BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2018080465

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on November 6, 2018.

Claimant's mother and conservator (mother) represented claimant who was not present. A Spanish language interpreter translated the proceedings.

Keri Neal, Consumer Services Representative, represented Inland Regional Center (IRC).

The matter was submitted on November 6, 2018.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of a diagnosis of Autism Spectrum Disorder which constitutes a substantial disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On July 3, 2018, IRC notified claimant that he was not eligible for regional center services.

2. On August 3, 2018, claimant filed a fair hearing request appealing that decision and this hearing ensued.

ELIGIBILITY CLAIM

3. Claimant is an 18-year-old male. He asserted he was eligible for services on the basis of Autism Spectrum Disorder.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

4. Official notice was taken of excerpts from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (*DSM-5*). The *DSM-5* provides the diagnostic criteria used by psychologists to make diagnoses of Autism Spectrum Disorder, which an individual must have to qualify for regional center services based on Autism Spectrum Disorder.

The *DSM-5* criteria for the diagnosis of Autism Spectrum Disorder include persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay. Nothing in the *DSM-5* requires formal testing, such as an Autism Diagnostic Observation Schedule (ADOS), rather the diagnostic criteria may be found "currently or by history." The *DSM-5* states:

> The stage at which functional impairment becomes obvious will vary according to characteristics of the individual and his or her environment. Core diagnostic features are evident in the developmental period, but intervention, compensation, and current supports may mask difficulties in at least some contexts. Manifestations of the disorder also vary greatly depending on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. Autism Spectrum Disorder encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder. (Italics in original.)

EVIDENCE INTRODUCED AT HEARING

Utah Medical Records

5. On November 9, 2005, when claimant was five years old, a Utah Department of Health and Family Services Division Report of Medical Examination, Children with Special Health Needs, authored by Judith Ahrano, M.D., noted that claimant was "a new referral" due to "problems with attention and hearing." Claimant was "a little slower in language development … and actually began talking one year ago and is bilingual in Spanish and English now. He is speaking in full, short sentences now." Claimant was in a new school and in preschool/Kindergarten. His mother "took him out of public school because they did not appear to be able to serve him because of his attention problems, according to mother's understanding. He is now in a private

Kindergarten. He did have some testing at the school, which we do not have results of today." Dr. Ahrano noted that the school testing would be obtained, that claimant was scheduled to see a social worker and an audiologist that day and would be scheduled for a psychology visit in January. Dr. Ahrano's "Behavioral Observations" were that claimant enjoyed drawing for a long period of time and was quite good at drawing different objects; became slightly more active at the end of the visit and begin to investigate other things in the exam room but did not engage in any risky or destructive behavior; and his mother described him as being immature in his play with friends, he was currently imitating Elmo's laugh and responding to most questions with a laugh initially and then following with the answer which is in normal language and tone for his age. Dr. Ahrano's "Impression" was "Learning problem described, possible ADHD." Dr. Ahrano recommended obtaining school testing results, scheduling a psychology evaluation and a social work evaluation, that "Parent and Teacher Conners"[1] be completed, and scheduling a developmental pediatric follow-up examination to determine whether medication may be helpful.

6. A January 11, 2006, report by Dr. Ahrano documented claimant had previously been seen for "ADD and Mixed Developmental Disorder." Claimant "also had significant problems with language, both receptive and expressive" and his mother gave a "history today" of "significant sensory integration problems, rigidities, and social problems." Mother and claimant's teachers completed "Conners' Long Forms" which both showed the identical pattern, just varying degrees, with Significant Severe scores for Cognitive/Attention and Social Problems and Moderate Difficulties scores for Impulsivity and Restlessness. Dr. Ahrano wrote that these scores, in addition to claimant's history, were "consistent with a diagnosis of an Autistic Spectrum Disorder,

[1] No evidence explaining this was offered at hearing.

with a Cognitive Attention Deficit Disorder and Sensory Integration problems." Claimant "was seen by a psychologist today who obtained Above Average IQ on IQ testing and noted some anxiety, and also diagnosed Autistic Spectrum Disorder in the high-functioning range." The psychologist recommended that an ADOS be performed in the school.

In her Behavioral Observation Dr. Ahrano noted that claimant was a "very likable boy who has clearly Autistic Spectrum features, though he is higher functioning." Her Diagnostic Impression was Autism Spectrum Disorder/high-functioning; Attention Deficit Disorder; Sensory Integration Disorder; Receptive Expressive Language Disorder; and Significant social interaction problems, with deficits in reciprocal interaction and rigidity, which limit social interaction, and avoidance of direct eye contact. Dr. Ahrano's recommendations were that an ADOS be done by "the school specialist who does the ADOS" as claimant needed to be given appropriate autism support services; that speech/language and occupational therapy services be provided; that ADD medication begin; that claimant's mother be given proper advocacy training to obtain appropriate educational support services; and that a developmental/pediatric follow-up visit with an occupational therapy consultation be scheduled.

7. On January 19, 2006, Dr. Ahrano wrote to the Drug Review Board, Utah State Medicaid, requesting prior authorization for prescribing Concerta to claimant. Dr. Ahrano wrote that claimant's diagnoses included "High functioning Autism and Attention Deficit Disorder."

Utah Education Records

8. Claimant's 2007 Individualized Education Plan (IEP) performed in Utah when he was six years, 11 months old and in second grade, identified claimant's "Classification" as "Developmental Delay." Claimant had made "excellent progress on his reading goals" which placed him at grade level. He could write his letters correctly when

he was "very focused and on task." He was at grade level with math but struggled to apply himself and his work showed him at a lower grade level. He appeared to have a receptive language delay which was significant in both Spanish and English. His expressive language appeared within normal limits and he had difficulty understanding language which impacted his ability to understand information and follow directions. He had improved his classroom behavior but had difficulty with impulsive and hyperactive behaviors, including some aggressiveness. His ability to listen and follow directions was noticeably low and that negatively impacted his success in the general classroom. Claimant was to spend 90 total minutes per day in special education classes for written language, math and reading and 40 minutes per week in a special education class for speech and language services.

9. A May 24, 2008, Psycho-educational Evaluation[2] performed in Utah when claimant was seven years, 10 months old and in second grade, noted that "[p]rior evaluations have been inconsistent in determining whether [claimant] is a child with autism." Claimant had been receiving special education services as a child with a "Developmental Delay." As part of the evaluation, claimant was observed by two different individuals and the following tests were also administered: Woodcock Johnson III Test of Cognitive Abilities, Woodcock Johnson III Tests of Achievement, Child Autism Rating Scale-Teacher, Child Autism Rating Scale-Parent, Achenbach Child Behavior Checklist-Parent, and Achenbach Teacher Report Form-Teacher. A review of all prior assessments was also conducted.

The Prior Assessments section noted that claimant was assessed in February 2006 on a referral from his pediatrician to determine if his lack of social interaction and school-related problems were due to autism. Claimant was administered the Stanford

[2] The e is lowercase in the word Psycho-educational in the report.

