BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: KIMBERLY G., Claimant, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH No. 2013071207

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 10, 2013, in Culver City.

Claimant was represented by her adoptive mother (Mother).[1]

Westside Regional Center (Service Agency or WRC) was represented by Lisa Basiri, Fair Hearing Coordinator.

Oral and documentary evidence was received, and argument was heard. The record was closed and the matter was submitted for decision on December 10, 2013.

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[1] Claimant and her mother are identified by titles or first name and initials to protect their privacy.

ISSUE

Whether claimant is eligible for regional center services under the Lanterman Act.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-15; claimant presented no exhibits.

Testimonial: Thompson Kelly, Ph.D.; claimant's mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 14-year-old female. She lives with Mother and older biological sister.

2. In 2011, claimant's mother requested regional center services for claimant from WRC. The intake coordinator referred claimant to licensed clinical psychologist Beth Levy, Ph.D., for an assessment to determine claimant's overall development and cognitive and adaptive functioning, and to assess claimant's eligibility for regional center services. Dr. Levy completed a psychological evaluation of claimant on November 28, 2011, and diagnosed claimant with Attention Deficit Hyperactivity Disorder (ADHD). On January 18, 2012, the WRC eligibility team, after reviewing Dr. Levy's report and other available information, determined that claimant was not eligible for regional center services. By letter dated January 26, 2012, the Service Agency notified claimant's mother of its determination that claimant was not eligible for regional center services. Claimant's mother did not appeal the Service Agency's decision.

3. On July 9, 2013, claimant's mother made another request for regional

center services from WRC for claimant. The intake application indicated that claimant was seeking eligibility for regional center services on the basis of Autistic Disorder. The intake application stated that claimant "was diagnosed with Autism, FAS,"[2] she attends a non-public school, she has an IEP under the eligibility category of specific learning disability and also previously under the category of other health impairment, and she was "having memory issues."

4. By a letter dated July 12, 2013, and a Notice of Proposed Action dated July 15, 2013, the Service Agency notified Mother that claimant's application and supporting information were reviewed by a multidisciplinary clinical team, and the team determined that claimant did not have an eligible regional center diagnosis. The letter stated, in part, that the information provided by Mother "remains more consistent with potential mental health diagnoses and was not sufficient to suggest a developmental disability." The letter further stated that the available records "continue to support that [claimant] is likely to have a learning disability in addition to some of her emotional challenges. Although these conditions can be substantially disabling please understand that they are not eligible conditions for regional center supports."

5. On July 18, 2013, claimant's mother filed a fair hearing request, on claimant's behalf, to appeal the Service Agency's decision that claimant is not eligible for regional center services. Mother explained that the reason for requesting a fair hearing was that she felt "the information that was used to determine eligibility was not complete as well as some information (previous Regional Center Report) had inaccurate information. Additionally, I was advised to have her assessed in the future as her functioning level could change." Mother's

[2] FAS stands for fetal alcohol syndrome.

proposed resolution was to have claimant "re-assessed and an accurate report done to determine her functioning level and if she meets eligibility for Regional Center."

6. The Office of Administrative Hearings set a hearing on claimant's fair hearing request for September 11, 2013. However, on August 29, 2013, the Service Agency requested a continuance of the hearing in order to have more time to complete a further assessment of claimant. Claimant's mother did not oppose the continuance request. The Office of Administrative Hearings granted the Service Agency's request and continued the hearing to December 10, 2013.

7. Subsequently, on September 5, 2013, WRC's psychologist consultant, Jessica Quevedo, Psy.D., evaluated claimant and prepared a psychological consultation report. Based on the evaluation, Dr. Quevedo diagnosed claimant with ADHD. The WRC eligibility team reviewed Dr. Quevedo's report and claimant's file, and again determined that claimant did not have a diagnosis that qualified her for regional center services. The Service Agency notified claimant's mother of its decision by a letter dated November 26, 2013. This hearing ensued.

CLAIMANT'S BACKGROUND

8. Claimant lives with her older sister and Mother. Claimant was placed with Mother as a foster child when she was seven years old. Mother adopted claimant in March 2007 and the adoption was finalized in April 2008. Mother also adopted claimant's older sister. Mother is a special education teacher.

