BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, v. ALTA CALIFORNIA REGIONAL CENTER, Service Agency.	OAH No. 2017090862

DECISION

A fair hearing was held on October 27, 2017, before Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, in Sacramento, California.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, Legal Services Manager.

Claimant, who was not present at the hearing, was represented by his mother.

Evidence was received, the record was closed, and the matter was submitted for decision on October 27, 2017.

ISSUES

Is claimant eligible for services from ACRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., because he is an individual with autism spectrum disorder, intellectual disability, or a disabling condition closely related to intellectual disability or requires treatment similar to that required for individuals with an intellectual disability?

FACTUAL FINDINGS

1. Claimant was born in November 2001. He is currently age 16, and resides with his mother. Claimant was a client of ACRC beginning in December 2001 until July 2014. During March to July, 2014, ACRC's interdisciplinary eligibility team completed a review of available information regarding Claimant's functioning. Based on its review, the team determined that Claimant does not have an intellectual disability, a condition closely related to intellectual disability, or autism. On July 10, 2014, ACRC sent Claimant's mother a Notice of Proposed Action advising her of its finding that Claimant was no longer eligible for ACRC services, and that Claimant had a right to appeal ACRC's finding. No appeal was made.

2. In November 2016, Claimant was referred to ACRC for services by child and adolescent psychiatrist William H. Hughes, M.D., based on his diagnosis of autism spectrum disorder. On September 8, 2017, ACRC sent a letter to Claimant's mother notifying her that an interdisciplinary team had determined on September 5, 2017, that Claimant does not have autism, intellectual disability, a condition closely related to intellectual disability, or other qualifying condition, and that he is therefore ineligible for ACRC services. Claimant's mother timely submitted a Fair Hearing Request. This hearing followed.

ASSESSMENTS, EVALUATIONS, AND DIAGNOSES (2001 – 2014)

3. Early Intervention Assessment, December 28, 2001. Claimant was initially assessed by ACRC at the age of two months for the California Early Start Program. The assessment identified risks including that Claimant's mother is developmentally disabled, and that Claimant would hold his breath when crying or after eating. The recommendation for services included parent respite of 24 hours per quarter, and an infant stimulation program.

4. Initial Developmental Assessment, June 11, 2002. The Children's Path Infant-Toddler Program provided an initial assessment at the age of seven months. Claimant was found to be functioning at the level of three to six months in the developmental areas of cognition, communication, and social adaptation. The area of concern was gross motor development, in that Claimant was not rolling from stomach to back or back to stomach.

5. Infant Toddler Developmental Assessment, June 13, 2002. ACRC assessed Claimant's development at the age of seven months. Claimant was found to be developing within age limits in the areas of gross motor skills, fine motor skills, relationship to inanimate objects, language/communication, self-help, relationship to persons, emotions and feelings, and coping behavior.

6. Psychoeducational Study, February 5, 2005. The Sacramento City Unified School District (SCUSD) conducted a special education evaluation to determine whether Claimant qualified for services as a student with a specific learning disability or speech disability. Claimant was then age three and attending Head Start preschool. The assessment included standardized testing. The verbal scores were considered invalid due to Claimant's speech and language delays. The nonverbal scores indicated that claimant was functioning within the borderline range for cognitive ability and sensory motor skills. Claimant was found to be 10 months delayed for physical ability and self-help skills, 16 months delayed for social skills and academics, and 18 months delayed for communication when compared to his age level peers.

7. Individual Program Plan, November 9, 2006. An ACRC service coordinator prepared an Individual Program Plan (IPP), noting that Claimant, then age five, was eligible for ACRC services based on a diagnosis of mental retardation, now known as intellectual disability. Claimant was described in the IPP as "a friendly boy who was socially engaging and participated in interactive play with the Service Coordinator

during the home visit." Claimant was receiving speech therapy one time per week, and attending special classes 50 percent of the school day. It was also noted that Claimant was making progress on his toileting skills with the assistance of behavioral services, but had regressed in the few weeks prior to the IPP when the behavioral services were discontinued.

8. Individual Program Plan, November 19, 2007. An ACRC service coordinator prepared an IPP, noting that Claimant, then age six, was eligible for ACRC services based on a diagnosis of intellectual disability, with substantial handicaps in the areas of communication, learning, and self-care. Claimant continued to receive speech therapy one time per week, and attend special classes 50 percent of the school day. It was also noted that Claimant was then substantially handicapped in the areas of self-care, and that his mother assisted him in dressing, bathing, grooming, eating, and toileting.

9. Psychoeducational Study, May 1, 2008. The SCUSD conducted an evaluation to help assess Claimant's learning ability, and whether he continued to be eligible for special education services. Claimant was then age six and repeating a year of kindergarten. He was enrolled in a regular education kindergarten, participating in a Resource Specialist Program (RSP), and receiving speech and language services. The Naglieri Nonverbal Ability Test (NNAT) was administered as a nonverbal measure of cognitive functioning. Claimant received a score in the below-average range. Adaptive functioning was measured with the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) which showed his adaptive level to be adequate, and the Connors' Rating Scale which ranked his behaviors impacting education as average.