Binet Intelligence Scale: Fourth Edition, receiving scores ranging between 85 and 126. The test was administered over several sessions and claimant was observed to have more difficulty with the verbal portions as well as with making direct eye contact and complying with directives. The psychologist recommended further assessment using the ADOS, special education services to address claimant's needs, and diagnosed claimant with Pervasive Developmental Disorder, Not Otherwise Specified (PDD, NOS). In April 2006 claimant's school psychologist assessed claimant using the ADOS and found him "to not meet the criteria for determination of autism, although there were autistic like behaviors."[3]

The Current Assessment section of the report contained the results of the tests administered as part of this psycho-educational evaluation. The results of the Woodcock Johnson III Test of Cognitive Abilities noted that claimant obtained a standard score of 80 on the verbal ability scale which was in the low average range; he received a standard scale score of 87 in the thinking ability which was in the low average range; he obtained a cognitive efficiency standard score of 91 which was in the average range; and he received a general intellectual ability score of 83 which was in the low average range. On the Woodcock Johnson III Tests of Achievement claimant received scores in the low average and average ranges. Although claimant's mother's scores on the Child Autism Rating Scale-Parent were slightly higher than the teacher's scores on the Child Autism Rating Scale-Teacher, both scores noted that claimant has extreme emotional responses, cries or laughs for no reason, tends to look at things using his peripheral vision and hates changes in his routine. Mother also reported that claimant overreacts

[3] This diagnosis was made under the former DSM, which did not provide that PDD, NOS qualified as an Autism Spectrum Disorder. The *DSM-5* now states that Autism Spectrum Disorder encompasses PDD, NOS.

to noises, has extreme tantrums with changes to his routine, grimaces and bounces up and down. Claimant's scores on the Achenbach Child Behavior Checklist-Parent, and Achenbach Teacher Report Form-Teacher revealed that claimant's mother's concerns were that claimant was anxious/depressed, withdrawn/depressed, he had somatic complaints, social problems, thought problems, attention problems, rule breaking behavior and aggressive behavior. In contrast, his teacher's concerns that reached clinical significance were for thought problems and her concerns reached borderline significance for attention problems, rule breaking behavior and somatic complaints. Claimant was observed twice in his classroom by two different assessors, and was noted to be off task for a significant amount of time during one observation but not during the other.

In the Summary and Recommendations section, the school psychologist noted that when the assessment began, the team learned that claimant's mother planned to relocate to California. "Prior assessments were divided about whether [claimant] was a child with autism. He had a diagnosis of PDD, NOS and has been receiving special education services due to Developmental Delay." His prior assessments indicated low to high average intelligence and his current assessments indicated low average intelligence and low average to average achievement scores. "If claimant had not moved and was available for further testing, another IQ test would have been administered in order to clarify his current functioning." His mother appeared to have much greater concerns about his behavior than his teacher did which may have indicated a difference of opinion or different behavior in different settings. "On the autism rating scales both his teacher and mother rate him in the mildly-moderately autistic range." The school psychologist determined that based on the "scores and information it would appear that [claimant] continues to qualify for and require special education as a student with autism."

California Education Records

10. Claimant's 2013 California IEP, completed when claimant was 13 years, four months old and in eighth grade, identified him as a Spanish language speaker. Claimant's primary disability was "Autism" with his secondary disability being "Speech or Language Impairment, low incidence disability." Claimant's math and reading skills were at a fifth-grade level. He demonstrated difficulty in the area of pragmatics, weakness in the ability to understand and provide appropriate responses to sarcasm, slang, and indirect requests, and "may have difficulty providing correct responses to teacher presented scenarios where he must provide the correct social response."

Claimant was able to maintain a topic for over five minutes, depending on the topic, and with minimal cueing could retell the plot summary of a movie he recently watched. He was able to maintain eye contact as necessary, spoke in simple compound sentences and articulation was not a concern. Claimant was a respectful student who had shown improvement in his academic skills. He may need additional prompting to get on task when distracted. He needs to ask for help when needed as he tends to sit and stare at his paper when confused. Claimant takes medication as needed for asthma. He was able to take care of his personal care needs. Claimant would be in a general education class with related services that would be provided for several minutes each day.

A 2013 Specialized Academic Instruction attached to the IEP documented that claimant was eligible to receive 400 weekly minutes of collaboration/consult support in the general education classroom with special education staff; 200 weekly minutes of specialized academic instruction for language strategies and 625 yearly minutes of speech and language services. The October 16, 2013, Offer of Free Appropriate Public Education noted that claimant spent 17 percent of his time outside the regular classroom in extracurricular and non-academic activities. He did not participate in the

general education environment for his learning strategies class. The notes section documented a recent head injury resulting in a concussion that claimant incurred when he fell during PE class. The school psychologist "discussed that [claimant's] previous eligibility is autism and consistent from early age. Autistic-like behaviors were discussed and the definition of characteristics that meets eligibility for CA law was also discussed."

Claimant's mother reported that his behaviors were different at home and school and she was concerned with his home behaviors. She was informed that the IEP addresses school behaviors and claimant's mother reported that she would be requesting services from IRC. Claimant's mother shared that she and her son attend an autism club for children. The IEP team shared that the majority of claimant's skills are in the average range and he continues to meet eligibility for services under autism. Claimant's composition book was shared, and his language arts teacher advised that he regularly participates in class sharing, is closely monitored, completes most of his work, and asks questions. That teacher also related how claimant recently had his arm inside his shirt and when asked about it stated he wanted to see how it feels to be without an arm. Claimant needed to complete his math homework and class work daily.

An amendment to the IEP, dated May 9, 2014, after an IEP meeting was held at mother's request, documented mother's relaying of an incident that occurred during seventh grade PE, and her concerns that claimant's grades were going down, but the reported grades did not reflect that. One teacher shared that claimant did not like to do group work and another shared that he was not doing work in the classroom. The program director for a local community access center reported that claimant "thinks he is dumb and is depressed." The program director asked all team members to work together and sought wrap-around services from the district. A recent incident where claimant tried to hurt himself and police were involved was discussed. Claimant's family was seeking a mental health referral and the IEP team advised they would forward the

request to the high school. Claimant reportedly told the school counselor that he tried to hurt himself, and when he told his mother she did not believe him. His mother stated that conversation did not take place. The school psychologist proposed that claimant check in daily with the school administration staff, so staff could monitor him. The school sought a release of medical information, but mother advised that "there is no real doctor that can address his situation so no release" at present.

11. A California Assessment of Student Performance and Progress (CAASPP) Score Report, that reported the Spring 2017 test results, performed when claimant was 16 years old, documented that claimant's English Language Arts/Literacy Score was "Standard Nearly Met" as he was "Near Standard" in reading, listening and research/inquiry, and "Below Standard" in writing. Claimant's score in Mathematics was "Standard Not Met" as he was "Below Standard" in all three performance areas: "concepts and procedures, problem solving and modeling & data analysis, and communicating reasoning."

12. Claimant's school district performed a multidisciplinary assessment on September 23, 2016, and October 3, 2016, when claimant was 16 years, three months old, and prepared a report on October 6, 2016. The purpose of the assessment was to determine whether claimant continued to have a disability, his current levels of performance and additional needs, whether he continued to need special education and related services, and whether any additions or modifications to services were required. The assessment team reviewed records, claimant's academic and behavioral history, his current classroom assessment and standardized performance, teacher and service provider observations and a school health screening. The results of various reports reviewed were documented, including notations that in 2008 claimant's teacher rated him likely and speech therapists rated him very likely on the Asperger Syndrome Diagnostic.