9. In 2003, claimant and her siblings were removed from their biological parents' home due to exposure to domestic violence, parental illicit drug use, physical abuse, neglect and failure to protect. At the time, claimant was three years old and her sister was six years old. Claimant's placement with Mother, in approximately 2006/2007, was her sixth placement.

10. Claimant is currently in the eighth grade and attends a non-public

school. She has an individualized education program (IEP) with her school district. She is eligible for an IEP on the basis of a specific learning disability (SLD). Claimant's IEP dated February 4, 2011, includes goals in the area of counseling to help claimant learn to reframe self-talk messages in more positive ways and learn relaxation techniques and strategies when she is feeling stressed out or anxious.

11. Claimant has a history of receiving treatment for mental health issues. In early 2008, claimant received individual therapy services from Dr. Lesley Stahl at the UCLA TIES for Adoption Program.[3] Starting in September 2008, claimant received treatment from psychiatrist Nancy S. Wolf, M.D. In a letter dated May 18, 2011, Dr. Wolf stated, in part: "I have been the treating psychiatrist for [claimant] since September of 2008. [Claimant] suffers from a combination of Post Traumatic Stress Disorder, serious Learning Disabilities, Generalized Anxiety Disorder, Attention Deficit Disorder (which cannot be mitigated in her case with stimulants as they are too arousing), Fetal Alcohol Syndrome and Pervasively Developmentally Disabled (PDD). Her overall intelligence falls at the 8th% which leaves her with very few resources for dealing with social and academic situations, especially when there is a halo of emotional content through which the materials and situations must be understood. She does not have the appropriate ability to maintain her attention, nor the social skills necessary to function well with large groups of children. Her ability to utilize abstract reasoning is limited, and she cannot function in her own self-interest. Children with this type of profile resort to maladaptive behaviors to

[3] Official notice is taken that, according to its website, the TIES program provides services to children and families before, during, and after the transition from foster care through adoption finalization. (Gov. Code, § 11515; Evid. Code, § 452.)

handle their stress, which in [claimant's] case can mean increase in urinating on herself, and tantrum-like behavior at home where she feels safe." (Exh. 10.)

12. In addition to treatment with Dr. Wolf, claimant also received individual and family therapy from Katherine Rose Peters, Ph.D. In a letter dated May 11, 2011, Dr. Peters noted that claimant's "behavior can be uncontrollable at times. When she becomes angry she has no judgment and has behaved in ways that could be dangerous to her. I have witnessed this behavior on many occasions."

13. Since March 2013, claimant has been a patient of psychiatrist Philantha Kon, M.D., Ph.D. A letter by Dr. Kon dated June 10, 2013, was presented. Claimant has been under the care of Dr. Kon since March 2013 "for treatment for anxiety, depression, mood instability, and oppositional behavior." The letter states that claimant "is on a medication regimen to assist with her mood instability, anxiety, and impulsivity which consists of Risperdal, Trileptal, Topamax, and Intuniv," and is also receiving individual psychotherapy. According to Dr. Kon, "[claimant's] difficulties have existed over an extended period time and have had an adverse effect on her relationships and overall functioning. She has exhibited an inability to maintain satisfactory relationships with peers and family members, possesses inappropriate feelings/behaviors under normal circumstances, and tends to develop exaggerated mood reactions without any evident trigger. She has been compliant with treatment recommendations and regular visits with me and is currently stable." According to Mother, claimant has appointments with Dr. Kon every four to six weeks. In between the appointments with Dr. Kon, claimant sees a therapist once per week to work on her behavioral issues and daily living skills. The therapist works with Dr. Kon and provides Dr. Kon with updates on claimant's status.

14. The June 10, 2013 letter by Dr. Kon includes the following statement: "[Claimant] has been diagnosed with Autism, Depression NOS, Anxiety NOS, and

Mood Disorder NOS and has a history of inpatient hospitalization as well as living in residential." Mother testified that the statement that claimant has been "diagnosed with Autism" is based on information she provided to the doctor. Mother testified that Dr. Kon did not conduct any testing or assessment of claimant that resulted in any formal diagnosis of Autism for claimant.