10. Individual Program Plans, October 13, 2009, and January 5, 2012. An ACRC service coordinator prepared IPPs on the referenced dates, when Claimant was age 8 and 10, respectively. The IPPs on both dates note Claimant was eligible for ACRC services based on a diagnosis of intellectual disability, with substantial handicaps in the

areas of communication, learning, and self-care. Claimant continued to attend special classes 50 percent of the school day. Claimant's mother reported that he no longer needed speech therapy. Claimant had a substantial handicap in the area of self-care, and his mother continued to assist him in dressing, bathing, grooming, eating, and toileting.

11. Individual Program Plan, January 17, 2013. An ACRC service coordinator prepared an IPP, noting that Claimant, then age 11, was eligible for ACRC services based on a diagnosis of intellectual disability, with primary substantial handicaps in the areas of self-care, communication, and learning. Claimant's mother reported that he still needed assistance in bathing, tying his shoes, and reminders in personal care and dressing. It was noted that Claimant's case would be referred to the ACRC clinical team for eligibility review.

12. Psychological Evaluation, March 5, 2014. Cynthia Root, PhD, a staff psychologist for ACRC, performed a psychological evaluation to assist in clarifying whether Claimant has an intellectual disability or autism. Claimant was age 12 at the time of evaluation. The evaluation did not constitute a comprehensive psychodiagnostic evaluation, and did not include an assessment for any mental health conditions.

Dr. Root noted in her behavioral observations that Claimant initially presented with a quiet, guarded demeanor. During the informed consent process with his mother present, Claimant sat quietly and exhibited odd movements with his mouth (opening and closing his mouth in a repetitive fashion). When his mother left the room, Claimant was initially unwilling to answer questions. He responded with monosyllabic answers that were often inaccurate, e.g., when asked his age he responded "nine." He would not engage in casual conversation with Dr. Root.

When standardized testing was presented to Claimant, he said in a small voice, "I want to go." After reassurances were given, Claimant agreed to begin the standardized

tests. Dr. Root stopped the testing because it did not appear Claimant was giving his best effort. She told Claimant that he would be given another opportunity to cooperate with the testing after his mother was interviewed. After a one-hour break in the waiting room, Claimant was visibly more relaxed, polite, and put forth an excellent effort. Claimant explained his earlier non-cooperative behavior by saying he had been hungry, and now felt better after he had a snack. The overall test results were considered valid indicators of current functioning and are summarized below:

(a) Intellectual Functioning: Claimant's general intellectual ability was measured with two tests – Test of Nonverbal Intelligence-Fourth Edition (TONI-4), and the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV). The TONI-4 is a standardized test of cognitive ability that uses non-abstract reasoning and figural problem-solving to estimate general intellectual ability. Claimant received an index score of 104, which is in the 61st percentile, and in the average range.

The WISC-IV also measures the general cognitive ability of children. It consists of four composite index scores comprised of a total of 10 subtests. Composite index scores are given in the areas of Verbal Comprehension, Perceptual Reasoning, Processing Speed, and Working Memory, which are then totaled to provide a Full Scale IQ. Claimant was not assigned a score in the Working Memory Index because he failed to cooperate with one of the two subtests comprising the Working Memory Index. Claimant also refused to

cooperate with one of the three subtests comprising the Perceptual Reasoning Index, which resulted in a prorated subtest score based on the two subtests completed. For these reasons, Claimant was not assigned a Full Scale IQ.

Claimant had a composite score of 87 (low average) in the Verbal Comprehension Index, which measures the ability to think with words, to process and understand verbal information, and a person's fund of previously learned knowledge. Claimant had a composite score of 100 (average) in the Perceptual Reasoning Index, which measures the ability to think in terms of visual images, form abstract concepts, and problem-solving skills. Claimant had a composite score of 80 (low average) in the Processing Speed Index, which measures the ability to perform simple cognitive or perceptual tasks rapidly and efficiently.

(b) Autism Spectrum Disorder: The Gilliam Autism Rating Scale-Third Edition (GARS-3) is used to identify the likelihood that a person has autism spectrum disorder. Behaviors commonly associated with autism are scored by parents, teachers, and/or clinicians. The scores are then aggregated to calculate a total Autism Index score. The higher the Autism Index score, the more severe the autistic behavior it represents. The GARS-3 was administered in an interview format with Claimant's mother. The scaled scores and corresponding percentile rankings are as follows:

Restricted/Repetitive Behaviors (4, or 2nd percentile); Social Interaction (4, or 2nd percentile); Social Communication (3, or 1st percentile); Emotional Responses (6, or 9th percentile); Cognitive Style (5, or 3rd percentile); Maladaptive Speech (5, or 3rd percentile). Claimant's aggregate Autism Index score was 52, less than the 1st percentile. Based on these scores, Claimant was rated as "unlikely" to have autism spectrum disorder. This rating was consistent with Dr. Root's observations of Claimant during the evaluation.

(c) Adaptive Functioning: The Vineland-II is a standardized survey instrument completed by parents and/or teachers regarding an individual's adaptive behaviors. The term "adaptive functioning" is used to describe how an individual manages the demands of daily living, including both personal and social skills, compared to age-group peers. The survey results in Domain Scores in the areas of Communication, Daily Living Skills, and Socialization, aggregated for an Adaptive Behavior Composite.

