BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2022110152

DECISION

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on January 19, 2023. Daniel Ibarra, Fair Hearing Specialist, represented San Gabriel/Pomona Regional Center (SGPRC or Service Agency). Claimant was represented by her mother with the assistance of Spanish-language interpreters. (The names of Claimant and her family are omitted to protect their privacy.)

Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on January 19, 2023.

ISSUE

Does Claimant have a developmental disability entitling her to regional center services?

EVIDENCE

The documentary evidence considered in this case was: Service Agency exhibits 1 - 15. The testimonial evidence considered in this case was that of Staff Psychologist Deborah Langenbacher, Ph.D.; Claimant's mother; Gloria Gomez, Claimant's therapist; and A.B., Claimant's special education teacher (the witness's name is omitted to avoid indirectly exposing Claimant's personal identifying information, i.e., the school she attends).

FACTUAL FINDINGS

Claimant's Background

1. Claimant is a 13-year-old female. She seeks eligibility for regional center services based on a diagnosis of Autism Spectrum Disorder (ASD or autism).

2. Claimant lives at home with her parents.

Special Education Evaluations and Services

3. Claimant began receiving special education services from her local school district after her preschool teachers reported she was non-verbal and required physical prompting to transition from activities. Claimant made minimal progress in her

academics, language, and social interactions with peers and adults. Testing revealed Claimant's severe deficits in language development. In 2014, Claimant qualified for special education under the primary disability category of Autism and the secondary disability category of Speech and Language Disorder. She has been receiving speech and language therapy since kindergarten.

MARCH 2017 PSYCHO-EDUCATIONAL EVALUATION

4. In March 2017, Claimant's school district conducted a psycho-educational evaluation of Claimant. Claimant's cognitive functioning was determined to be slightly below average, although her non-verbal cognitive functioning was in the average range. During the auditory processing test, Claimant often "remained quiet and several tests were discontinued as she engaged in immediate echolalia (repeated right after the examiner) and did not attend to the instruction. She was prompted to listen to the question every item." (Exhibit 7, p. A52.)

5. Claimant demonstrated different social behavior and communication at school versus her home environment. Claimant's mother reported Claimant engaged in verbal exchanges with her parents, cousins, and a neighborhood friend. Claimant's mother also reported Claimant "answers the telephone, she finishes conversations appropriately and start[s] conversations of interest with other people." (Exhibit 7, p. A53.) Claimant's teacher reported Claimant was "socially awkward, w[a]nders from one activity to another, has difficulty relating to peers and staff, and has difficulty keeping up a normal flow of conversation. [Claimant] seems tense in social situations and stares in space, she shows a flat affect and limited eye contact." (Exhibit 7, p. A54.)

6. The examiner conducting the psycho-educational evaluation noted observations of Claimant's behavior, including limited eye contact and echolalia, as follows:

> [Claimant] was quiet and responded "yes or no" to the examiner['s] attempts to communicate with her. She exhibited limited eye contact and at times smiled to herself. During tasks that involved auditory stimulation, [Claimant] was observed to repeat the stimulus (Immediate Echolalia) and did not produced [*sic*] a response. [Claimant] was observed to work at a slow pace. She seemed to enjoy tasks that involved visual stimulation. At times [Claimant] required prompting to produce a response. She was provided [breaks] as needed or with signs of fatigue and at the end of the evaluation smiled when she heard the examiner say it was time to go back to the class.
>
> During different classroom observations [Claimant] was seen to be quiet and unresponsive to peers. At times she was not aware that her peer was so close to her. [Claimant] gets individual support and requires step by step instruction to complete tasks. . . . [Claimant] does not volunteer responses, she did not engage in discussions nor participate in group choral responses. . . . Often [Claimant] is inattentive, stares into space, unresponsive to what is going on in the classroom and needs prompting to continue working. She has difficulty working

> independent[ly]. During recess, [Claimant] was observed to play by herself in the playground. [She] refrains from initiating conversation and at times does not responds to peers['] attempts to engage her in play and in talk. However, she was observed playing with a ball and two students, she was smiling and appear[ed] to be enjoying the interaction. She was also observed to grab a girl[']s hand when she was afraid to go over the bridge on the jungle gym. [Claimant] was also observed to smile at a girl grabbing her hand and guiding her to line up.

(Exhibit 7, p. A48.)

7. At home, Claimant was reportedly able to complete grooming and other tasks. At school, Claimant required physical and verbal prompting to be on task throughout the day. She also "had some incidents at school in which she needed to be prompted to go to the bathroom when she was almost wetting on her clothes." (Exhibit 7, p. A53.)

8. The examiner concluded Claimant continued to demonstrate "behaviors often associated with Autism, . . . [including] a flat affect, limited eye contact, she stares into space for more than 5 seconds, and needs constant prompting to focus. [Claimant] does not engage in back and forth conversation with peers or staff, she is often playing by herself, and does not engage in creating play with peers." (Exhibit 7, pp. A55-A56.)

JANUARY 2020 EDUCATIONAL ASSESSMENT

9. In January 2020, when Claimant was 10 years old, Claimant's school district conduced an educational assessment. The examiner noted Claimant's continued inattention and need for some redirection in the classroom. The following observations were made during Claimant's testing:

> [Claimant] transitioned well to and from the testing environment. [Claimant] did not initially respond verbally to conversational questions by the examiner, but she did nod her head yes and no. During the interview [Claimant] used her fingers to indicate how old she was and what grade she is in. [Claimant] responded verbally to testing prompts. During testing, [Claimant] took extra time to respond to each question and at times had to be prompted to respond. With prompting she would at times respond, but at times still remained silent at which time the examiner moved on to the next question. This occurred more as items became more difficult. During testing [Claimant] was observed to wipe her nose with her sleeve and lick her lips repetitively.