15. From September 1 through 12, 2011, claimant was admitted to UCLA Neuropsychiatric Hospital "for psychiatric issues." Claimant was hospitalized following an incident at school where she threw a massive tantrum in the therapist's office, and threatened to hurt herself and her sister with a knife. The police were called to the scene. Prior to that incident, claimant, while at school, had been stealing, telling lies, and threatened to jump from the third floor balcony. Mother believes claimant's behavior was due to claimant being stressed and fearful about attending a large middle school. In a letter dated, September 13, 2011, Sonia Krishna, M.D., a physician at the hospital, wrote that, due to the severity of claimant's psychiatric issues, "she cannot return to the school at this time," and that it was recommended "that she participate in a structured outpatient program (UCLA ABC) and be placed in a non-public school." Mother testified that claimant lasted only four days in the ABC program. Mother felt that claimant was not getting any education. Mother enrolled claimant at the school where she worked part-time. Mother testified that claimant did well because she knew Mother was at the school.

EVALUATIONS AND ASSESSMENTS

16. (A) In January through March 2008, the TIES program completed an evaluation and testing of claimant by Emilie Paczkowski, M.A., and Eugenia Hsu Tsao, Ph.D., clinical psychologist and Director of Clinical Services. The evaluation was in response to Mother's request for testing to clarify claimant's symptomology and differential diagnosis and to assist with treatment planning. Claimant's

diagnoses were anxiety disorder, post-traumatic stress disorder, adjustment disorder, and ADHD. Ms. Paczkowski reviewed records and claimant's history, administered various tests, and made clinical observations of claimant. At the time of the evaluation, claimant was eight years old and in the second grade. She was reported to be at grade level in all subjects. During testing, Ms. Paczkowski found claimant to be sociable and was easily engaged in discussion about her school and peer experiences. Claimant was extremely compliant during testing and was able to pay attention to instructions and remain engaged in each task. During a classroom observation, Ms. Paczkowski saw that claimant could sit appropriately in her seat and attended to the directives from the teacher. She raised her hand and participated in the classroom activity.

(B) The Wechsler Intelligent Scale for Children - Fourth Edition (WISC-IV) is a measure of general cognitive ability. Claimant's scores on the WISC-IV indicated her full-scale IQ was 79, which was in the borderline to low average range of functioning. On the subtests, claimant's index score in verbal comprehension was 93 (average), perceptual reasoning was 77 (borderline), working memory was 86 (low average), and processing speed was 78, indicating that she had some difficulty processing information. Ms. Paczkowski opined that claimant was processing information at a slower rate than her peers. She also opined that the variability in claimant's scores on individual subtests suggested that her cognitive abilities were not evenly developed. The Wechsler Individual Achievement Test - Second Edition (WIAT-II) is a measure of academic achievement. Claimant's scores on the WIAT-II indicated that her academic skills fell within the low average to average range as compared to what would be expected for a child her age and number of years in school. Claimant's scores in reading, math, and writing were in the average range, and her score for oral language was in the low average range.

(D) Ms. Paczkowski used the Conner's Parent Rating Scale-Revised and the Conner's Teacher Rating Scale-Revised to evaluate claimant's behavior related to inattention and hyperactivity. Mother and claimant's teacher served as the informants. They both reported that claimant exhibited problems with inattention. The scores on the Conner's Rating Scales indicated that claimant's inattentive and hyperactive-impulsive behaviors were more of a concern at home than at school. The teacher was able to manage claimant's behaviors at school, indicating that claimant had the capacity to function similar to her peers in the area of attention and activity level in a structured environment.

17. (A) On February 8, 2010, school psychologist Stacey E. Silber performed a Psycho-Educational Assessment of claimant. At the time of the assessment, claimant was 10-years-old and in the fourth grade. Dr. Silber reviewed school records, administered various tests, interviewed claimant, Mother, and teachers, and made observations of claimant. At the time of the assessment, Dr. Silber had been seeing claimant for school-based counseling for one year, for 20 minute sessions, once a week. Dr. Silber prepared a written report of her findings and conclusions.

