BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER, Service Agency

OAH No. 2019090507

DECISION

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings, heard this matter on January 6, 2020, in Culver City, California.

Candace J. Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency).

Hedy Zhang, Esq.,[1] represented Claimant's mother (Mother).[2] Claimant was not present at the hearing.

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[1] Ms. Zhang withdrew from her representation of Mother on January 13, 2020.

[2] Titles are used to protect the family's privacy.

The Administrative Law Judge received oral and documentary evidence and heard argument. The record was kept open until February 7, 2020, to allow Claimant to submit into evidence a report from his school and a formal comprehensive psychological evaluation from Kaiser Permanente (Kaiser) and to allow WRC to file a response. Both parties were also permitted to file closing briefs.

On January 24, 2020, WRC filed its Response to Claimant's Additional Exhibits and Closing Statement (Response), which was marked and lodged as Exhibit 12. Accompanying the Response were the two documents Claimant provided to WRC on January 10, 2020: (1) a Functional Behavior Assessment (FBA) prepared by Culver City Unified School District (CCUSD), dated November 15, 2019, and (2) an Initial Assessment and Recommendation Report prepared by Easter Seals Autism Services, dated December 28, 2014 (Easter Seals Report). WRC objected to the consideration of both documents, contending that Claimant requested additional time to submit a report from Los Angeles Unified School District, not CCUSD, and a copy of his most recent psychological evaluation by Kaiser, not a six-year old report from Easter Seals. However, no prejudice was shown because WRC had enough time to review and comment on the two documents. The Administrative Law Judge thereby marked and admitted the FBA and the Easter Seals Report into evidence as Exhibits F and G, respectively.

Claimant timely filed his closing brief on February 7, 2020. It was marked and lodged as Exhibit H.

The Administrative Law Judge closed the record and deemed the matter submitted for decision on February 7, 2020.

ISSUE PRESENTED

Does Claimant have a developmental disability (autism) that would make him eligible for regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act; Welf. & Inst. Code, § 4500 et seq.)?

EVIDENCE RELIED UPON

Documents: Service Agency Exhibits 1 through 12; [3] Claimant Exhibits A through H.

Testimony: On behalf of Service Agency, Dr. Kaely Shilakes, WRC Chief Psychologist and Manager of Intake Services. On behalf of Claimant, Mother.

SUMMARY

Claimant contends he is eligible for regional center services based on a diagnosis of autism by certain medical providers and his receipt of special education services at school under the autism category. WRC maintains that Claimant does not meet the criteria of Autism Spectrum Disorder (ASD) set forth in the Diagnostic and

[3] The Administrative Law Judge marked and took official notice of Exhibit 11, containing relevant portions of the Lanterman Act and accompanying regulations.

Statistics Manual of Mental Disorders (Fifth Edition) (DSM-5)[4] and, therefore, is ineligible for regional center services. WRC's denial of eligibility is supported by formal psychological testing and extensive observation of Claimant at both WRC offices and Claimant's school. None of Claimant's identified medical providers nor Claimant's school evaluated Claimant using the criteria of the DSM-5; nor did they engage in the kinds of formal psychological testing used by the regional center to determine service eligibility. Claimant's evidence is therefore insufficient to rebut WRC's findings. Accordingly, Claimant has not established he is entitled to regional center services at this time and his appeal is denied.

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[4] The DSM is a generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. (See *Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2 [referring to the DSM as "a standard reference work containing a comprehensive classification and terminology of mental disorders"].) The American Psychiatric Association Committee on Nomenclature and Statistics developed and published the first edition of Diagnostic and Statistical Manual: Mental Disorders (DSM-I) in 1952. Subsequent editions were the DSM-II, DSM-III (1980), DSM-III-R (1987), DSM-IV (1994), and DSM-IV-TR (2000). The most recent edition is the DSM-5, published in May 2013.

FACTUAL FINDINGS

1. Claimant is a 12-year-old male. He asserts he is eligible for regional center services based on a diagnosis of ASD.[5] The parties do not dispute that Claimant does not suffer from cerebral palsy, epilepsy, intellectual disability or a "fifth category" condition, i.e., a disabling condition closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability.

2. After conducting a psychological assessment of Claimant, WRC determined that it had insufficient information to diagnose Claimant with ASD and that Claimant did have any other qualifying condition for regional center services. On August 12, 2019, WRC wrote to Mother informing her of Claimant's ineligibility. On August 23, 2019, Mother timely filed a fair hearing request appealing WRC's decision.