The survey was completed by Claimant's mother on March 5, 2014, and Claimant's general education teacher on May 21, 2013. The scores from the ratings by Claimant's mother were Communication (82), Daily Living Skills (79), Socialization (91), with a total Adaptive Behavior Composite of 82, which is ranked as Moderately Low in the 12th percentile. The scores from the ratings by Claimant's teacher

were Communication (66), Daily Living Skills (72), and Socialization (74), with a total Adaptive Behavior Composite of 75, which is ranked as Moderately Low in the 5th percentile.

(d) Summary: Based on the results of the intelligence testing, showing scores in the Average and Low Average range, Dr. Root found that Claimant does not have intellectual deficits consistent with a diagnosis of intellectual disability. Based on Claimant's adaptive functioning as measured by his mother and his teacher from the previous year, Dr. Root found Claimant to be delayed compared to his same-age peers. Based on the screening for autism spectrum disorder and Dr. Root's observations during her examination, she found that Claimant does not show behaviors consistent with autism. No further evaluation for autism was deemed necessary.

13. Psychoeducational Study, November 10 and December 8, 2014. The SCUSD conducted an evaluation to determine Claimant's learning ability, whether academic delays then existed, and Claimant's eligibility for special education services. Claimant was then age 13 and in seventh grade. Attempts were made on two separate days to administer standardized testing to assess his learning potential. On the first attempt, Claimant appeared to guess on answers or not answer at all. On the second attempt, Claimant refused to participate in the testing. The examiner was for this reason unable to determine whether Claimant qualified for special education services.

14. Individualized Education Program, December 1, 2014. SCUSD prepared an Individualized Education Program (IEP) at Fern Bacon School. Claimant was then age 13 and in the seventh grade. The IEP indicated that Claimant had a specific learning disability, noting that Claimant's auditory processing disorder impeded his access to the core curriculum. The IEP team found a severe discrepancy between Claimant's intellectual ability and achievement based on standardized tests in the areas of reading comprehension and reading fluency. The discrepancies were found to be directly related to an auditory processing disorder. Claimant's baseline abilities in the areas of reading and reading comprehension were at the late third or early fourth grade level. The IEP noted that Claimant likes to read aloud in class, and leads group participation during discussions. Claimant's mother stated that he complains that his math and reading assignments are difficult, and cries because it makes his head hurt. Claimant's mother also expressed concern regarding his wandering away from class, as he had done twice earlier in the year.

ASSESSMENTS, EVALUATIONS, AND DIAGNOSES (2015 TO PRESENT)

15. Psychoeducational Study, February 12 and 13, 2015. The SCUSD conducted an evaluation to determine Claimant's learning ability, eligibility for special education services, and to provide assessment information to the IEP team to discuss any changes necessary in Claimant's program. Claimant was then age 13 and in the seventh grade. The NNAT was administered as a nonverbal measure of cognitive functioning. Claimant received a score in the below-average range. Other standardized tests were administered to assess Claimant's visual perception and visual-motor responses. Claimant exhibited above average visual-motor skill, and did not present with any significant visual perception processing difficulties. Based on the test results, it was found that Claimant no longer met the criteria to qualify for special education services.

16. Individualized Education Program, March 16, 2015. SCUSD prepared an annual/triennial IEP. Claimant was then age 13 and in the eighth grade. The IEP indicated that Claimant had a specific learning disability, noting that Claimant's auditory processing disorder impeded his access to the core curriculum. The IEP team found a severe discrepancy between Claimant's intellectual ability and achievement based on standardized tests in the area of reading comprehension. The discrepancies were found to be directly related to an auditory processing disorder. Claimant's baseline abilities in the areas of reading and reading comprehension were at the late third or early fourth grade level. The IEP noted that Claimant liked to read aloud in class, and would lead group participation during discussions.

17. Individualized Education Program, March 3, 2016. SCUSD prepared an annual IEP at Fern Bacon School. Claimant was then age 14 and in the eighth grade. The IEP indicated that Claimant had a specific learning disability, noting that Claimant's auditory processing disorder impedes his access to the core curriculum. Claimant's baseline abilities included a low level of reading comprehension and an ability to read at the 5.5 level. The IEP noted that Claimant's behavior may impede his learning in that he would try to talk to his peers while at his seat and while walking around the classroom. One of Claimant's general education teachers also noted that he is easily distracted and usually unable to focus on the assigned tasks. He would often blurt random things or respond to a comment made by another student, distracting himself and others.

18. Psychiatric Diagnosis, September 22, 2016. Claimant was seen by William Hughes, M.D., a child and adolescent psychiatrist, on September 22, 2016, when Claimant was age 14. Dr. Hughes noted Claimant's history, that he lives with his mother who herself has a learning disorder and is unable to care for him by herself, and that there is an in-home caregiver who assists Claimant. Dr. Hughes noted in the psychiatric history that Claimant can be oppositional, and on one occasion stood for close to an

hour watching water running over a dish while talking to his imaginary friend "Buddy Love." Dr. Hughes diagnosed Claimant with autism spectrum disorder and attention deficit hyperactivity disorder. Dr. Hughes prescribed Concerta to help Claimant with focus and staying on task, Clonidine for sleep, and Risperdal for aggression.