(B) In her written report, Dr. Silber noted that a previous psycho-educational assessment from January 2009 found that claimant's general ability to learn, apply knowledge, generalize, use abstract concepts, and evaluate, was within the average range. The 2009 assessment found that claimant displayed relative strengths in her ability to integrate several pieces of information and comprehend them as a group or whole, and in her ability to focus on specific features of test material and avoid responding to distracting aspects of the subtests for a few minutes at a time. Claimant displayed weaknesses in her short-term auditory rote memory recall for a sequence of words and nonsensical sentences, and in her ability to generate and

use efficient and effective strategies for problem solving and self-regulation. She exhibited significant difficulty in her short-term auditory rote memory recall for a sequence of numbers. Her visual-perceptual processing skills (all areas) fell within the below average range.

(C) Dr. Silber found that, academically, claimant was functioning within the average range in writing, but below grade level in reading and math. On the Woodcock-Johnson III Tests of Achievement, claimant's scores indicated she was at a beginning third grade level in passage comprehension and applied problems; a high third grade level in letter-word identification; a mid-fourth grade level in calculation; a high fifth grade level in spelling; and a ninth grade level in writing samples. Claimant's gross motor skills, language and communication functioning, and social-emotional development were adequate and age appropriate. Claimant exhibited some anxiety before taking tests and with regard to her tendency to urinate on herself, resulting in teasing from peers. The teacher reported that claimant was, overall, functioning quite well in the regular fourth grade class. Claimant appeared to have a positive attitude towards her academics, and appeared eager to participate in class discussions and share her ideas. The teacher also reported that claimant had difficulty completing her classwork within the allotted time.

(D) Dr. Silber noted that claimant was medically diagnosed with ADHD. Medication was tried but the negative side effects were quite significant. The results of the Behavior Assessment Scale for Children-2 (BASC-2), with Mother and claimant's teacher serving as the informants, indicated that claimant presented as a very different child at school than she did at home. Mother's responses resulted in an overall ADHD quotient in the high range, whereas the teacher's responses resulted in an overall ADHD quotient in the very low range.

(E) In the area of social/emotional functioning, Dr. Silber found a significant discrepancy between claimant's presentation at home as compared to her presentation at school. Claimant's teacher reported that, at school, claimant appeared to be a happy, well-adjusted child who seemed to enjoy school. She was very friendly and made friends easily. She enjoyed participating in class discussions and activities. It was, however, also noted that claimant appeared to become anxious before a test and often had wetting accidents at school. Similarly, Dr. Silber, in her weekly counseling sessions with claimant, found claimant to be very verbal and eager and willing to share her thoughts and feelings, both positive and negative. Claimant for the most part had a very positive and outgoing disposition during the counseling sessions and she appeared to enjoy the sessions. In contrast to the reports by Dr. Silber and claimant's teacher, according to Mother's report, claimant at home was often defiant, argumentative when she was denied her own way, would lose her temper easily, disobeyed her parent, and told lies to get out of trouble. Mother also reported that claimant lacked self-confidence, especially in academics, was easily upset, complained about being teased and not having friends, and changed moods quickly.

(F) Based on the evaluation, Dr. Silber concluded that claimant continued to meet eligibility for special education services as a pupil with a specific learning discrepancy. She found a significant discrepancy appeared to exist between claimant's average estimated general ability and her academic achievement in the areas of basic reading skills, reading comprehension, and mathematics reasoning. Dr. Silber opined that the discrepancy was due to deficits in the basic psychological processes of visual processing, auditory processing, visual-motor integration, attention processing, cognitive expression, conceptualization, and/or association. The discrepancy was not primarily the result of, among other things, limited school

experience, poor attendance or social maladjustment, mental retardation, or visual, hearing, or motor impairment.