3. All jurisdictional requirements have been met for this matter to proceed to fair hearing.

Background

4. Claimant lives with his elder sister and Mother, who works full-time for the Department of Child and Family Services. Claimant's father does not live at home, but Claimant visits him twice a month. Claimant has two paternal half-brothers, one of whom was diagnosed with ASD at an early age.

[5] Neither the Lanterman Act nor any of the Act's implementing regulations define autism or ASD.

5. Claimant is in good physical health. He has no history of hospitalization, surgery, hearing deficits, traumas/accidents, seizures, or major illness. He suffers from asthma and allergies, and takes medication as needed to address those conditions.

6. Claimant is in the seventh grade at Culver City Middle School in Culver City, California. CCUSD originally deemed Claimant eligible to receive special education services based on an OHI (Other Health Impaired) designation with a secondary designation of Autism; however, his current eligibility is based on Autism only. Claimant attends classes in a regular education classroom but has an Individual Education Plan (IEP) that allows him extra time on tests and provides other classroom accommodations. Claimant also attends a learning center class and receives speech assistance. Although Claimant worked with a one-to-one instructional aide from first through sixth grade, he is attending school without a one-to-one instructional aide for the first time this year.

7. Claimant is fully ambulant, and his gross and fine motor skills are age-appropriate. Claimant can brush his hair, tie his shoelaces, manipulate eating utensils, and drink from a cup without spillage. Mother performs Claimant's basic daily hygiene for him in the morning because he moves too slowly. Claimant also must be reminded to pick up after himself.

8. Claimant has friends at school but does not socialize with them outside of school. He is close with his cousins. He participated in a social group provided by Kaiser for about ten sessions when he was younger; however, he was asked to leave because of disruptive behavior. He was enrolled in a camp program this past summer but Mother removed him from the program after an unexplained incident at the camp. At school, Claimant had attended "Lunch Bunch," a special lunch program for students, but students in the program bullied him so he now eats separately.

9. The earliest medical records presented into evidence show that a neurologist first diagnosed Claimant with ASD when he was three and one-half years old. That diagnosis, referred to multiple times by Claimant's other medical providers, has been the basis for many of the services Claimant has received both inside and outside of the classroom. The diagnosis also appears to have been independently confirmed by at least one other physician. The issue presented here is whether Claimant has demonstrated that these diagnoses of ASD are sufficient under the Lanterman Act to establish his eligibility to receive regional center services.

Evaluations Submitted by Claimant

EVALUATION BY DR. NANCY NIPARKO

10. Claimant was first diagnosed with ASD under the DSM-IV in 2010, when Claimant was three and one-half years old, by Dr. Nancy A. Niparko, Claimant's neurologist. Claimant's pediatrician, Dr. Nicole Herzog, referred Claimant for a consultation with Dr. Niparko because of language delay. As part of her evaluation, Dr. Niparko interviewed Mother and observed Claimant during one office visit. Dr. Niparko did not note how long she spent observing Claimant. There is no evidence that Dr. Niparko administered any psychological testing to Claimant during this visit or at any subsequent visit.

11. During his first visit, Dr. Niparko observed Claimant to be a "[r]ather engaging, fairly cooperative boy." (Exhibit E, p. 2.) According to her report, Claimant "initially didn't speak . . . but later in the visit when comfortable, expressed brief, appropriate phrases." (*Ibid.*) Dr. Niparko also observed Claimant to have "poor eye contact." (*Ibid.*) According to Dr. Niparko, based on Mother's report and her own observations, Claimant "marginally meets [the] DSM-4 criteria for AUTISM DISORDER,

including LANGUAGE DELAY, some social impairment, and some STEREOTYPIC BEHAVIORS, most bothersome when in a situation stressed by persons other than his mother." (*Ibid.*) Dr. Niparko recommended certain behavioral-management techniques, a speech pathology evaluation and therapy, and formal neuropsychological testing by a pediatric neuropsychologist. Claimant did not present any evidence of any formal neuropsychological testing conducted in response to Dr. Niparko's recommendations.

12. Dr. Niparko re-examined Claimant on July 12, 2012, when Claimant was five and one-half years old. In her report on the July 2012 visit, Dr. Niparko observed that Claimant was now "shy" but that he "makes good eye-contact," and Claimant's typical response to any direction was "testing behavior." (Exhibit E, p. 4.) Dr. Niparko's diagnosis of Claimant's condition still included ASD, language delay, social impairment, and stereotypical behaviors but now also included oppositional defiance. She noted Claimant's "behavior is thwart with impulsive and COMPULSIVE behaviors typical of bright autistic children managing their anxiety." (*Ibid.*) Dr. Niparko recommended behavior management techniques and speech therapy to address Claimant's symptoms.