Dr. Hughes opined in a letter dated September 21, 2017, that Claimant's developmental delays are long-term, and do not represent a psychotic break. He noted that "[o]ften people with developmental disabilities, intellectual delay, and autism will have imaginary friends and/or talk to themselves. This is not consistent with true psychotic symptoms, such as schizophrenia."

19. Individualized Education Program, January 11, 2017. SCUSD prepared an initial IEP at Luther Burbank High School. Claimant was then age 15 and in the ninth grade. The IEP indicated that Claimant had a specific learning disability, noting that Claimant's auditory processing disorder impedes his access to the core curriculum. The IEP team found a severe discrepancy between Claimant's intellectual ability and achievement based on standardized tests in the area of reading comprehension. The discrepancies were found to be directly related to an auditory processing disorder. The IEP discussed Claimant's areas of need and his respective baselines. In the area of behavior, Claimant's baseline was that he required accommodations including sitting next to a peer role model in close proximity to the teacher or other adult, and away from distractions. In the area of study skills, Claimant's teacher observed overall task completion in the areas of English (25 percent), geography (30-35 percent), and math (80 percent). In the areas of reading and reading comprehension, Claimant's baseline was at the 5.5 grade level.

The IEP notes teacher comments that Claimant engages in disruptive behavior that interferes with his academics, and that he is easily distracted from assigned tasks. Claimant was observed by a behavior intervention specialist within the educational

setting during multiple days. His average on-task behavior was recorded at 63 percent, compared to 79 percent for his comparison peer group. The recommended accommodations included seating next to a peer role model in close proximity to a teacher or adult, short breaks between assignments, use of positive reinforcement, and consistent behavior management.

20. Individualized Education Program, March 9, 2017. Claimant and his mother moved their residence from the boundaries of the SCUSD to the San Juan Unified School District (SJUSD). The SJUSD prepared an interim IEP at Encina Preparatory High School. Claimant was then age 15 and in the ninth grade. The IEP team reviewed classroom data and student and parent concerns, and on that basis found that Claimant qualified for special education services as a child with a specific learning disability. The recommended supplementary aids, services and supports included use of a graphic organizer for note taking, presenting one task at a time, extending time to complete assignments, access to a separate study area, short breaks between classes, seating next to a peer role model and away from distractions, clear reminders of classroom rules, consistent behavior management, use of positive reinforcement, and home/school communication regarding behavior.

21. Neurology Diagnosis, May 2, 2017. Claimant was seen by Shailesh M. Asaikar, M.D., a board certified neurologist, on May 2, 2017. Claimant, then age 15, was referred by his primary care physician, Perla Maulino, M.D., with a chief complaint of behavioral issues, including autism and aggression. Dr. Asaikar reviewed a patient questionnaire, and conducted a neurological examination of Claimant. Dr. Asaikar diagnosed Claimant with autism, intellectual disabilities, and aggression.

Dr. Asaikar recommended a magnetic resonance imaging (MRI) of the brain, electroencephalography (EEG), and testing for Fragile X Syndrome (a genetic disorder

that can include moderate intellectual disability). The records in evidence do not include any follow-up on these recommended tests.

22. Psychoeducational Evaluation, May 3 and 4, 2017. SJUSD conducted an evaluation for the triennial review of Claimant's IEP to determine whether he continued to have a disability, continued to need special education, to document levels of functioning, and to determine whether modifications to the special education program were needed. Claimant was then age 15 and in the ninth grade.

During the assessments Claimant was polite and appeared to be resigned. He frequently said that the tasks were hard, but appeared to attempt all tasks within his limited ability. Claimant generally persisted with completing all assessment tasks. Claimant was observed in his general education math classroom. He was quiet and on task 7 percent of the time, which included looking at the teacher when asked. During the majority of the observation, Claimant remained quietly off-task, looking down, cleaning his fingernails, or placing his head on his desk. Claimant stated during the assessment interview that all of his classes are hard. He stated that he knows several three-letter site words, and is comfortable adding single digit numbers. When asked about double-digit addition, he stated the procedure was too difficult.

Standardized tests were administered to measure Claimant's psychological processing, adaptive functioning, and possible autism. The results of the assessments are summarized below:

(a) Psychological Processing: Claimant's basic psychological processing was assessed using standardized tests including the Developmental Neuropsychological Assessment, Second Edition (NEPSY-II); Dellis-Kaplan Executive Function System (D-KEFS); Test of Auditory Perceptual Skills, Third Edition (TAPS-3); Comprehensive Test

of Phonological Processing, Second Edition (CTOPP-2); and the Beery Buktenica Developmental Test of Visual Motor Integration (VMI). The testing included the intellectual processes of induction, sequential reasoning, language development, listening ability, working memory, associative memory, auditory processing, visual processing, and social perception. Claimant's scores were in the 1st or 2nd percentile in each of these areas, and ranked as "extremely low" or "well below expected."