18. (A) On February 23, 2010, claimant's RSP teacher, Susan Calvert, completed an Educational Evaluation of claimant and prepared a written report of her findings and conclusions. Claimant was referred to a re-evaluation by the IEP team to determine if her current placement in the general education setting with RSP services was the appropriate placement. Mother reported that claimant was having a difficult time with academics and was having tantrums in the evenings. Mother also reported that claimant was having more frequent wetting accidents at school and the other students were teasing her about it, which was affecting her self-esteem.

(B) In her written report, Ms. Calvert noted, per teacher report, that claimant was able to use comprehension strategies and skills taught in the classroom to help her understand a reading selection, and she enjoyed sharing her ideas in class discussions about reading selections. The teacher reported that claimant needed the most assistance in mathematics. According to the teacher, claimant seemed to understand a concept one day and then forget it the next day. Claimant's scores on the Woodcock-Johnson III Tests of Achievement measured her academic achievement in the average range in the areas of broad written language, written expression, broad reading, math calculation skills, and broad math. Her academic skills were in the average range. Ms. Calvert found that claimant was working below grade level, when compared to her same age/grade level peers, in the areas of writing and mathematics. The area of reading fluency and comprehension was an area of relative strength for claimant.

19. The letter dated September 13, 2011, by Dr. Sonia Krishna at UCLA Neuropsychiatric Hospital, discussed in Finding 15 above, indicates that claimant

was administered the WISC during her 12-day hospitalization. The letter states that claimant's scores on the WISC indicated a full-scale IQ of 73, and index scores of 91 for verbal comprehension, 65 for perceptual reasoning, 86 for working memory, and 73 for processing speed.

20. (A) On November 28, 2011, licensed clinical psychologist Beth Levy, Ph.D., conducted a Psychological Evaluation of claimant. At the time of the evaluation, claimant was 12 years old. The purpose of the evaluation was to determine claimant's overall development and current levels of cognitive and adaptive functioning, and assess her eligibility for regional center services. Dr. Levy interviewed Mother, reviewed records, made clinical observations of claimant, and administered the Test of Non-Verbal Intelligence-3 (TONI-3), the Peabody Picture Vocabulary Test-Third Edition (Peabody), and the Vineland Adaptive Behavior Scales II (VABS-II). Dr. Levy prepared a written report of her findings and conclusions. (Exh. 8.)

(B) In her written report, Dr. Levy noted that claimant was reported to have been exposed to drugs and alcohol in utero by her birth mother. She was born healthy at full term, with no health complications reported at birth. Claimant was diagnosed with fetal alcohol syndrome at the beginning of third grade. Dr. Levy noted that claimant was currently taking Cymbalta, Trileptal and Straterra for attention deficit disorder, which was diagnosed in September 2012. Mother reported that claimant was also diagnosed with anxiety, and was currently being treated by Dr. Nancy Wolf for individual therapy and also receiving school district mental health services. Mother reported that claimant was a picky-eater, which may be affected by her medications. Mother reported that claimant needs a lot of sleep and her mood changes with insufficient sleep. Dr. Levy noted that claimant was currently in the sixth grade eligible for special education services under the

eligibility category of specific learning disability. Her special education services included resource support, occupational therapy, and counseling services. Dr. Levy also noted that claimant had an AB3632 referral for therapy services.

(C) Dr. Levy observed claimant's behavior during the evaluation and testing. She found that claimant was responsive to social interactions, maintained good eye contact, and engaged appropriately in joint referencing activities. Claimant maintained a well-modulated activity level during testing. She responded appropriately to a variety of demands for an activity, maintained a good attention span, and was not distractible. She could follow directions well. She enjoyed the one-to-one attention and structured tasks. Claimant was clearly proud of her accomplishments and shared that enjoyment with Dr. Levy and Mother, who was present.

(D) Dr. Levy measured claimant's cognitive abilities by administering the Peabody and the TONI-3. The TONI-3 is a nonverbal test of intelligence. Dr. Levy did not administer the WISC-IV because it had recently been administered, per Dr. Krishna's September 13, 2011 letter. On the Peabody, claimant obtained a standard score of 93, which was an age-equivalent of 10.9 years, suggesting average abilities. On the TONI-3, claimant obtained a quotient score of 85, which was an age-equivalent of 8.3 years, suggesting low average abilities with regard to nonverbal problem solving. Dr. Levy found that claimant's scores were consistent with her prior psycho-educational assessment.