13. Dr. Niparko's met with Claimant a third time on August 19, 2013, when Claimant was six years old. During that visit, Dr. Niparko observed Claimant continued to be shy; however, she also observed that Claimant now avoided eye contact and did not speak. (Exhibit E, p. 5.) Based on her observations and Mother's report, Dr. Niparko noted "Good progress of AUTISM DISORDER by DSM-4, severe auditory processing deficits, qualitative LANGUAGE DELAY, social impairment, STEREOTYPIC BEHAVIORS, in response to excellent interventions, aggressive symptoms of ODD & OCD are no longer terrible issues. He has NO symptoms of ADHD [Attention Deficit Hyperactivity Disorder] by DSM-IV criteria. Still, mother is frustrated at the strange criticism she gets." (*Id.*, p. 5.)

There was no explanation for Dr. Niparko's conclusion that Claimant had made "good progress" regarding his autism, considering her observations that he did not speak and avoided eye contact. Following this visit, Dr. Niparko recommended review of behavior management techniques, IEP accommodations with speech and occupational therapy at school, and participation in a weekly social skills group.

14. Dr. Niparko's evaluations do not indicate how much time she spent observing Claimant or whether she observed Claimant outside of her office setting. She offered no explanation for the addition of "severe auditory-processing deficits" to her 2013 summary. She also provided no explanation for her statement that Claimant had no symptoms of Attention Deficit Hyperactivity Disorder (ADHD) by DSM-IV criteria, even though she notes that Mother reported that Claimant spoke out inappropriately, did not listen, and had difficulty waiting his turn, all indicia of impulsivity and hyperactivity under the DSM-IV ADHD criteria. In addition, Dr. Niparko's impressions and recommendations were based solely on her own observations and Mother's reporting. Although Dr. Niparko refers to the DSM-IV when making her ASD diagnosis, she does not specifically address how Claimant's conduct satisfies the DSM-IV criteria. Dr. Niparko did not testify at the hearing to explain her findings.

EVALUATION BY DR. KEK-KHEE LOO

15. Dr. Kek-Khee Loo, a Kaiser physician with a specialty in developmental behavioral pediatrics, conducted an outpatient developmental-behavioral pediatrics evaluation of Claimant on December 11, 2019. According to his records, Dr. Loo spent 60 minutes with Claimant and his parents, with more than 50 percent of the time spent on counseling. The records also reflect that an additional 30 minutes were spent on "extended dev [*sic*] testing and interpretation of results." (Exhibit D, p. 226.) Dr. Loo's medical records, however, do not specify what tests, if any, were administered to

Claimant or the results of such testing. At the close of hearing, Mother agreed to submit the Kaiser report of that testing; however, she did not do so. The medical records do not disclose whether Dr. Loo's evaluation was based on DSM criteria, and Dr. Loo did not testify at the hearing to discuss the basis of his conclusions.

16. In his most recent report, Dr. Loo relied on his earlier evaluation of Claimant on August 18, 2014, when Claimant was seven years old. That report included Claimant's history based on a review of medical records and an interview with Mother. Based on his interview with Mother and his own observations, Dr. Loo concluded that Claimant had a history of externalizing behavior with a rule out diagnosis of ASD. (*Id.,* p. 222.) He indicated that differential diagnoses include oppositional defiant disorder, anxiety/phobia or ASD. (*Ibid.*)

17. During Dr. Loo's interview with Mother for purposes of the December 2019 evaluation, Mother reported that Claimant has friends, but does not see them outside of school, gets anxious when he has difficulties with school work, needs reminders to brush his teeth and bathe, can get stuck on new topics, and is afraid of loud sounds. She also reported Claimant uses full sentences and can decode well. However, Mother noted Claimant has difficulty comprehending what he reads, and Claimant has been bullied at school.

18. Dr. Loo observed Claimant to be soft-spoken and polite and that he used full sentences. He also noted that Claimant had an awkward demeanor. Dr. Loo did not observe Claimant in the school setting. Dr. Loo summarized his findings as follows:

> [Claimant] is a 12 years, 7 months male with mild ASD (autism spectrum disorder) at this time. Was in Vista Del Mar school in kinder-1st grade and now he is

> mainstreamed. Has academic difficulties in reading comprehension, and a host of other difficulties related to executive functioning and motivation, not unusual in the context of mild ASD. Social function and gauging of safety (stranger danger, decisions for how to seek help) remain impacted and these problems are not explained by ADHD.