The Health and Developmental Factors section noted that claimant's mother reported that claimant was born prematurely, experienced respiratory distress, breathing problems and difficulty feeding. His developmental milestones were delayed. His mother reported he had a history of depression since 2013 and that claimant stopped taking medication for depression in June 2015. However, "no supporting documentation of that condition was provided." Claimant's school district had referred him to an outside agency for a visual examination in 2016 when he failed the vision screening offered at school.

When interviewed, claimant reported living with his mother and sister in California. He enjoyed playing games on his computer and his goal was to become a game designer. He reported taking medications but was unsure of his medical status. He reported that he did not wear glasses. Claimant was sensitive to sound. Claimant reportedly would jump up and down for hours at home as if playing basketball, which he does daily to relax. He was then undergoing an evaluation at Kaiser and had been receiving therapy and speech services for the past 18 months. His teachers reported frequent absences and failure to complete assignments, as well as failure to follow directions.

The school psychologist reported that claimant was dressed and groomed appropriately for his evaluation. He wore sunglasses which he kept on until the school psychologist requested he remove them. Claimant was cooperative and well-mannered, and a positive rapport appeared to be established between claimant and the examiner. Claimant appeared to read the material presented to him and put forth his best efforts. Claimant appeared to enjoy the one-to-one attention he received during the testing. A separate evaluator performed the academic portion of the testing and also reported that claimant was cooperative, did well, responded age appropriately to test questions, and persisted with difficult tasks. The examiners noted that claimant worked consistently

and was compliant with all requests, responded appropriately to praise, and did not require any adaptations or modifications to the standardized procedures. All testing was administered in the English language and the results on the cognitive, behavioral, academic, and psychological processing were believed to be a valid sample of claimant's current level of functioning.

The multidisciplinary team performed the following assessments: Woodcock Johnson IV (WJ-IV); Berry-Buktenica Test of Visual Motor Integration, Sixth Edition (VMI-6); Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2); Test of Auditory Processing Skills (TAPS-3); Hawthorne Adaptive Behavior Evaluation Scale-R2 (ABES-R2); Gilliam Autism Rating Scale-Third Edition (GARS-3); Behavior Assessment System for Children, Third Edition (BASC-3); and Delis Rating of Executive Functions (DREF).

Given that claimant is bilingual, a nonverbal intelligence test was administered. Claimant's scores on the CTONI-2 all fell within the average range. Claimant scored in the low average range on the auditory memory domain of the TAPS-3, but auditory memory was not considered an area of suspected disability. Claimant received an average range score on the auditory cohesion subtest which was not considered an area of suspected disability. Claimant's standard score on the VMI visual sensory motor integration was in the 61 percentile; sensory motor integration was not considered an area of suspected disability. Claimant's scores on the WJ-IV ranged between 68, for passage comprehension, to 106, for spelling, with most scores ranging between the 80's and 90's. Errors involving mispronunciation, omission, substitution and hesitation were observed. Claimant's DREF scores, "a test designed to assist in the assessment of adolescents suspected of having behavioral and cognitive problems often associated with attention deficit hyperactivity disorder and autism," were primarily in the high 50 to high 60 percentiles with a low of 21 percentile for compliance/anger management and a

high of 86 for attention/working memory. Claimant reported a strained relationship with his parents and difficulty establishing and maintaining relationships with others.

The report noted that GARS-3 "is one of the most widely used instruments for the assessment of Autism Spectrum Disorder in the world." Both the teacher scaled score and the parent scaled score indicated that claimant "very likely" had autism. Claimant's adaptive behavior was informally assessed by observation and teacher reports. Claimant was able to care for his own personal needs, required prompting at times but had improved. Claimant was observed in his study skills class working on his own, declining needed help, completing his work as assigned and "seemed mature in comparing same age peers. No behaviors or concerns were observed during this observation."

The report Summary section indicated that claimant's estimated cognitive ability fell within the average range. He demonstrated average skills in the areas of basic reading, reading fluency, mathematics, written language, broad written language, applied problems, spelling, writing samples, word attack and sentence reading fluency. Low average skills included broad reading, broad mathematics, written expression, academic fluency, letter-word identification, accusation, oral reading, math fluency, sentence writing fluency, and reading recall. The "very likely" results from the teacher and parent ratings on the GARS-3 were consistent with claimant's medical diagnosis. Teachers reported that a factor affecting claimant's academic performance was his high absenteeism rate which mother reported was due to doctor's appointments he must attend. The teacher rating on the DREF indicated "at risk concerns in the area of attention." The BASC-3 indicated "at risk elevation" on the depression and anxiety scales and an elevated social stress scale score suggesting his social interactions may be characterized by tension, pressure, and a lack of social coping resources. These three elevated scores may indicate significant emotional distress characterized by depressed

mood, tension and poor social support. Claimant also had elevated locus of control, sense of inadequacy, and interpersonal relations scale scores.

The report noted that eligibility for special education services was considered under the specific learning disability and autism categories. Claimant did not meet eligibility as a student with a specific learning disability as his absences were the primary factor adversely affecting his academic performance. As to his eligibility under the autism category, claimant had a medical diagnosis of autism, his teachers and parent reported communication, social, and behavior concerns, and learning problem domains were observed in the home and educational environment. Claimant's "behaviors across all settings include behaviors that also align" with Autism Spectrum Disorder. Claimant's "eligibility aligns more closely with his medically diagnosed Autism." The report concluded by providing intervention recommendations to implement.

13. Claimant's 2018 IEP, which took place when he was 17 years, 11 months old and in 12th grade, documented his primary disability was autism and his secondary disability was speech or language impairment. Claimant was "exiting from special education" and returning to regular education. Claimant continued to make gains towards his goals. If given a social situation prompt "he can provide one to two important pieces of information when provided with no prompts. Moderate prompts are needed to identify pertinent questions and provide additional pieces of information. Pragmatic language continue [*sic*] to be a concern at this time. Speech therapy will continue to support pragmatics." He is continuing to advocate for himself more in class. He is well behaved in all of his classes. Most teachers say he "has matured quite a bit" since freshman year. He takes medication as needed for asthma. He is occasionally absent because he attends autism classes off-site one day per week. He is able to take care of his personal care needs. Claimant received 160 weekly minutes of specialized

academic instruction in a separate classroom and 40 minutes yearly of college awareness services.

California Kaiser Medical Records

14. Claimant's records from Kaiser Permanente contained records of several visits. A July 7, 2016, visit with Katherine Levernier, M.D., for dental anesthesia clearance, noted that claimant was in a special education program at school due to "developmental delay." Mother was requesting a follow-up appointment[4] with Debra Demos, M.D., whose records are summarized below. Claimant was in "speech therapy at school and through Sensibilities." He was "followed by mental health, no longer with concerns regarding anxiety, depression, no current medication per mother's preference." The record contained a Patient Active Problem List that included: Intermittent Asthma - using MDI for possible wheezing more than few times per week, not on controller medication; Suspected Mental Condition Not Found; Attention Deficit Hyperactivity Disorder, Combined - followed by mental health, no current medication; Insomnia; Major Depressive Disorder; Sensory Integration Disorder; Social Anxiety Disorder (Social Phobia); generalized anxiety disorder and Autism Spectrum Disorder.

15. On August 12, 2016, when claimant was 16 years, one month old, claimant had a "Developmental Multidiscipline Evaluation." The report authored by Dr. Demos was titled "Autism Team Developmental Pediatric Evaluation" which noted to be "one part of the Team Multidisciplinary Team Evaluation." The "Reason for Referral" was that claimant was "previously evaluated" and "did not meet criteria for Autism at that time. Mother requesting follow up evaluation …"[5] The note indicated that a previous

[4] No records of any prior visit with Dr. Demos were offered at hearing.