(E) Dr. Levy measured claimant's adaptive skills using the Vineland Adaptive Behavior Scales II (Vineland). Claimant obtained an adaptive behavior composite score of 75, which was in the moderately delayed range. Her score in the communication domain was 74 (moderately delayed). Her receptive language abilities fell within the moderately delayed range with a varying degree of abilities

that ranged to adequate. Her expressive language skills were reported to be at the low average range. Dr. Levy found that, overall, claimant made good eye contact and engaged well in joint activities, which indicated that social communication skills and intent were adequate. Claimant's scores in the daily living skills domain indicated that her daily living skills fell within the adequate range. She could take care of her personal hygiene, dressing, feeding herself, and follow medical recommendations with prompting. She helps with chores around the house. In the socialization domain, claimant's scores fell within the adequate range for a child her age. She shows affection towards familiar people, and shows interest in other children and the activities of others. She imitates simple adult movements. She shows a desire to please her caregiver. She plays appropriately with other children and her family. She engages in joint attention activities.

(F) Based on her evaluation, Dr. Levy concluded that claimant's diagnosis is Attention Deficit Hyperactivity Disorder, Inattentive Type (per parent report) with oppositional tendencies and a rule out for attachment disorder, anxiety disorder, and learning disorders. Dr. Levy recommended that claimant continue with school district services, and that claimant would benefit from continued individual and family mental health counseling.

21. In or about August 2013, when claimant's fair hearing request was pending, the WRC clinical team recommended that a multidisciplinary evaluation should be done for claimant's case. The team wanted to take a "second look" at claimant's case, including arranging for a psychological consultation so that claimant could be observed in person and additional testing could be completed. The team wanted to make sure autism was fairly considered and wanted more testing of claimant's cognitive abilities. Claimant was referred for evaluation to Jessica Quevedo, Psy.D., who is a licensed psychologist and WRC's psychology

consultant.

22. (A) On September 5, 2013, Dr. Quevedo conducted an evaluation of claimant and prepared a written report of her findings and conclusions. Claimant was referred to Dr. Quevedo for assessment by WRC for the purpose of diagnostic clarification to address the issue of regional center eligibility and for program planning. As noted in Dr. Quevedo's report, claimant was previously assessed by Dr. Levy, "who gave a diagnosis of attention deficit hyperactivity disorder (inattentive type per parent report) with oppositional tendencies and a rule out for attachment disorder, anxiety disorder and learning disabilities." Dr. Quevedo made behavioral observations of claimant, reviewed records, and administered the Stanford Binet-Fifth Edition.

(B) Dr. Quevedo observed claimant during the evaluation and testing. She found that claimant was able to communicate effectively, maintained good eye contact, and engaged appropriately throughout the session. She was responsive to social interactions and responded to social overtures. She responded to Dr. Quevedo's questions about her friendships and various emotions. Claimant responded to a variety of demands for an activity in an appropriate manner. She maintained a good attention span and was not distractible. Her attitude was casual and relaxed during the session. She followed directions easily and appeared to give her best effort in all phases of testing.

(C) Dr. Quevedo administered the Stanford Binet-Fifth Edition to measure claimant's cognitive abilities. Claimant obtained a full-scale IQ score of 75, suggesting borderline abilities. Claimant obtained a nonverbal IQ score of 72 and a verbal IQ score of 81; both of those scores fell within the borderline range. Dr. Quevedo found that claimant appeared to have some relative strengths in fluid reasoning and verbal knowledge, particularly when mediated through verbal

communication. She found that claimant exhibited the most weakness on procedural knowledge and block span on the nonverbal domain.