(b) Adaptive Functioning: Claimant's adaptive functioning was assessed in the school environment using the Adaptive Behavior Assessment System, Third Edition (ABAS-III), with ratings provided by his teacher. Claimant's adaptive behavior was rated in the extremely low range. Claimant was scored in the Conceptual Skill Area, which includes communication, functional academics, and self-direction; the Social Skill Area, which includes social and leisure; and the Practical Skill Area, which includes community use, school living, health and safety, and self-care. Claimant was scored in the 1st or 2nd percentile in each of these areas, and ranked as "extremely low."

(c) Autism Spectrum Disorder: The Gilliam Autism Rating Scale, Third Addition (GARS-3) was administered in the school environment, with ratings provided by Claimant's case manager. The scaled scores were and corresponding

percentile rankings are as follows: Restricted/Repetitive Behaviors (6, or 9th percentile); Social Interaction (10, or 50th percentile); Social Communication (7, or 16th percentile); Emotional Responses (5, or 5th percentile); Cognitive Style (5, or 5th percentile); Maladaptive Speech (6, or 9th percentile). Claimant's aggregate Autism Index score was 69, in the 2nd percentile. Based on these scores, the likelihood of Claimant having autism spectrum disorder was rated as "probable."

(d) Summary: SJUSD specified in the eligibility summary that the district is not charged with rendering a formal psychological diagnosis, but that it is the district's responsibility to determine whether Claimant is eligible to receive special education services. SJUSD determined that Claimant is eligible for special education services under the categories of intellectual disability and autism. SJUSD found that Claimant meets the criteria for intellectual disability in that he has (1) significantly sub average general intellectual functioning, as evidenced by his psychological processing scores within the extremely low range at or below the 1st percentile, and (2) he has deficits in adaptive behavior as evidenced by his ratings in the extremely low range in the school environment. SJUSD found that Claimant meets the criteria for autism spectrum disorder in that his condition affects his (1) verbal and nonverbal communications, as evidenced by low scores in his ability to identify facial expressions; (2) social interactions, as evidenced by low

scores in his ability to understand others' perspectives; and (3) educational performance, as evidenced by his inability to learn within the general education environment.

23. Individualized Education Program, May 9, 2017. SJUSD prepared a triennial IEP at Encina Preparatory High School. Claimant was then age 15 and in the ninth grade. The IEP indicated that Claimant's disabilities as intellectual disability (primary) and autism (secondary). The IEP team found a severe discrepancy between Claimant's intellectual ability and achievement based on standardized tests in the areas of oral expression, written expression, listening comprehension, mathematics calculation, basic reading skills, mathematics problem-solving, and reading comprehension. The discrepancies were found to be directly related to processing disorders in the area of auditory processing and cognitive abilities including association, conceptualization, and expression. Claimant's baseline abilities in the areas of reading, math, and writing fluency included the ability to read tier one sight words, count to five independently, write his own name, and form most letters of the alphabet. Claimant's mother expressed concern that his writing and drawing skills had declined. Claimant's mother told the IEP team that at home Claimant whispers and talks to someone who is not there. His teachers have not noted this behavior at school.

The IEP included significant accommodations necessary for Claimant to access his educational curriculum. The accommodations included use of a graphic organizer for notetaking, presenting one task at a time, extending time to complete assignments, access to a separate study area, short breaks between classes, repeating directions as needed, giving only one or two directions at a time, seating Claimant next to a peer role model in close proximity to a teacher or other adult, reminders of classroom rules and expectations, visual cues to pair with verbal directions, consistent behavior

management, use of positive reinforcement, and extended time for assignments and tests.

24. ACRC Requested Psychological Evaluation, August 13, 2017. Melinda Appleby, Psy.D., is a clinical psychologist at the Sullivan Center for Children, in Fresno, and a vendored service provider for ACRC. ACRC requested this written evaluation of Claimant's intellectual, adaptive, and social functioning to help determine his eligibility for regional center services. This evaluation was limited in scope to assist in the eligibility determination, and did not constitute a comprehensive psychological evaluation. It was outside the scope of this evaluation to directly assess Claimant for any mental health conditions. Dr. Appleby's observations on August 13, 2017, are summarized below:

(a) Behavioral Observations and Concerns:

> Claimant presented late for the evaluation, accompanied by his mother and an in-home supportive services (IHSS) worker. Claimant's mother had called Dr. Appleby to let her know they would be arriving late due to Claimant's behavioral issues. The IHSS worker led Claimant by the hand into the office. When Dr. Appleby greeted him, Claimant called out angrily, "You stink." Claimant made inadequate eye contact and was nonresponsive to Dr. Appleby's attempts at casual conversation. Claimant began to tear apart a magazine in the waiting room, and the IHSS worker had to redirect him and physically guide him to a chair. The IHSS worker sat with her chair blocking the exit, as Claimant kept making attempts to elope. The IHSS worker kept her hand on Claimant's arm continuously. Claimant brought a

stack of *Yu-Gi-Oh!* cards with him and threw them around the waiting room.