[5] Records of that prior evaluation were not offered at this hearing.

evaluation by Kaiser determined claimant had depression and should be re-evaluated after treatment if there were still concerns. The "History of Present Illness" section noted that claimant's mother advised that she attends an autism group and was told to obtain IRC services before claimant turns 18. The section also noted: "[Claimant] was diagnosed with Autism Spectrum Disorder by Dr. Chuateco. Followed by Dr. Santos Nanadiego."[6] Following the evaluation, which included making findings under the *DSM-5* criteria of not initiating conversations, poor eye contact, not making friends or engaging in conversations or social events, having stereotyped/repetitive movements of jumping and touching the wall, having a highly fixated interest of playing computer games (all day of he could), a history of being oversensitive to loud noises (movies) and chewing on non-food items (bed and bottle caps), Dr. Demos diagnosed Autism Spectrum Disorder. Her plan was to continue speech therapy, and a referral to "behavioral health and social skills."

16. At an October 17, 2016, visit, Dr. Demos noted that mother reported claimant was diagnosed with autism in Utah when he was five or six years old. Claimant was diagnosed with autism by "Dr. Chan" in 2014. Claimant had an IEP with a primary disability of autism and received speech therapy. Claimant had severe obesity. Mother requested a letter for IRC regarding claimant's diagnosis. Dr. Demos noted that claimant has a diagnosis of Autism Spectrum Disorder, is "receiving speech therapy at Sensibilities through Easter Seals," would be starting occupational therapy "this week," and was awaiting to undergo an ABA evaluation that the Kaiser Autism Evaluation Team had recommended.

17. On September 9, 2017, Kaiser notified claimant that the referral to Easterseals from Sofronio Basical, M.D., claimant's treating provider, had been approved.

[6] No records from Dr. Chuateco or Dr. Nanadiego were offered at this hearing.

Claimant's diagnoses were listed as intermittent asthma; attention deficit hyperactivity disorder, combined presentation; major depressive disorder, recurrent episode, in partial remission; generalized anxiety disorder; and Autism Spectrum Disorder. The authorized services were a health and behavior assessment and a mental health assessment.

18. Katherine Levernier, M.D.'s October 19, 2017, record documented sensory integration disorder, social anxiety disorder (social phobia), generalized anxiety disorder, and major depressive disorder, recurrent episode, in partial remission – improved, no medication, no longer seeing therapist. Claimant spent half his school day in a regular classroom, half in special education. Several health issues were identified, and recommendations were made to treat them. Claimant was being followed by the Kaiser Autism Team. Claimant had been unable to follow up on the behavioral service recommendation given his busy schedule.

19. On April 26, 2018, claimant had a "Behavioral Learning Disability Follow-Up Visit" with Dr. Demos. Claimant and his mother were "not doing ABA, referrals have been placed, but no response from parent per Health Connect 2017." Mom reported that IRC did not accept claimant. Claimant's Active Problem List and Active Ambulatory Problems List both noted diagnoses of Social Anxiety Disorder, Autism Spectrum Disorder, and Sensory Integration Disorder, among other problems listed. Dr. Demos's Diagnoses included: Suspected Mental Condition, Not Found; Major Depression, Single Episode, Severe; Attention Deficit Hyperactivity Disorder, Severe; Autism Spectrum Disorder; Major Depressive Disorder, Recurrent Episode, in partial remission; and Generalized Anxiety Disorder. Her Assessment listed: "Fears - afraid of the stove, anxiety, he denied depression" and a behavioral health referral was again recommended, as was an ABA evaluation and occupational therapy. Claimant was given information about IRC for "evaluation for possible eligibility…" Claimant was asked to bring his most recent psycho-educational testing report to his next visit and set a follow-up appointment.

20. Dr. Demos wrote a letter on April 26, 2018, stating: "[Claimant] has a diagnosis of autistic spectrum disorder. I recommend for you to contact [IRC] and go to [IRC] and request them to evaluate [claimant] for possible eligibility."

21. On June 4, 2018, Dr. Demos authored a letter stating claimant "has a diagnosis of Autism Spectrum Disorder. He met dsm [*sic*] 5 criteria for Autism Spectrum Disorder by history and behavioral observation." Dr. Demos then listed the *DSM*-5 diagnostic criteria required to make an Autism Spectrum Disorder diagnosis, identifying how claimant met each category. Under Section A, persistent deficits in social communication and social interaction, Dr. Demos noted that claimant has (1) deficits in social-emotional reciprocity because he does not speak about his emotions much and usually the other kids initiate conversations; (2) deficits in non-verbal communicative behaviors used for social interaction because he has poor eye contact; and (3) deficits in developing, maintaining and understanding relationships because he has a history of decreased interest in children and difficulty with peer relationships. Under Section B, Dr. Demos noted that claimant has restricted, repetitive patterns of behavior, interests or activities because he has (1) stereotyped or repetitive motor movements, use of objects or speech as demonstrated by his jumping behavior; (2) insistence on sameness, inflexible adherence to routines or ritualized patterns of verbal or nonverbal behavior because his mother reports that he does not like change and he does not want to have new clothes; (3) highly restricted, fixated interests that are abnormal in intensity or focus as demonstrated by his restricted interests in computer and digital games; and (4) he has hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment in that he previously could not go to the movies because it was too loud but can now attend, and he chews on non-food items.

California Superior Court Records

22. On April 4, 2018, Katherine Levernier, M.D., of Kaiser Permanente Medical Group, executed a Capacity Declaration-Conservatorship under penalty of perjury that was filed in Riverside County Superior Court. Dr. Levernier is a licensed physician and noted claimant's many mental function impairments, the majority of which she identified as being "moderate," "major," or "so impaired as to be incapable of being assessed." She stated that his periods of impairment do not vary substantially in frequency, severity, or duration. Her diagnoses were Autism Spectrum Disorder, Sensory Integration Disorder, and Social Anxiety Disorder. Dr. Levernier advised the superior court that claimant lacked the capacity to give informed consent to any form of medical treatment.

Easterseals Records

23. A June 15, 2018, Easterseals Initial ABA Assessment and Recommendation Report noted that claimant was referred to Easterseals Autism Services for evaluation to determine eligibility and recommendations for an intensive Applied Behavior Analysis (ABA) program. To perform the assessment, Easterseals gathered "data from a variety of sources including direct observation in natural settings, direct assessment, interviews with caregivers," reviewed prior records, and administered various tasks, including Functional Behavior Assessment (FBA), Vineland Adaptive Behavior Scales Assessment, Second Edition (Vineland II), Assessment of Functional Living Skills (AFLS), and performed an initial parent interview.

Mother reported that her pregnancy was complicated because her placenta and claimant were very low. She was in a lot of pain and unable to walk throughout her pregnancy. Claimant was delivered via C-section at 27 weeks and weighed three pounds. He had jaundice and remained in an incubator for 30 days. Thereafter he had weekly checkups for three months. Claimant wears glasses and has astigmatism. He has asthma and uses albuterol as needed. Claimant "received his primary diagnosis of Autism

Spectrum Disorder on January 6, 2006, by Dr. Judith Ahrano." He was reevaluated at Kaiser in 2016 where he received another Autism Spectrum Disorder diagnosis from Dr. Susanne [*sic*] Demos." Claimant has received occupational therapy and speech therapy in the past in school and currently receives 37.5 hours per week of services in high school.