(D) As stated in her written report, Dr. Quevedo concluded: "Overall based on this assessment and review of records, it is clear that there is some fluctuation in [claimant's] abilities. [Claimant] maintained a discrepancy between her verbal and nonverbal skills, suggestive of a Non-Verbal Learning Disorder. Subsequently a diagnosis of Borderline Intellectual Functioning is not rendered. Further, there is a history of vulnerability in her emotional functioning which would assist in explaining fluctuation in her performance. [Claimant] may be exhibiting symptoms related to anxiety. As a result, [claimant] would benefit from further evaluation to make a more conclusive diagnosis and to assist with treatment." Dr. Quevedo diagnosed claimant with attention deficit hyperactivity disorder, inattentive type (per records), with a rule out for learning disorders and generalized anxiety disorder.

CURRENT DETERMINATION OF NON-ELIGIBILITY

23. Thompson Kelly, Ph.D., is a licensed clinical psychologist. He is currently employed by WRC as Chief Psychologist and Manager of Intake. Dr. Kelly was a member of the WRC eligibility team that determined claimant was not eligible for regional center services. According to Dr. Kelly, the available records and prior testing indicated that claimant has a learning disability. Since her scores for verbal abilities are strong and her scores for nonverbal abilities are significantly lower, her overall profile is that of a child with a nonverbal learning disability. Throughout the records, claimant's abilities were measured in the average range. According to Dr. Kelly, the team wondered why claimant was not performing to her ability. The team concluded that claimant's mental health concerns were affecting her functioning level. Claimant was diagnosed with ADHD, which is typically comorbid with a learning disability. Dr. Kelly opined that claimant's fluctuating skills

are not indicative of a person with mental retardation. Claimant does not exhibit global deficits that would be expected in a person with mental retardation.

24. The WISC scores reported in the September 2011 letter by Dr. Krishna did not incorporate scaled scores. According to Dr. Kelly, this is why the eligibility team wanted to have Dr. Quevedo conduct additional cognitive testing and also to observe claimant. Dr. Kelly watched Dr. Quevedo's evaluation and testing of claimant in an adjacent room, through a one-way mirror. Mother was also present in the room with Dr. Kelly watching the evaluation. Neither Dr. Kelly nor Dr. Quevedo noted anything during the evaluation indicating that additional testing was needed for autism.

25. In Dr. Kelly's opinion, claimant does not have a diagnosis that makes her eligible under the fifth category -- a condition similar to, or requires treatment similar to that required for, mental retardation. Claimant's scores on cognitive testing are not consistent with mental retardation.

26. Mother contends that WRC relied on incorrect information in making the determination that claimant is not eligible for services. Mother claimed there were errors in Dr. Levy's report. The third and fourth paragraphs of the "Behavioral Observations" section on pages 3 and 4 of Dr. Levy's report are erroneously included in the report, as they describe another younger child, not claimant. This was confirmed by Dr. Kelly's testimony that it appeared Dr. Levy used a report for another child as the template in preparing her report about claimant and forgot to delete the two paragraphs. The erroneous paragraphs mention a home observation; Mother confirmed that Dr. Levy never observed claimant at home. Dr. Kelly found the first two paragraphs of the "Behavioral Observations" section in Dr. Levy's report appear to describe claimant. Mother also contends that WRC did not have complete information. However, she did not specify the information that WRC

was missing.

27. Mother contends that she was told that members of the multidisciplinary team would be present to observe the evaluation by Dr. Quevedo on September 5, 2013. According to Mother, when she arrived for the evaluation, Dr. Kelly would be the only member of the team watching Dr. Quevedo's evaluation because other team members were unavailable. Dr. Kelly, during his testimony, could not recall if any other team members were in the room. Mother questions the thoroughness of Dr. Quevedo's assessment. Dr. Kelly explained that a psychological consultation, which was what Dr. Quevedo performed, is not as comprehensive as a psychological evaluation. In any event, the WRC diagnostic/eligibility sheet established that claimant's case was reviewed for eligibility by members of the eligibility team, namely, Dr. Kelly, physician Alicia Bazzano, M.D., and psychology consultant Mayra Mendez, Ph.D., MFT. (Exh. 4.)