(Exhibit D, p. 226.) Dr. Loo offered no explanation for his change from a "rule out" autism diagnosis in 2014 to a diagnosis of mild ASD.

CULVER CITY UNIFIED SCHOOL DISTRICT FUNCTIONAL BEHAVIOR ASSESSMENT

19. The CCUSD FBA, dated November 15, 2019, was conducted by CCUSD school psychologist Lydia Morcos. According to the FBA, Mother requested the assessment because she believed Claimant's then current IEP did not accurately reflect his true behavioral functioning. The FBA was based on a review of Claimant's educational records, interviews with Claimant's teachers and Mother, and observations of Claimant in the classroom.

20. The CCUSD FBA contains no psychological testing results for Claimant, or diagnostic analysis, and it does not consider the DSM-5 criteria. Its stated purpose is to "identify the purpose or function of an individual's behavior and the maintaining variables surrounding the behavior." (Exhibit F, p. 1.) The FBA notes that Claimant has a history of "inattention and off-task behaviors since kindergarten" but does not address whether these behaviors stem from ASD or another condition. (Exhibit F, p. 4.) In addition, the FBA notes that Claimant is social in class and has a good relationship with his peers. The FBA also notes that Claimant's behaviors have not negatively impacted

his education progress and Claimant "appears to be able to access the curriculum without any impairment due to his behaviors." (*Id.,* p.14.) Nonetheless, the FBA finds that Claimant's "academic needs are impacted by his disability. He demonstrates weak executive functioning and planning skills and would benefit from accommodation to his academic needs." (*Ibid.*)

21. WRC's conclusion that Claimant is ineligible for regional center services remained unchanged after reviewing the FBA. WRC contends that "[a]lthough the FBA restates that Claimant is eligible for special education services because of autism, that determination was not based upon a medical diagnosis of autism nor was it made in order to determine regional center eligibility." (Exhibit 12, p. 3, emphasis in original.)

EVALUATION BY EASTER SEALS

22. The Easter Seals Report, dated December 28, 2014, was prepared by Sondra Stubblefield, a licensed clinical social worker, based on her interviews with Mother and observations of Claimant when he was seven years, eight months old. The purpose of the Easter Seals assessment was to "determine eligibility and recommendations for an intensive ABA [Applied Behavior Analytics] program." (Exhibit G, p.1.) Ms. Stubblefield found that Claimant "demonstrates deficits in receptive and expressive communication and prerequisite skills for appropriate social interactions and communication." (*Id.*, p. 11.) On her home visit, Ms. Stubblefield noted Claimant had "brief eye contact" and did not carry on a reciprocal conversation. Her report also notes that Claimant has difficulty interacting with his peers and Claimant engages in frequent elopement. (*Ibid.*) Ms. Stubblefield recommended that Claimant receive ongoing intensive ABA services of 12 hours per week over a six-month period.

23. The Easter Seals Report did not contain any independent analysis of whether Claimant suffers from ASD. Instead, it relied on the diagnosis of Kaiser regarding Claimant's ASD. The Easter Seals Report does not mention whether Claimant's behaviors correlate to the DSM-5 diagnostic criteria for ASD; nor does the Easter Seals Report note whether Easter Seals conducted any psychological testing to diagnose Claimant's condition.

24. WRC reviewed the Easter Seals Report. The Report did not change WRC's finding that Claimant was ineligible to receive regional center services. According to WRC, the "assessment was not done to diagnose a developmental disability and was conducted too long ago to be considered relevant in this matter." (Exhibit 12, p. 2.)

OTHER EVIDENCE

25. Claimant also presented letters by Dr. Nicole Herzog, his pediatrician, and Dr. Jane Tavyev Asher, Director of the Division of Child Neurology/Neurodevelopmental Disabilities at Cedars-Sinai Medical Center in support of his claim. (Exhibits A and B.) Dr. Herzog's letter as well as her practice notes state that Claimant has a diagnosis of autism and describes autism-like symptoms Claimant exhibits. However, Dr. Herzog does not explain the basis for the diagnosis or apply DSM-5 criteria to Claimant's symptoms; Dr. Herzog's diagnosis appears to rely exclusively on Dr. Niparko's initial evaluation, Mother's reporting, and her own observations. Dr. Tavyev Asher's letter states that Claimant is under her care for ASD as well as auditory processing disorder but likewise does not explain the basis for those diagnoses.