During testing, Claimant remained seated between his mother and the IHSS worker. When he was shown pictures in a test booklet, Claimant would consistently point to the option farthest to his right, and state "*Yu-Gi-Oh!*" Claimant would also say "McDonald's" as that had been promised as his reward after the evaluation. When claimant was shown a picture of a person and asked to point to various body parts, Claimant said "ugly" without pointing. Claimant frequently said "it stinks" while in the office.

Test procedures were abandoned, the IHSS worker took Claimant outside while Dr. Appleby interviewed Claimant's mother. She indicated that Claimant's behavior during the evaluation was consistent with his typical behavior. Her concerns regarding Claimant include elopement, lack of independent living skills, and safety awareness. Claimant requires constant supervision to ensure safety, and the IHSS worker prompts him to do most activities. He has a history of aggression, shutting down, and will laugh for no apparent reason. He whispers a lot to himself, and does not interact socially with others in a meaningful way. Claimant's mother would like assistance with toilet training, medication, and behavioral services.

(b) General Intellectual Ability: Dr. Appleby attempted to administer the Stanford Binet Intelligence Scales, Fifth Edition (SB-5). No valid scores were obtained due to Claimant's lack of adequate responses to test items administered.

(c) Adaptive Functioning: The Vineland-II was administered by interviewing Claimant's mother. The scores derived from the ratings by Claimant's mother were Communication (49), Daily Living Skills (28), Socialization (52), with a total Adaptive Behavior Composite of 42. The individual and composite scores were all below the 1st percentile, and ranked as "Low."

(d) Autism Spectrum Disorder: Dr. Appleby assessed Claimant for autism utilizing the Autism Mental Status Exam (AMSE). The AMSE is an eight-item observational assessment that prompts the observation and recording of signs and symptoms of autism within the context of a clinical examination. Dr. Appleby's examination yielded information about claimant's functioning. For example, Claimant demonstrated fleeting eye contact, spoke in phrases and undeveloped sentences, could not engage in conversations, would not answer simple questions posed to him, made repetitive requests, jumped up and down repeatedly, and engaged in repetitive jaw movements. Based on these and other observations, Claimant received a total

score of seven, which is above the minimum cutoff of five, thus indicating possible autism, warranting further assessment.

The AMSE cannot independently diagnose people with autism spectrum disorder. The Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) was attempted, but Claimant did not participate in any of the tasks presented. Dr. Appleby opined in her written assessment that is unlikely that the diagnostic category of autism spectrum disorder would best describe Claimant's behaviors, as his symptoms were not evident in early childhood, do not appear to persist across all situations, and are not chronic in nature.

TESTIMONY AT HEARING

25. Melinda Appleby, Psy.D., testified consistently with her written report, summarized above. With respect to the possible diagnosis of autism, Dr. Appleby believes that further evaluation is necessary to reach any definitive conclusion. Although the AMSE observational score for autism was elevated (Factual Finding 24(d)), the AMSE standing alone is not a basis to form a diagnosis. Dr. Appleby would have preferred to administer the ADOS-2, which she regards as the gold standard, but was unable to do so because Claimant would not cooperate. Also, Dr. Appleby noted that Claimant's behavior during the evaluation suggests a recent significant decline compared to the earlier evaluations by the school districts and ACRC. Dr. Appleby opined such a rapid decline would be unusual for a diagnosis of autism spectrum disorder.

26. With respect to the possible diagnosis of intellectual disability, Dr. Appleby noted that Claimant's current intellectual functioning is unknown because he would not cooperate in the administration of the SB-5. (Factual Finding 24(b).) Also, Claimant's intellectual ability and adaptive functioning scores fluctuated over time, which would not be typical of an intellectual disability. Claimant's adaptive functioning as measured by the Vineland-II showed a significant drop between the tests administered in 2014 and 2017. (Factual Findings 12(c) and 24(c).) Dr. Appleby noted that Claimant's intellectual ability was measured in 2014 using the WISC-IV, which resulted in scores in the low average range in the areas of Verbal Comprehension and Processing Speed, and in the average range in the area of Perceptual Reasoning. She opined that these measures are not consistent with a diagnosis of intellectual disability. She also noted that measures of Claimant's intellectual ability and adaptive functioning diminished substantially between the 2014 psychological evaluation done by Dr. Root (Factual Finding 12) and the psychoeducational evaluation done by SJUSD in May 2017 (Factual Finding 22). Dr. Appleby did not make any determination about the possible cause of the precipitous decline, but opined that it warrants further assessment to rule out a possible psychiatric disorder.

27. Dr. Appleby reviewed Dr. Asaikar's diagnosis of autism and intellectual disability of May, 2017, and Dr. Hughes's diagnosis of autism and attention deficit hyperactivity disorder of September, 2016. (Factual Findings 18 and 21.) Dr. Appleby does not know whether any testing was administered to support these diagnoses. Based on the absence of any testing data, Dr. Appleby was not persuaded by the diagnoses made by Drs. Asaikar and Hughes.

