At section 54000 a further definition of "developmental disability" is found which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

[7] All references to the CCR are to title 17.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

4. Section 4512, subdivision (l), provides that,

> "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.

5. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that he suffers from an eligible condition, i.e., Autism, Intellectual Disability, Cerebral Palsy, Epilepsy, or disabling conditions found to be closely related to Intellectual Disability or to require treatment similar to that required for individuals with

an Intellectual Disability. This Conclusion is based on section 4512, subdivision (a) and Evidence Code section 500. He must also prove that he has a substantial disability as a result of his eligible condition, within the meaning of section 4512, subdivision (l).

(B) For many years, the undersigned and other ALJ's have considered that since the governing statute uses the term autism, and did not use the term Autism Spectrum Disorder, Asperger's Disorder, or PDD-NOS, then only the former condition was an eligible one. However, since the DSM-5 has been published, the term Autistic Disorder has been abandoned by the professionals who diagnose and treat the condition. When used in a statute, technical words are given their peculiar and appropriate meaning. (*Handlery v. Franchise Tax Bd.* (1972) 26 Cal.App.3d 970, 981; Civ. Code § 13.) Because that technical definition has changed, it appears appropriate to use the provisions of the DSM-5 to determine eligibility in this area. Otherwise, an absurd result could follow; that nobody could obtain services under the statutory rubric of autism. And, while it might be argued that the DSM-IV definition should continue to bind the definition of the condition, it has to be noted that the definition of autism was substantially different under the DSM-IV than it had been in prior editions of the DSM. Since the Lanterman Act was enacted in the mid-1970's, the definition of autism has changed more than once, without barring services to those deemed autistic within the technical definition then in place. The definition has changed again, and the latest definition is utilized.

6. Claimant has not established he is eligible for services by having an Autism Spectrum Disorder, based on Factual Findings 1 through 35, and Legal Conclusions 1 through 5. Further, it was not established that ASD constitutes a substantial disability for Claimant. While there is evidence that his self-care is impaired, his learning, mobility, and receptive and expressive language do not seem impaired. The other factors set out in section 4512, subdivision (l) are difficult to assess given Claimant's age.

7. Claimant has not established he is eligible for services by having Intellectual Disability, based on Factual Findings 1 through 39 and Legal Conclusions 1 through 5.

8. Claimant has not established he is eligible for services based on the "fifth category" based on Factual Findings 1 through 40 and Legal Conclusions 1 through 5.

9. Based on all the foregoing, while it appears that Claimant suffers from ADHD, that does not make him eligible for services from the regional center. (Legal Conclusions 2 and 3.)

ORDER

Claimant's appeal is denied, and he shall not be eligible for services under the Lanterman Act.

Date:

_____

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.