Claimant's current level of functioning was assessed. Claimant reported he enjoys playing video games and listening to music and enjoys eating hamburgers, tacos, pizza and chocolate ice cream. The assessor observed claimant watching YouTube videos and playing video games. Mother reported that claimant does not initiate completing his chores or tending to his personal needs such as showering and brushing his hair and teeth. Mother repeatedly has to ask him to complete tasks, he replies "Ok," but does not do them. Mother also reported that claimant has difficulty communicating and engaging in conversations with others. He will constantly talk about one topic even if others are trying to change the topic and will talk about it until others tell him to stop. Claimant refuses to speak to others even if he needs help. For example, he will not ask for help in a store to locate an item and would rather leave the store without the item rather than ask for help.

On the Vineland II claimant's communication, daily living skills, socialization and gross motor skills were all in the low level; his fine motor skills were moderately low, his adaptive behavior composite was low, and his maladaptive behavior index was clinically significant. In the summary section of the report, claimant's strengths were that he can play video games, find his favorite videos on YouTube, fold his clothes, get dressed to leave the house and was observed looking for a preferred item in the store, asking for help, and purchasing the item with prompts. Claimant was evaluated for intensive intervention services by Easterseals Autism Services which "are designed to remediate

core deficits associated with Autism Spectrum Disorders." At that time, parent training and consultation, consisting of 60 hours over a six-month period, was recommended.

Other Medical Records

24. On October 31, 2018, Sunni Van Waardenburg, MFT, of SCPG,[7] located in Sun City, California, wrote a "treatment summary" at mother's request. The letter indicated that claimant began treatment with Ms. Waardenburg on October 5, 2018, "due to symptoms of anxiety and depression, as well as symptoms relating to Autism Spectrum Disorder." Claimant had attended three sessions so far. He answered direct questions during the sessions and identified areas in his life on which he would like to work. His mother was present during the initial assessment to help provide background information. Previous records were also reviewed as part of the initial assessment. Those records and recent assessment information established that claimant met the criteria for the following diagnoses: Autistic Disorder; Anxiety Disorder, unspecified; and Major Depressive Disorder, recurrent, mild.

IRC Evaluation

25. Paul Greenwald, Ph.D., is a staff psychologist at IRC who conducts assessments to determine eligibility. His curriculum vitae documented that he graduated with a Bachelor of Arts degree in 1974 from the University of Miami and received his Ph.D. in 1987 from the California School of Professional Psychology. In Florida Dr. Greenwald worked as a research associate at the University of Miami School of Medicine from 1980 to 1990; a postdoctoral resident at a family psychology center from 1990 to 1992; a pre-certification psychologist from 1992 to 1995; a clinical programs director for a group counseling center from 1985 to 2001; and a clinical coordinator for a children's

[7] No evidence was offered identifying this group.

psychiatric center from 2003 to 2004. He practiced psychology in Florida from 2001 to 2006, when he began practicing psychology in California. Dr. Greenwald initially was an independent psychology vendor for Harbor Regional Center from 2006 to 2008 and thereafter became a staff psychologist at IRC.

In 2014, Dr. Greenwald reviewed records, performed an assessment, and authored a report in which he determined claimant was not eligible for regional center services.

No explanation for the gap in time between claimant's 2014 assessment and IRC's 2018 Notice of Proposed Action was offered at this hearing.

In the Reason for Assessment and Background Information section of his report, Dr. Greenwald noted that claimant was seen to determine "eligibility for IRC services under an Autism Spectrum Disorder (ASD) criterion." Claimant's speech, specifically language comprehension, was delayed and there were "extant diagnoses" of learning disability and attention deficit hyperactivity disorder with predominately inattentive presentation. Dr. Greenwald made no mention of the "extant diagnoses" of autism in the records. Claimant's medical history was positive for respiratory problems associated with prematurity resulting in 45 days in the NICU. Claimant had mood lability and depression as indicated by the medication that included antidepressants and mood stabilizers. Dr. Greenwald reviewed Dr. Ahrano's January 19, 2006, letter, claimant's 2013 California IEP, and claimant's 2007 Utah IEP. Under Educational Status, Dr. Greenwald noted that claimant's 2012 IEP designated emotional disturbance as his primary criteria and learning disability as his secondary criteria qualifying him for special education services.

In the Previous Assessments portion of the report, Dr. Greenwald noted the assessments performed in 2008 by the Utah school district. Dr. Greenwald's "Assessment Procedures" included a Mental Status Exam, the Wechsler Intelligence Scale for Children-4th Edition (WISC-IV), the Autism Diagnostic Observation Schedule, the

Childhood Autism Rating Scale-2nd Edition (CARS 2-ST), the Vineland-II Adaptive Behavior Scales, and a September 17, 2014, school observation.

In the Behavioral Observations section, Dr. Greenwald reported on both his observations at IRC and at school. At IRC, claimant was appropriately dressed, and grooming and hygiene appeared satisfactory. Claimant was first observed lying on his back on long bench seats in the reception area and acknowledged Dr. Greenwald calling his name by turning, nodding his head and reciprocating a verbal greeting, gaze (eye contact) and waved. Claimant accompanied his mother and Dr. Greenwald to the assessment room and en route gave no signs of stereotyped behaviors or sensory visual, auditory, tactile or other aversions or attractions. Claimant sat as directed on the swivel chair and began spinning himself around in the chair. He responded to Dr. Greenwald's comment, "You must be sick of testing" with an affirmative: "Yeah!" Claimant "elaborated spontaneously by adding context to his aversion," noting having "too many memories," from his earlier family life in Utah. However, simply stating "too many memories" neither correlates to being sick of testing nor does it indicate claimant was referring to Utah, so it was unclear how that comment added context. Dr. Greenwald noted claimant "used conventional phrase speech to answer questions, initiate comments and requests, and engage in limited conversation with examiner." Claimant's responses proved relevant to questions asked and conventional for semantics, syntax and prosody characteristics of speech. Claimant's "motor behavior was atypical for slow psychomotor speed, approaching a level of psychomotor retardation." Claimant deliberated on WISC-IV test items for a long time before committing to an answer. He moved deliberately but extremely slowly.

Dr. Greenwald observed claimant in two mainstream classrooms on September 17, 2014, that included a successful transition from one class to another. Claimant sat at his desk facing forward and apparently attending to his classwork and teacher's

instructions. He "maintained a businesslike facial expression throughout the entire observation period. Mild psychomotor agitation was seen as fidgeting legs. This contrasted his slow deliberate movements suggesting fatigue and/or anhedonic mood, i.e., psychomotor retardation." Claimant "did not initiate interactions with teachers or peers but proved responsive to teachers and other students, for example sustaining a dialogue initiated by a girl sitting beside him" in class.

Claimant was alert and spatially, temporally and personally oriented. He correctly stated the date and day of the week. He demonstrated consistent command and access to overlearned personal and family information, recalling his home address and telephone number. He also demonstrated satisfactory recall of recent events. Claimant's WISC-IV results revealed wide disparities among and within indices. He obtained low average range scores on the verbal comprehension index and processing speed indices. In verbal scale subtests he obtained "average range results on a subtest measuring language mediated classification and reasoning," lower borderline to extremely low scores on vocabulary, and average to low average scores on comprehension.