28. Mother believes that claimant has many gaps in her development. She believes claimant has a substantial disability, as defined by the Lanterman Act. She contends claimant has problems with self-care, receptive and expressive language, capacity for independent living, and economic self-sufficiency. For example, when Mother gives claimant money, she spends it, loses it, or gives it away. Claimant does not understand that money is important. Mother testified that claimant does not wash properly. She needs to prompt claimant to brush her teeth and bathe. Claimant has difficulty with tying and untying shoelaces. She does not know how to ask for help. She will start laughing for no apparent reason. Claimant does not know that she needs to change her clothes if she urinates on herself. Claimant is vulnerable because she does whatever anyone tells her to do. According to Mother, for example, if another child tells claimant to steal something or go into the boys' bathroom, claimant will do it because she does not know or

recognize things she should not do. Mother did not present any evidence to establish that claimant's difficulties are due to a disability resulting from cerebral palsy, epilepsy, autism, mental retardation, or a condition closely related to or requiring treatment similar to mental retardation.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)[4] A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-7.)

2. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (See Evid. Code, §§ 115, 500.) Thus, Claimant has the burden in this case of proving her eligibility under the Lanterman Act by a preponderance of the evidence.

3. Eligibility for services under the Lanterman Act exists when an individual establishes that he or she suffers from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category ("disabling conditions found to be closely related to

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[4] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

mental retardation or to require treatment similar to that required for individuals with mental retardation"). (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely therafter. (§ 4512; Cal. Code Regs., tit. 17, § 54000, subds. (a), (b)(1), and (b)(3).)

4. The determination of eligibility for services under the Lanterman Act is made by the regional center. "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." (§ 4643, subd. (b).)

5. While the Legislature has not defined the fifth category, it does require that the qualifying condition be "closely related" (§ 4512, subd. (a)) or "similar" (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or "require treatment similar to that required for mentally retarded individuals." (§ 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" or "similar" to mental retardation, there must be a manifestation of cognitive or adaptive deficits, or both, which render that individual's disability like that of a person with mental retardation. Furthermore, determining whether a claimant's condition "requires treatment similar to that required for mentally retarded individuals" is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone's

condition requires such treatment.

DISCUSSION

6. In this case, it was not established that claimant has a disability that fits into one of the five categories of eligibility under the Lanterman Act. There is no evidence that claimant has a diagnosis of mental retardation, autism, cerebral palsy, or epilepsy. Nor was it established that her disability is described by the "fifth category." Claimant has multiple diagnoses, including learning disability, ADHD, depression, anxiety, mood instability, impulsivity, oppositional behavior, post-traumatic stress disorder, and fetal alcohol syndrome. None of those diagnoses are eligible conditions under the Lanterman Act. Claimant's cognitive and behavioral difficulties appear to be the result of a learning disability and/or her mental health issues. Claimant's eligibility for special education services from her school district is under the category of specific learning disability, even though the eligibility categories also include "autistic-like behaviors" and mental retardation. (Cal. Code Regs., tit. 5, § 3030, subds. (g), (h).) There is nothing in the available records indicating a concern that claimant might have autism or mental retardation. Claimant's psychiatric and mental health issues have been treated over the years by therapy and a regimen of medications. The weight of the evidence in this case supports the Service Agency's conclusion that claimant is not eligible for regional center services. (Factual Findings 8-25.)

7. As part of the fair hearing request, Mother contends that the Service Agency should be required to re-assess claimant because its determination that claimant is not eligible for services is based on incomplete and inaccurate information. However, Mother presented insufficient evidence to support this contention. The only error she identified was in Dr. Levy's report, where the doctor inadvertently included two paragraphs in the "Behavioral Observation" section that

were from a report about another child. This error, however, did not invalidate the other substantive findings and conclusions in the report. Further, Mother failed to identify the information relied on by the Service Agency that she contends was incomplete or what information was missing. The preponderance of evidence in this case established that the Service Agency made a complete and appropriate determination of non-eligibility based on the available information. No further assessment of claimant by the Service Agency is required at this time.

ORDER

Claimant's appeal is denied. The Service Agency's determination that claimant is not eligible for regional center services is affirmed.

DATED: December 23, 2013

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ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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