Regional Center Evaluations

2012 EVALUATION

26. Mother originally sought regional center assistance for Claimant in 2012, when Claimant was five years old. WRC denied Mother's request on October 30, 2012, finding that Claimant did not suffer from any of the covered conditions under the Lanterman Act and specifically finding that Claimant did not suffer from ASD or intellectual disability under the DSM-IV criteria. The WRC eligibility team recommended that Mother contact a mental health provider with expertise in providing intervention tools to address Claimant's behavior challenges.

27. Janet Wolf, Ph.D., conducted the psychological assessment for WRC in connection with Claimant's 2012 request. She administered the Wechsler Preschool and Primary Scale of Intelligence (Wechsler), Autism Diagnostic Observation Schedules, Module 2 (ADOS-2), and the Vineland Adaptive Behavior Scales (VABS), and she also observed Claimant at her office and at school during snack and recess.

28. Dr. Wolf was not able to complete the Wechsler test because of Claimant's inconsistent attentiveness, impulsivity, and inconsistent cooperation. Mother assisted with completing the VABS checklist of basic skills. According to Mother's report, claimant's communication and daily living skills fell in the borderline range, his socialization skills fell in the mildly subnormal range, and his motor skills fell in the average range. Applying the ADOS-2, Dr. Wolf found that Claimant's quality of communication fell in the autism range, his quality of social interaction fell in the autism spectrum range, and his combined score fell in the autism spectrum range. Dr. Wolf pointed out, however, that the ADOS-2 provides additional clinical data to help the evaluator determine whether Claimant suffers from autism, but the test is not a

substitute for diagnostic determination based on the DSM guidelines. She also noted that some of the autistic-like behaviors that Claimant demonstrated were also consistent with behaviors that could be secondary to attentional deficits. According to Dr. Wolf, "the ADOS has not been validated with regard to its ability to differentiate between individuals with autistic characteristics and those whose behaviors may be secondary to challenges with attention." (Exhibit 10, p. 6.)

29. A. Based on her testing and observations of Claimant both at WRC and in the classroom setting, Dr. Wolf found that Claimant did meet the diagnostic criteria for Pervasive Developmental Disorder/Autistic Disorder set forth in the DSM-IV. Under the DSM-IV criteria for Autistic Disorder, Claimant had to suffer qualitative impairment in social interaction, qualitative impairment in communication, and restricted repetitive and stereotyped patterns of behavior, interests, and activities. According to Dr. Wolf, although Claimant demonstrated qualitative impairment in communication, he did not suffer qualitative impairment in social interaction and did not exhibit restricted, repetitive, or stereotyped patterns of behavior, interests, and activities.

B. *Social Interaction*: According to Dr. Wolf, Claimant's use of nonverbal behaviors to regulate social interaction were "inconsistent" instead of "markedly impaired." (Exhibit 10, p. 7.) She observed that his behavior at school was more socially appropriate than his behavior during the psychological assessment. However, in both settings, Dr. Wolf found Claimant demonstrated frequent use of eye contact and facial expressions to regulate social interaction. His relationships with peers were appropriate to his developmental level, and he shared enjoyment, interests, and achievements. (*Ibid.*) Claimant did not lack social/emotional reciprocity, but Dr. Wolf noted his social exchanges with her were one-sided. Based on these observations, Dr.

Wolf concluded that Claimant did not demonstrate qualitative impairment in social interaction.

C. *Communication*. Dr. Wolf found that Claimant's language skills were mildly delayed. He spoke in phrases and short sentences, initiated but did not sustain verbal interaction, and did not respond to questions. In addition, Claimant's play was not appropriate to his developmental level. Thus, this was the one area where Claimant satisfied the DSM-IV criteria.

D. *Restricted repetitive and stereotyped patterns of behavior, interests, and activities.* According to Dr. Wolf, Claimant did not demonstrate restrictive, repetitive, or stereotyped patterns of behavior during the assessment. Nor did Dr. Wolf observe Claimant demonstrate restricted patterns of interest. Although she was aware of Claimant's interest in trains, Dr. Wolf did not observe him to be preoccupied with them during the assessment. She also did not observe Claimant to adhere to nonfunctional routines, demonstrate repetitive motor mannerisms, or be preoccupied with parts of objects.