Dr. Greenwald wrote that ADOS is the "'gold standard' for assessing/diagnosing autism and Autism Spectrum Disorders (ASD) across ages, developmental levels, and language skills." The protocol identified predominately subtle anomalies in the area of social affect and a singular mild manifestation of restricted and repetitive behavior. There were three mild communication deficiencies. Although claimant used descriptive gestures, he rarely gestured spontaneously and had limited conversation. While claimant readily responded to questions with relevant information including self-disclosures, and asked follow-up questions sustaining verbal exchanges, he never initiated those exchanges. Claimant effectively responded to inquiries about his subjective emotions and feelings. He acknowledged feeling sad, noting mood congruent changes in his own behavior. Claimant identified conflicts with his mother as one source of his feelings and

also disclosed how perceived peer rejection generated sadness. A preponderance of mild, along with more substantial, limitations were identified in the areas of social interaction and intact functioning. Claimant was receptive to Dr. Greenwald's overtures though rarely took the initiative in those encounters. Although shared enjoyment in interaction was present, it was not consistently so. Claimant demonstrated a full range of contextually congruent facial expressions during some conversational exchanges in moments of shared enjoyment. Claimant used no stereotyped/idiosyncratic use of words and phrases in verbal exchanges at any time during the assessment. There were no incidents of hand and finger or other complex mannerisms, excessive interest in unusual or highly specific topics or repetitive behaviors. Dr. Greenwald discounted claimant's chair spinning during the assessment as a "mild example" of unusual sensory interests.

Although Dr. Greenwald determined that claimant's ADOS-2 Module 3 Diagnostic Total Score "does meet critical cutoff criterion (9) consistent with ASD, he concluded that '[w]hile the protocol identified subtle deficits in social affect and reciprocal social interaction, manifestations of restricted and repetitive behavior (briefly spinning in swivel chair) do not meet a threshold of persistence or severity sufficient to meet the criterion for restricted or repetitive patterns of behavior, interests or activities specified by DSM-5 for ASD."

Dr. Greenwald stated that CARS helps "identify children with autism and determine symptom severity." One of 14 categories evaluated, Level and Intensity of Intellectual Response, was assessed at moderate symptom severity. Hypoactive Activity Level and Emotional Response were each assessed at mild to moderate severity referencing a history of moods and current observations of constrained or sad affect. Categories relating to People, Visual Response and Listening Response were assessed at mild severity. Dr. Greenwald's general impressions "were consistent with Minimal autism

spectrum symptoms and did not meet criterion [*sic*] consistent with [Autism Spectrum Disorder.]" Claimant's Vineland scores ranged from low to moderate/severe deficit. Dr. Greenwald noted that the ratings fell significantly below commensurate cognitive levels assessed on the WISC-IV, "an unusual occurrence."

In his summary Dr. Greenwald opined that claimant's ADOS scores do not meet critical cutoff criterion consistent with Autism Spectrum Disorder. While the protocol identified subtle deficits in social affect and reciprocal social interactions, manifestations of restricted and repetitive behavior (briefly spinning in swivel chair) did not meet a threshold of persistence or severity sufficient to meet the criterion for restricted or repetitive patterns of behavior, interests or activities specified by *DSM-5* for Autism Spectrum Disorder. Claimant did not manifest sensory anomalies, atypical use of objects or other repetitive behaviors during the IRC office assessment or during the school observation. Claimant's CARS scores did not meet cut off consistent with Autism Spectrum Disorder. The protocol revealed only mild indications for sensory anomalies scored based on record review and peer report but not supported by IRC or school observations or stereotyped behaviors that would be crucial to an autism determination. Dr. Greenwald's diagnostic impressions were Attention Deficit Hyperactivity Disorder, predominantly inattentive type by history; Language Disorder by history; Rule Out Other Specified Trauma and Stressor Related Disorder with depressed mood; and Rule Out Major Depressive Disorder, moderate severity, with melancholic features. Dr. Greenwald found claimant ineligible for regional center services under the diagnostic criteria for Autism Spectrum Disorder. He recommended claimant continue psychiatric/psychotherapeutic interventions addressing prominent and enduring depressive symptoms; continue his speech and language programming to address the language disorder diagnosis; occupational therapy to address executive dysfunctions

associated with his attention deficit disorder diagnosis; and noted claimant may benefit from interest sharing social/recreational activities with compatible peers.

26. IRC Continuous Notes documenting Diagnostic Team Conference Note/Statement of Eligibility, dated July 1, 2014, and September 17, 2014, had boxes checked off indicating that claimant was determined to be ineligible for regional center services, and that eligibility was deferred as a further assessment was needed because "psychologist wants to do a school visit in September 2014 date 9/17/14 @ 9 AM." The Team Recommendations were social services, medical/dental care, needed supports, and interventions. The Comments were: "Smart IQ Test putting patterns eye hand coordination."

27. Dr. Greenwald prepared and signed a June 26, 2018, IRC Eligibility Determination/Team Review. Under the section marked "Records Reviewed" he made the following entries: "Psychological Date: 9-17-14; Medical Report Date: 8-12-16; and Education Date: 5-22-18." His comments were: "While IEP cites Autism (Aut) for Spec. Ed. Svcs. no supporting documentation updating 2014 IRC psychological (by this writer) were submitted." Dr. Greenwald checked the boxes indicating claimant was not eligible for regional center services on the basis of "ASD, Cerebral Palsy or Epilepsy."

Although numerous medical and school records were prepared after the 2014 IRC evaluation and offered by IRC at this hearing, it appeared that Dr. Greenwald never reviewed any of them.

DR. GREENWALD'S TESTIMONY

28. Dr. Greenwald testified that his duties include performing psychological assessments to determine regional center eligibility. He stated that Attention Deficit Hyperactivity Disorder affects functions related to learning and can compromise the process of attention, concentration and executive functioning. Autism Spectrum Disorder can affect language, especially pragmatic language, which is social language.

When asked how psychologists diagnose Autism Spectrum Disorder he replied, "It depends on the type of clinician." Dr. Greenwald was asked various questions about the documents submitted in evidence. He dismissed the Kaiser autism diagnoses because "there was no indication of what was used to arrive at the diagnosis." He "looked for the tools used and could not find" any. It appeared from this testimony that Dr. Greenwald had not even reviewed Dr. Demos's June 24, 2018, letter identifying the *DSM-5* criteria on which Dr. Demos relied to make the Autism Spectrum Disorder diagnosis. Moreover, Dr. Greenwald's testimony was at odds with the *DSM-5* clear directive that the diagnostic criteria can be established "currently or by history." Given that the Kaiser records were replete with the treating clinician's observations and mother's reports, Dr. Greenwald's opinion regarding the Kaiser records was not persuasive.

Dr. Greenwald then testified that in reviewing the Kaiser records he found other diagnoses that could impact claimant's functioning, stating that there were "lots of diagnoses that can lead to what was observed." Dr. Greenwald testified that Dr. Levernier's July 7, 2016, note indicated that claimant has asthma which "could have psychological effects." Dr. Greenwald then proceeded to give lengthy testimony about how he had asthma as a child and had been prescribed Pseudoephedrine which caused him to have hyperactive affects. He also noted that claimant had been diagnosed with insomnia and Dr. Greenwald relayed how he could not sleep as a child because of the asthma medication he had been prescribed.