28. Cynthia Root, PhD. Dr. Root is a Staff Psychologist employed by ACRC for approximately nine years. She serves on the team that recommends whether a person is eligible for services at ACRC. She testified consistently with her written evaluation

(Factual Finding 12) that Claimant did not meet the diagnostic criteria of intellectual disability or autism spectrum disorder.

29. Dr. Root pointed to the significant differences in the indications for intellectual disability and autism found in the psychoeducational assessments by SCUSD in February, 2015 (Factual Finding 15) and SJUSD in May, 2017 (Factual Finding 22). For example, the classroom observations noted in the 2015 SCUSD assessment stated that Claimant was on task 75 percent of the time compared to an average of 85 percent for his peers, and that he read out loud in class with clarity and fluency. In the 2015 SCUSD assessment, Dr. Root did not see any description of behaviors typical of autism, nor did she see deficits in adaptive functioning or intellectual ability consistent with intellectual disability. Dr. Root compared this to the findings in the 2017 SJUSD assessment which notes that Claimant knows several three letter site words and is comfortable adding single digit numbers. Dr. Root noted that this would be consistent with a kindergarten grade level performance, and substantially below Claimant's abilities recorded in the 2015 SCUSD assessment. A big question in Dr. Root's mind is how to explain the substantial decline in Claimant's scores between the 2015 and 2017 assessments. She can only hypothesize about possible explanations, such as traumatic brain injury, a brain tumor, or psychosis. In any event, she opined that a review of the 2017 SJUSD assessment, without reference to the earlier assessments, could lead to an erroneous diagnosis of autism and intellectual disability.

30. Dr. Root does not agree with Dr. Asaikar's diagnosis of autism and intellectual disability, or Dr. Hughes's diagnosis of autism and attention deficit hyperactivity disorder. She saw no indication that either physician conducted any testing, reviewed previous records, or consulted with Claimant's mother. Dr. Root opined that the standard of practice in diagnosing autism is to determine whether symptoms are present in a child's early development.

31. Claimant's Mother believes that Claimant is eligible for services from ACRC based on the diagnoses of autism and intellectual disability made by SJUSD, Dr. Asaikar, and Dr. Hughes. She pointed out that the school psychologist for SJUSD and Claimant's treating psychiatrist see much more of her son than Dr. Root or Dr. Appleby.

32. Her own observations and experience with her son include that he continues to need assistance with toileting, chopping his food, and in many other areas of self-care. He cannot be left alone because he is unaware of safety and sometimes wanders from home. He easily loses direction, and on at least one occasion the police have found him and brought him home. He does not have many friends at school, and tends to keep to himself. He just wants to play with his *Yu-Gi-Oh!* cards. Her son was doing better two or three years ago, when he could complete tasks such as folding clothes. Though he has always needed help at home, his behavior and abilities have gone down drastically, and she is concerned about her son.

DISCUSSION

33. Regional centers provide services to individuals who have a "developmental disability" as defined in the Lanterman Act. In order to qualify for services from ACRC, an individual must be diagnosed with one or more of the five developmental disabilities outlined in the Lanterman Act: intellectual disability, cerebral palsy, epilepsy, autism, and/or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability (fifth category). (Welf. & Inst. Code, § 4512, subd. (a).) An individual who has one of the included developmental disabilities must be "substantially disabled" by that disability. To establish a "substantial disability," the individual must have significant functional limitations in three or more major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and/or economic self-sufficiency. (Welf. & Inst. Code, § 4512, subd.

(l)(1).) A qualifying condition must start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.) In addition, the individual's functional limitations must be directly related to the developmental disability that qualifies the individual for services under the Lanterman Act.

Autism Spectrum Disorder

34. The diagnostic criteria for autism spectrum disorder set forth in the DSM-5 requires positive findings under each of the section A criteria specified below, and positive findings under two of the four section B criteria, 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 making friends; to absence of interest in peers.

[¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two to the following, currently or by history. . . .

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, 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 sounds or textures, excessive smelling or touching of 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 later in 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 developmental disorder) or global developmental delay. . . .

35. The psychoeducational evaluation prepared by SJUSD (Factual Finding 22) included administration of the GARS-3, which resulted in an aggregate Autism Index score in the 2nd percentile, indicating that it is "probable" that Claimant has autism spectrum disorder. However, neither the SJUSD evaluation nor other evidence presented established that Claimant's symptoms of autism were persistent over time (Criterion A), or that the symptoms were present in early development (Criterion C). For example, it was noted in the November 9, 2006 IPP (Factual Finding 7) that Claimant at age 5 was a "friendly boy who was socially engaging and participated in interactive play with the Service Coordinator during the home visit." Similarly, the IEPs of December 1, 2014, and March 16, 2015, both noted that Claimant read aloud in class, and led group

participation during discussions. (Factual Findings 14 and 16.) These examples of Claimant's behavior do not support a diagnosis of autism. Neither the Psychoeducational Evaluation prepared by SJUSD nor the respective diagnoses by Drs. Asaikar and Hughes account for the diagnostic elements in Criteria A and C. For these reasons, the evidence does not establish that Claimant has autism spectrum disorder.

Intellectual Disability

36. Intellectual disability is addressed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition,* (DSM-V). The DSM-V contains the diagnostic criteria used for intellectual disability. The following three criteria must be met:

> 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 or 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.