30. Dr. Wolf found Claimant's conduct to be more consistent with the DSM-IV diagnostic criteria for ADHD. According to Dr. Wolf, Claimant showed signs of inattention and was easily distracted by external stimuli. He also demonstrated several challenges of hyperactivity and impulsivity. Dr. Wolf's diagnosis of ADHD was provisional, however, because of Claimant's age at the time of the evaluation. She recommended that Mother work with a mental health provider to address Claimant's inattentiveness and that Claimant have a classroom plan to address attentional difficulties.

2019 EVALUATION

31. WRC evaluated Claimant a second time in April, May, and June of 2019. Gabrielle du Verglas, Ph.D., conducted the evaluation, meeting with Claimant two times at WRC, observing Claimant at school, and interviewing Mother without Claimant present. She administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the Wide Range Achievement Test-Fourth Edition (WRAT-4), the Adaptive Behavior Assessment System-Third Edition (ABAS-III), and the Autism Diagnostic Observation Schedule (ADOS-2), Module 3.

32. The WISC-V examines Claimant's cognitive abilities. Claimant was not able to complete the WISC-V because of his inability to pay attention and complete tasks. Dr. du Verglas concluded Claimant's overall cognitive profile is suggestive of average cognitive abilities based on the WISC-V subtests he was able to complete.

33. The WRAT-4 tests Claimant's academic abilities. Claimant scored well above grade level in Word Reading and Spelling but below grade level in Reading Comprehension.

34. A. Dr. du Verglas assessed Claimant's level of adaptive functioning using the ABAS-3, with Mother as the informant. The ABAS-3 is comprised of ten subscales: Communication Use, Functional Academics, Home Living, Health and Safety, Leisure, Self-Care, Self-Direction, Social and Work. The ABAS-3 yields four composites: the General Adaptive Composite, the Conceptual Composite, the Social Composite, and the Practical Composite. According to Mother's ratings, when all the subscales are combined to inform the General Adaptive Composite score, Claimant's General Adaptive functioning is within the Extremely Low range.

B. On the Conceptual Composite, comprised of the Communication, Functional Academics, and Self-Direction scales, Mother rated Claimant in the Low range. In the Communication scale, which includes speech, language, and listening skills, Mother rated Claimant as Below Average. Mother also rated Claimant as Below Average on the Functional Academics subscale, which includes basic foundations skills for reading, writing, mathematics, and other skills needed for daily, independent functioning. Mother rated Claimant in the Low range of Self-Direction, which includes skills needed for independence, responsibility, and self-control.

C. On the Social Composite, which consists of the Leisure and Social subscales, Mother rated Claimant within the Low range. According to Mother, Claimant can occupy himself with toys and games and regularly participates in fun activities and organized sports. Claimant also has many friends and has a good relationship with his parents and other adults.

D. On the Practical Composite, Mother rated Claimant within the Extremely Low range. The Practical Composite is comprised of four subscales: Community Use, Home Living, Health and Safety, and Self-Care. Mother rated Claimant in low range for Community Use, which includes skills needed for functional and performing important behaviors in the community. On the Home Living subscale, which includes Claimant's ability to do home chores, Mother rated Claimant within the Below Average range. On the Health and Safety subscale, Mother rated Claimant within the Low range, and on the Self-Care subscale in the Extremely Low range.

35. Dr. du Verglas also interviewed Mother to gather information to evaluate Claimant's symptoms under the DSM-5 criteria. Mother reported that Claimant has made significant gains since he was about 4 or 5 years old. He can have typical, regular conversations at home, his eye contact can be selective, he has a group of friends, and

he participates in a variety of activities. However, Mother perceives Claimant to be immature and shy. He has difficulties with executive functioning and is not always successful in structured settings. He is hypersensitive to noise but no longer is insistent on sameness; he does not have restricted interests. Mother did not observe any stereotyped or repetitive motor movements by Claimant.