Dr. Greenwald's testimony in this regard was extremely alarming for several reasons. First, Dr. Levernier's chart note clearly and explicitly stated that claimant had "intermittent asthma - using MDI for possible wheezing more than few times per week, not on controller medication;" there was no evidence that claimant was taking the same medication that Dr. Greenwald had been prescribed decades earlier. Moreover, even if

he had, the fact that Dr. Greenwald had hyperactive and insomniac reactions to his medication did not establish that claimant suffered those same reactions.

Dr. Greenwald's conclusions were highly speculative, even he used the phrase "could have psychological effects," were made without any supporting evidence, did not constitute competent medical opinion because they were outside the scope of his expertise as he is not a medical doctor or licensed to prescribe medications, and his conclusions made it appear that Dr. Greenwald was grabbing at straws to rationalize his conclusions. His testimony was also ironic because one of his criticisms, as noted below, was that medical doctors cannot diagnose psychological conditions, yet he had no qualms making medical diagnoses. It was also extremely disturbing that Dr. Greenwald would use anecdotal testimony regarding his own childhood reactions to asthma medication when determining eligibility and rendering opinions.

Dr. Greenwald then discounted Dr. Levernier's notation on her "Patient Active Problem List," testifying that sensory integration disorder was not a formal psychological diagnosis. However, not only does the *DSM-5* identify many names formerly used which should now be called Autism Spectrum Disorder, but sensory integration problems are a hallmark of an autism diagnosis. Dr. Greenwald continued to discount the opinions of other treaters and records offered in this matter that found claimant did have autism. He opined that Dr. Ahrano's November 9, 2005, report did not demonstrate that claimant was eligible for regional center services even though that report identified problems that could be caused by autism. Dr. Greenwald discounted Dr. Ahrano's January 19, 2006, report because he erroneously believed that there was no explanation as to how the high functioning autism diagnosis was derived. However, as allowed by the *DSM-5*, Dr. Ahrano documented the history he took from mother and reported test scores that supported his autism diagnosis. Dr. Greenwald further opined that the behaviors documented in the May 24, 2008, Utah school district Psycho-educational Evaluation

"were not exclusive to Autism Spectrum Disorder" even though those evaluators attributed them to autism. Dr. Greenwald discounted all the IEPs and school records finding claimant eligible for services under an autism disability because schools use Title 5 educational standards which are not as specific as regional center regulations and "do not require three specific criteria." While that is true, and school determinations, alone, would be insufficient to make a finding of autism, the school records contained multiple test scores and behaviors that supported an autism diagnosis.

Dr. Greenwald also discounted Dr. Ahrano's January 11, 2006, report in which she diagnosed "Autism Spectrum Disorder/High Functioning," because it "is not best practices to diagnose after observing 'Autism Spectrum features.'" However, that testimony was unpersuasive because it contradicted the clear statement in the *DSM-5* that the diagnostic criteria can be found "currently or by history," which indicates that it can be based on observations. Dr. Greenwald further discounted Dr. Ahrano's January 11, 2006, report testifying that "high functioning autism" is an obsolete and imprecise term and not an official diagnostic term. However, that testimony failed to take into account that the report was written in 2006, before the DSM was revised and more importantly, the *DSM-5* unequivocally states that former diagnoses of "high functioning autism" are to now encompassed in Autism Spectrum Disorder diagnoses.

Dr. Greenwald also discounted Dr. Ahrano's opinion because he believed that she did not specify what measures she used to arrive at her diagnosis. Again, this testimony was unpersuasive because her report clearly noted the factors on which she was relying, including an evaluation by a psychologist, performed that same day, who also diagnosed Autism Spectrum Disorder in the high-functioning range. Finally, and quite alarmingly, Dr. Greenwald testified that he further discounted the report because "doctors are very rarely trained or licensed to perform psychological testing for Autism Spectrum Disorder or speech language testing" without any evidence that Dr. Ahrano

was not so trained, especially given that she worked in the Children with Special Health Care Needs division of the Utah Department of Health, and her report clearly documented that her opinions were also based on her consultation with a psychologist and a review of that psychologist's testing results. Similarly, he discounted Dr. Demos's records for failing to specify how she arrived at her diagnoses, but, again, the *DSM-5* does not require formal testing; history can be sufficient. Thus, those criticisms, too, are rejected.

Dr. Greenwald next discounted the October 31, 2018, letter written by Ms. Waardenburg because "an MFT is not qualified to diagnose autism." However, nowhere in her letter does Ms. Waardenburg state that she made that diagnosis; instead she writes that she is preparing a "treatment summary" at mother's request, presumably for IRC, and that "per previous records and recent assessment information, [claimant] meets criteria for" Autism Spectrum Disorder. Thus, her letter merely summarized the diagnoses and treatment claimant was receiving; she was not making the diagnosis.

As to his own testing performed, Dr. Greenwald, even though he acknowledged that the CARS scores were in the autism ranges, which would support an Autism Spectrum Diagnosis, testified the scores were "just mild" and did not cause him to make an autism diagnosis because he did not observe those behaviors at IRC or at claimant's school. He also thought claimant's depression may have affected the ADOS scores given that Dr. Greenwald did not observe any sensory issues. Dr. Greenwald in addition opined that claimant's medications may have affected his scores. However, there was no basis for that opinion. None of claimant's medical providers attributed his scores to his medications and the dosage of the medication claimant was taking was "not specified," making it highly speculative for Dr. Greenwald to opine that the medications "may have" affected claimant's scores.

Dr. Greenwald opined that claimant's report of feeling sad indicated he could observe himself as did his statements regarding peer rejection and being put down by other kids, further supporting that claimant did not have autism. However, as the *DSM-5* notes, autism is a "spectrum" and there are many presentations. Dr. Greenwald observed the claimant did not seem very interested in having a conversation and seemed "very down" with low energy. Those observations suggested claimant did not engage in conversation. However, Dr. Greenwald's testimony when discussing his interaction with claimant was most concerning. While explaining how claimant rarely responded during the assessment, Dr. Greenwald testified, "I had to provide the evidence." This statement was alarming because it suggested that rather than being a neutral, non-interested examiner, Dr. Greenwald was actively trying to affect the outcome, making him appear biased. His testimony also supported mother's letter describing the IRC assessment with Dr. Greenwald.

On cross-examination when asked why claimant has repetitive behavior, Dr. Greenwald testified that repetitive behavior had been reported but he had not observed it and repetitive behavior could be one feature of autistic spectrum disorder, but other diagnoses could also cause that behavior such as "obsessions and compulsions associated with anxiety disorders." Dr. Greenwald explained that although many behaviors were discussed and reported, he did not see any records where the treaters observed those behaviors. His opinion, here, is rejected. First, the *DSM-5* permits the diagnosis of Autism Spectrum Disorder by history and the records contain multiple reports of claimant's repetitive behaviors. Second, none of the treaters diagnosed claimant with obsession and compulsion disorders, making Dr. Greenwald's testimony speculative and unsupported by the evidence.