37. The DSM-V notes that, with regard to Criterion A, "individuals with intellectual disability have scores of approximately two standard deviations or more below the 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 ± 5)." The DSM-V cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. It states that "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."

38. The evidence is not persuasive that claimant meets diagnostic Criterion A. His intellectual functioning was tested by Dr. Root in 2014 using the TONI-4 and the WISC-IV. (Factual Finding 12(a).) In the TONI-4, Claimant received an index score of 104, which is in the 61st percentile, and in the average range. In the WISC-IV, Claimant received a score of 87 (low average) in the Verbal Comprehension Index, a score of 100 (average) in the Perceptual Reasoning Index, and a score of 80 (low average) in the Processing Speed Index. Though full-scale IQ was not measured due to spoiled subtests, the available scores provide an indication of Claimant's intellectual ability at the time of assessment. Given that a person is highly unlikely to score significantly higher than their actual IQ, the TONI-4 and WISC-IV results likely represent an accurate measure of Claimant's intellectual ability.

39. The DSM-V provides that "Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." There is no dispute that claimant currently has low adaptive functioning. The evidence is not clear, however, that Claimant's decline in adaptive functioning is attributable to his intellectual ability.

Thus, considering the evidence as a whole, it was not established that claimant fits within the definition of intellectual disability under the DSM-V criteria.

Fifth Category

40. The Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (Welf. & Inst. Code, § 4512, subd. (a).) This is known as the "fifth category." The fifth category is intended to include individuals whose IQ scores are higher than 70, but who still have significant deficits in cognitive functioning. To fall within the fifth category, an individual must (a) function like someone with an intellectual disability, or (b) require treatment similar to the treatment required by individuals with an intellectual disability. Eligibility however, may not be based on "other handicapping conditions" that are solely resulting from learning disabilities or psychiatric disorders. (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(1), (2).).

41. The fifth category is not a diagnosis in the DSM-V. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the California Court of Appeal set down a general standard: "The fifth category condition must be very similar to [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." It is therefore important to consider factors required for a diagnosis of intellectual disability when assessing fifth category eligibility.

42. The evidence established that Claimant currently functions like someone with an intellectual disability. He has deficits in intellectual functions such as reasoning, problem-solving, abstract thought, and academic learning, as evident in the SJUSD psychoeducational evaluation and the SJUSD IEP. (Factual Findings 22(a) and 23.) For

example, Claimant was ranked in the 1st or 2nd percentile in the intellectual processes of induction, sequential reasoning, language development, listening ability, working memory, associative memory, auditory processing, visual processing, and social perception. (Factual Finding 22(a).)

43. Claimant also has significant deficits in adaptive functioning in the activities of daily life, including communication, social participation, and the capacity for independent living. This is evident in the assessments administered by SJUSD and Dr. Appleby. (Factual Findings 22(b), 23, and 24.) For example, Claimant's adaptive functioning as measured by the Vineland-II showed that Claimant ranked below the 1st percentile in the areas of Communication, Daily Living Skills, and Socialization. (Factual Finding 24(c).) This low level of adaptive functioning is evident in Dr. Appleby's observations of Claimant's behavior during her assessment. Claimant arrived late to the assessment because of his behavior, made inadequate eye contact, was nonresponsive to attempts at casual conversation, and began tearing apart a magazine in the waiting room. The IHSS worker accompanying Claimant needed to redirect him and guide him to a chair, then placed her own chair in front of the exit to prevent Claimant from eloping. Claimant's mother reported to Dr. Appleby that Claimant's behavior during the evaluation was typical, that he requires constant supervision, and that he lacks independent living skills or safety awareness. (Factual Finding 24 (a).)

44. Claimant's deficits in intellectual and adaptive functioning are substantially disabling in that claimant has functional limitations in self-care, receptive and expressive language, self-direction, capacity for independent living, and economic self-sufficiency. The evidence did not establish that Claimant's disabilities are solely the result of learning disabilities or a psychiatric disorder.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for regional center services, the burden of proof is on the claimant to establish that he or she has a qualifying developmental disability. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for developmentally disabled individuals and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

3. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial developmental disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

4. Welfare & Institutions Code section 4512, subdivision (l)(1), provides:

> "Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:
>
> (A) Self-care.
>
> (B) Receptive and expressive language.
>
> (C) Learning.
>
> (D) Mobility.
>
> (E) Self-direction.
>
> (F) Capacity for independent living.
>
> (G) Economic self-sufficiency.

5. Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

6. As set forth in the Factual Findings, it was not established that Claimant is eligible for services under the Lanterman Act because he has autism or an intellectual disability. Claimant is, however, eligible for services under the fifth category because he has a disabling condition that is closely related to intellectual disability or requires treatment similar to the treatment required by individuals with an intellectual disability. Consequently, it was established that Claimant is eligible for services and support from ACRC under the Lanterman Act. Claimant's appeal must therefore be granted.

//

//

//

ORDER

Claimant's appeal is GRANTED. Claimant is eligible for services and supports from Alta California Regional Center.

DATED: November 13, 2017

_____

TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)