36. Dr. du Verglas unsuccessfully attempted to administer the ADOS-2 to Claimant. For the communication module, Claimant was uncooperative and often would not respond to any questions. When Claimant did respond to questions, his answers were unclear because he spoke in a low tone with his hand supporting his jaw. During her questioning, Dr. du Verglas noted that despite his marginal participation, Claimant did not have difficulty with eye contact, and he became more cooperative when asked about subjects of interest. For the reciprocal social interaction module, Claimant's participation was again limited. While he was able to explain his emotions, he refused to create a story with objects and often did not respond verbally to questions posed by Dr. du Verglas if he was not interested in the topic. Dr. du Verglas noted that Claimant did not use any idiosyncratic words or echolalia. She also did not observe any sensory difficulties or atypical sensory interests except that Claimant chewed on his shirt at the beginning of the session. Dr. du Verglas did not observe any atypical hand or motor mannerisms. Although Claimant frequently referenced his primary areas of interest (computer games and video games), he did not engage in a lengthy description of those games when asked about them. Dr. du Verglas summarized her ADOS findings as follows:

> [The] ADOS was extremely difficult to score as the validity of [Claimant's] responses was questionable due to his diminished motivation. Therefore, only a description of his

> responses was provided. No atypical language was noted and he was able to converse and respond when interested. The overall quality of his interaction was poor, influenced by his lack of motivation.

(Exhibit 5, p. 17.)

37. Dr. du Verglas concluded Claimant did not meet the DSM-5 diagnostic criteria for ASD based on her observations, her discussions with Mother, and the limited testing she conducted. The DSM-5 diagnostic criteria for ASD require the presence of the following:

> A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):
>
> 1. Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.
>
> 2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. [¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).

4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse

response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement). [¶] . . . [¶]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

38. According to the DSM-5, a diagnosis of ASD is made "only when the characteristic deficits of social communication are accompanied by excessively repetitive behaviors, restricted interests, and insistence on sameness. . . . Because symptoms change with development and may be masked by compensatory mechanisms, the diagnostic criteria may be met based on historical information, although the current presentation must cause significant impairment." (DSM-5, § 299.00, pp. 31–32.)

39. A. Dr. du Verglas found that Claimant did not demonstrate persistent deficits in social communication and social interaction across multiple contexts. Although he had deficits in nonverbal communication behaviors evidenced by his selective eye contact, Dr. du Verglas found that Claimant did not exhibit deficits in social-emotional reciprocity or in developing, maintaining, or understanding relationships. Claimant was reported to have typical conversations at home, and, when motivated, can speak clearly, in full sentences, and express himself. According to Dr. du

Verglas, Claimant is also capable of communicating reciprocally with his peers, particularly with respect to his areas of interest. In addition, Claimant has friends and responds appropriately with his cousins, likes to engage in sports, and participates in a variety of activities.

B. Dr. du Verglas also found that Claimant did not meet any two of the criteria for restricted, repetitive patterns of behavior, interests, or activities as required by DSM-5. Claimant did not exhibit any stereotyped motor movements or behaviors. He did not insist on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, and he did not have fixated interests. Dr. du Verglas noted that the only criteria in this area Claimant met was that he is sensitive to sound and continues to be bothered by crowds.

C. Dr. du Verglas was unable to determine whether Claimant's symptoms of ASD were present in the early developmental period. However, she found that the symptoms currently described did not significantly impair his functioning.

40. Dr. du Verglas noted the "lack of clarity" regarding Claimant's ASD diagnosis (Exhibit 5, p. 19) and acknowledged her findings were not definitive. She also acknowledged that Claimant's initial behaviors at younger ages were more pronounced, "with difficulties in social interaction and problems separating from his mother and language delays more prominent." (*Ibid.*) However, even with those earlier behaviors, she noted that the 2012 evaluation did not find that Claimant suffered from ASD.

41. Dr. du Verglas summarized her findings as follows:

> In summary, [Claimant] does meet some of the criteria for ASD, as outlined above: difficulties with transitions, inconsistent eye contact, and hypersensitivity to sensory

> input; however[,] it is difficult to determine whether the severity of the symptoms is impairing his functioning. No intellectual impairment or academic delays are present.

(Exhibit 5, p. 21.)

42. Dr. du Verglas deferred an ASD diagnosis due to "inconsistently reported symptoms, lack of motivation on ADOS-2 administration, and difficulties judging that the partial symptoms reported are significantly impairing [Claimant's] functioning." (Exhibit 5, p. 21.) She acknowledged historical references to Claimant's symptoms of ADHD and recommended clarifying Claimant's ADHD diagnosis through further testing and a detailed history review. Dr. du Verglas also recommended behavioral services to address Claimant's inconsistent motivation, participation in a social skills training group, and a review of records substantiating Claimant's brother's ASD diagnosis. She also recommended that the results from Claimant's pending neuropsychological assessment be shared with WRC. (*Ibid.*)

Mother's Testimony

43. Mother provided further details about Claimant's behavior in her testimony at the hearing. She described Claimant as awkward, odd, and lost. Although Claimant had been recommended to participate in a social skills group when he was younger, he could not do so because of his immaturity. Mother believes he does not always understand what is happening around him. Claimant moves slowly and receives information slowly. She is frustrated by the different diagnoses Claimant has received and disagrees with WRC that Claimant suffers from ADHD.