Dr. Greenwald's testimony in this regard was even more alarming given that claimant was seen and diagnosed by autism specialists, e.g. the Kaiser Autism Team

Developmental Pediatric Evaluation, none of whom attributed claimant's symptoms to obsessive compulsion disorder. Finally, Dr. Greenwald acknowledged that although claimant's ADOS scores at IRC were in the autistic range, he discounted them because claimant's "levels of anxiety, depressive symptoms, and Attention Deficit Hyperactivity Disorder symptoms were so significant they could be a source of the behaviors." Again, that opinion was highly speculative and lacked evidentiary support.

PERCIPIENT WITNESS TESTIMONY

29. Mother's friend has known the family for 10 years. She has two sons, aged 19 and 21, who have tried to include claimant in their activities, to no avail. Claimant does not want to engage in social activities with her sons, does not participate when at social events, often wanting to go back home, and does not engage in conversation. She explained that claimant will merely say yes or no to questions posed to him but does not initiate conversation and always "has to go with his mother" if he does go out. Claimant prefers to stay away from others and be by himself. She also described an event when her sons were frightened of claimant because he suddenly came out of his bedroom and started jumping and her sons did not know what to do.

30. Mother testified that she was extremely thankful for the opportunity to provide information about her son. She wants him to obtain services so he can become independent. She would like him "to be like other young autistic men who can do a lot of things." Claimant "does not communicate correctly." She has four sons and a daughter with whom she has good communication, but claimant has problems engaging in conversation unless he is talking about a certain topic in which he is interested and then he does not know how to stop talking about it. Mother works "really hard" to help claimant, she brings him to psychologists, but he still requires additional help. His "Kaiser specialist" has said that he cannot drive. Mother worries that he does not communicate, and she feels sad because he has no friends. Her friends try to

befriend him or engage him in conversation but he only answers whatever is asked of him. Sometimes he makes eye contact, sometimes he does not.

31. Mother authored a letter dated October 31, 2018, outlining her son's history and her experiences during that IRC assessment. She noted that Dr. Greenwald's report was "full of inconsistencies and things that never happened. For example, my son in 2014 still did not know what the phone number to our house was, and much less the address." She noted that claimant answered some questions with inappropriate responses, mistakenly sat during the evaluation in Dr. Greenwald's chair, and did not make eye contact with Dr. Greenwald. Mother wrote: "Curiously, [Dr. Greenwald] ended up giving me the same diagnosis that a few weeks earlier I was given by Miss Dalia Castrejon the receptionist at [IRC]."

Most concerning was what mother next wrote: "Dr. Greenwald compared [claimant's] condition with a pizza. He told me that if a pizza has five ingredients, and that if he gave me only three of those ingredients, I would not have a pizza. He explained that [claimant] has two or three characteristics of autism, but that did not mean that he had autism." The fact that Dr. Greenwald would compare claimant's condition to "a pizza" was not only insulting, and contrary to the diagnostic criteria identified in the *DSM-5* but raised serious concerns regarding Dr. Greenwald's professionalism and tendency to make bizarre statements as noted below when he provided completely irrelevant testimony regarding his personal reaction to asthma medication he was given as a child.

Mother further noted in her letter that she went to claimant's school to find out if Dr. Greenwald had actually done an observation and the school did not have a signature for Dr. Greenwald in its visitor log. This fact raised questions regarding if in fact, Dr.

Greenwald did go to claimant's school; a claim he did not address in his testimony.[8] Dr. Greenwald never addressed this issue at the hearing. Mother also noted that she has received the diagnosis of autism from several medical professionals, one of whom, Dr. Demos, is "one of six specialists in the nation."[9] Claimant continues jumping every day, still needs help with personal hygiene, gets lost easily, and mother has never heard him talking with friends. Mother has never had a conversation with claimant like she is able to do with her other three children.

Lastly, mother wrote that she had only brought a few documents with her to IRC "because I was told to only bring documents that are no more than two years old." IRC did not refute that contention and no explanation was offered for why IRC would tell mother to limit her documents to the past two years. More importantly, there is no support for any such limitation in the Lanterman Act or in the regulations.

LEGAL CONCLUSIONS

BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

[8] For purposes of this decision, it is presumed he did go to the school as he reported.

[9] No other evidence regarding Dr. Demos being "one of six specialists" was offered.

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 states:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance …
>
> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

"Developmental disability" means a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, 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.

5. California Code of Regulations, title 17, section 54000,[10] provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

[10] The regulations still use the term "mental retardation," instead of the term "Intellectual Disability."

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that 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.

(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.

6. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar

qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

7. A school providing services to a student under a disability is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, Title 5 and regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are more stringent than Title 5.

EVALUATION

8. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. Claimant's medical and educational records offered in this hearing demonstrated that he was diagnosed with autism multiple times by multiple specialists after undergoing multiple assessments and

observations. Some specialists diagnosed conditions that are now included in the Autism Spectrum Disorder diagnosis per the *DSM-5*. Claimant demonstrated by a preponderance of the evidence that he has a qualifying condition, Autism Spectrum Disorder, that is substantially disabling, and is eligible for regional center services. The overwhelming evidence supported claimant's contention and the records to the contrary were insufficient to refute it.

Dr. Greenwald did not present as a dispassionate evaluator of claimant's condition. He appeared to advocate for his conclusion that claimant does not have Autism Spectrum Disorder and appeared determined to fit the facts into his conclusion and analysis. For the many reasons stated above, Dr. Greenwald's opinions that claimant did not meet diagnostic criteria for Autism Spectrum Disorder are rejected.

Claimant's medical records documented years of evaluations by trained specialists who concluded that respondent has Autism Spectrum Disorder. Their opinions far outweighed Dr. Greenwald's contrary opinion based on his one observation at IRC and one observation of claimant at his school. All the more so given Dr. Greenwald's admission that he "had to provide the evidence," making it seem like he was looking for ways to find claimant ineligible. Dr. Greenwald's opinions as an expert were further undermined because he based his opinion, in part, upon his childhood asthma medication reactions, he compared the criteria for Autism Spectrum Disorder to ingredients in a pizza, and he made numerous speculative assumptions without support in the record. It was extremely troubling the extent to which he discounted the vast medical and educational evidence supporting an autism diagnosis, especially when that diagnosis was given by multiple professionals in two different states, on numerous occasions based on countless assessments performed over at least the past 13 years. In fact, Dr. Greenwald even asked claimant if he was tired of taking so many tests. Dr. Greenwald appeared not to have considered recent medical records before making his

second determination in 2018 because he wrote in the IRC June 2018 Eligibility Determination/Team Review there was "no supporting documentation updating" his 2014 evaluation. His statement was contradicted by all of the records introduced at this hearing dated 2015 through 2018, many offered by IRC.

Moreover, the *DSM-5* allows for the diagnosis of the Autism Spectrum Disorder to be made by history. Thus, mother's reports were sufficient. Additionally, Dr. Greenwald's repeated use of the word "criterion" suggested he believes there is "one autism criterion" which runs counter to the *DSM-5* references to multiple symptoms of varying degrees in the "*spectrum*." Finally, the CARS test results Dr. Greenwald obtained revealed scores in the autism ranges, and his explanation for why he rejected them was not persuasive.

Claimant met his burden of proof that he has Autism Spectrum Disorder which constitutes a substantial handicap for him. As such, he is eligible for regional center services.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is granted. Claimant is eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act under a diagnosis of Autism Spectrum Disorder which constitutes a substantial disability for him. IRC shall immediately make claimant eligible for services and supports.

DATED: November 19, 201

_____

MARY AGNES MATYSZEWSKI

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.