Regional Center Testimony

44. Dr. Kaely Shilakes testified on behalf of WRC. Dr. Shilakes has served as WRC's Staff Psychologist for two years and was an outside psychologist for WRC for four years. Dr. Shilakes reviewed Claimant's medical and school records. She acknowledged that Claimant's doctors had diagnosed him with ASD, but she explained that the diagnoses were not based on a psychological evaluation, did not necessarily utilize DSM criteria, and did not take adaptive skills into account. She also explained that the school district's designation of autism was not based on DSM criteria.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700–4716, and Cal. Code Regs., tit. 17, §§ 50900–50964), the state-level fair hearing is referred to as an appeal of the Service Agency's decision. Where a claimant seeks to establish his eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect. Claimant has not met his burden.

Eligibility for Regional Center Services

2. To be eligible for regional center services, a claimant must demonstrate he or she has a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

> a disability that originates before an individual attains age 18 years, continues, or can be expected to continue,

> indefinitely, and constitutes a substantial disability for that individual. . . . This [includes] intellectual disability, cerebral palsy, epilepsy, and autism. [It also includes] 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.

3. Welfare and Institutions Code section 4643, subdivision (b), provides: "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources."

4. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that his or her disability constitutes a "substantial disability." California Code of Regulations, title 17, section 54001 defines "substantial disability" as follows:

> (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.

Analysis

5. Claimant did not establish by a preponderance of the evidence that he has a "developmental disability" as defined by Welfare and Institutions Code section 4512. WRC based its denial of services on the assessment conducted by Dr. du Verglas. That assessment included observations of Claimant at school and at WRC, interviews with Mother, a review of the pertinent school and medical records, and psychological testing. Based on her observations, interviews, and testing, Dr. Verglas found that Claimant's conduct did not meet the DSM-5 criteria for ASD. (Factual Findings 35 through 42.) Mother's anecdotal testimony, the medical evaluations submitted by Dr. Niparko and Dr. Loo, the FBA, the Easter Seals Report, and the letters from Claimant's

physicians are not sufficient to refute WRC's decision. (See Factual Findings 10 through 25.)

6. In his closing brief, Claimant contends that he has been repeatedly diagnosed with ASD and that he is substantially disabled by his disability. He asserts that WRC has ignored his diagnosis and has erroneously diagnosed him with ADHD. Claimant also contends, citing to the Center for Disease Control, that people with ASD also suffer from symptoms consistent with ADHD including hyperactivity, impulsivity, and short attention span.

7. Claimant's contentions are not persuasive. None of the medical records submitted by Claimant demonstrate that any of his physicians conducted the kind of evaluation necessary to determine eligibility for regional center services. As noted in Factual Findings 14, 15, and 18, neither Dr. Niparko nor Dr. Loo evaluated Claimant pursuant to the DSM-5 criteria, and their medical records do not provide the bases of their diagnoses. Nor did CCUSD or Easter Seals utilize any psychological testing or review the DSM criteria in evaluating Claimant. (Factual Findings 20, 23.) In addition, while Claimant may suffer from functional limitations in many areas of his life, he has not established that those functional limitations are due to ASD. Dr. du Verglas also did not diagnose Claimant with ADHD; she recommended that further ADHD testing be done. Moreover, although symptoms of ADHD and ASD may overlap, Claimant is ineligible for regional services unless he can demonstrate he meets all the DSM-5 criteria for ASD, regardless of whether he exhibits some ASD symptoms.

8. Mother has valid concerns about Claimant's behaviors. However, Claimant has the burden of proof and must present sufficient evidence of a qualifying developmental disability under the Lanterman Act. The records submitted by Claimant do not demonstrate that Claimant's medical providers used the appropriate testing,

engaged in the necessary observation, or applied the DSM-5 diagnostic criteria to demonstrate that Claimant suffers from a developmental disability rendering him eligible for regional center services. Based on the evidence submitted in this fair hearing, Claimant is ineligible at this time to receive regional center services under the Lanterman Act.

ORDER

Claimant's appeal is denied.

DATE:

CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.