(Exhibit 6, p. A31.)

10. Claimant's teacher and mother provided responses to assess her social communication. The examiner noted:

> [Claimant] has difficulty using appropriate verbal and non-verbal communication for social contact, has difficulty relating to children, and has difficulty providing appropriate

> emotional responses to people in social situations. Additionally, teacher reports that she uses language in an atypical manner and overreacts to sensory stimulation. For example, [Claimant] has trouble starting and keeping a conversation going, noticing social cues, showing interest in the ideas of others, and looking at others during interactions. Additionally[,] she may not seek the company of other children or respond when spoken to by other children. Teacher has observed use of language that is immature for her age and using an odd way of talking. Overall, responses from all raters suggest that [Claimant] displays many characteristics associated with Autism.

(Exhibit 6, p. A34.)

11. The evaluators concluded Claimant continued to meet special education eligibility under the category of Autism. They specifically noted, based on parent and teacher reports:

> [Claimant] continues to demonstrate characteristics consistent with children on the autism spectrum, such as atypicality, withdrawal, [and] deficits in social skills and functional communication. [Claimant] has difficulty using appropriate verbal and non- verbal communication for social contact, has difficulty relating to children, and has difficulty providing appropriate emotional responses to people in social situations. Additionally, teacher reports in the school setting that she uses language in an atypical

> manner and overreacts to sensory stimulation. Speech and language assessment indicates delays in expressive language (semantics, syntax/morphology, and pragmatic language).

(Exhibit 6, p. A43.)

CLAIMANT'S CURRENT INDIVIDUALIZED EDUCATION PROGRAM

12. Claimant continues to receive special education services from her school district under the category of Autism. Claimant's most recent Individualized Education Program (IEP), dated January 2022, noted her continued autistic-like behaviors. The 2022 IEP concluded:

> [Claimant] continues to demonstrate characteristics consistent with children on the autism spectrum, such as atypicality, withdrawal, deficits in social skills and functional communication. [Claimant] has difficulty using appropriate verbal [communication] for social contact. . . . In the classroom, she has not spoken but a few words.

(Exhibit 15, p. A176.)

Mental Health Services

13. Claimant has been receiving mental health services from Foothill Family Services (Foothill) intermittently since 2013 to address "unresponsiveness, aggressive outbursts, socially isolating behaviors, and language delays." (Exhibit 13, p. A91.) She was initially diagnosed with anxiety disorder and with selective mutism.

SGPRC Intake Evaluation

14. Claimant was referred to the Service Agency by Foothill due to concerns Claimant may have ASD.

15. On February 5, 2020, Claimant and her mother met with a Service Agency Intake Coordinator. The Intake Coordinator noted Claimant's receipt of special education services under the category of Autism. The Intake Coordinator also documented, "[Claimant] purrs like a cat and needs [to be] redirected to stay on task." (Exhibit 3, p. A13.) "[Claimant] becomes frustrated and resistive when she perceives the assignment is too difficult. [She] has reportedly become physically aggressive with teachers and peers." (*Id.* at p. A18.)

16. The Intake Coordinator documented his personal observations and Claimant's mother's report regarding Claimant's communication ability as follows:

> [Claimant] uses sentences of three words or more to communicate her needs and her speech is easy to understand by strangers. However, [Claimant] chooses not to talk at times, and she hardly said a word during this interview. She nodded her head to indicate yes/no. [Claimant] responds to her name and makes eye contact. She reportedly communicates at home with no problems and talks to friends and her cousins.

(Exhibit 3, p. A17.)

17. Claimant's mother informed the Intake Coordinator that Claimant initiates social interactions with others and has approximately six friends. However,

Claimant frequently exhibits socially disruptive behavior at school, and she reportedly used profanity, spat, and threw pieces of fruit. Although Claimant does not typically exhibit physical aggression, Claimant recently charged toward her mother as if to attack her. Claimant wanders away if unsupervised, and she has approximately three tantrums per month. She becomes frustrated when she is not allowed to play video games on her Nintendo device or cell phone. Claimant tends to suck her upper lip which is red most of the time. She also "plays with her hands and moves her eyes constantly when she's nervous." (Exhibit 3, p. A17.)

18. Based on the intake interview, the Intake Coordinator recommended Claimant undergo a psychological evaluation to determine whether she suffers from a developmental disability entitling her to regional center services.

SGPRC Psychological Evaluation

19. On February 12, 2020, on referral by SGPRC, licensed clinical psychologist, Yadira Vazquez, Psy.D., conducted a psychological evaluation of Claimant to assess for possible ASD. Dr. Vazquez documented her evaluation findings in a report provided to SGPRC.

20. As part of the evaluation, Dr. Vazquez reviewed Claimant's school records, and she noted that Claimant attends school in a special day class, receives counseling services and speech therapy, and "has a behavior intervention plan since September 2019 due to maladaptive behaviors which include physical aggression (hitting, kicking, and throwing [food or other] materials and desks to the floor) and disruptive behavior (refusing to follow directives, humming, laughing, and being unresponsive to staff)." (Exhibit 5, p. A20.) She has also used profanity and spat at staff. Claimant's disruptive and aggressive behaviors have been increasing, and she tends to

engage in these behaviors when she feels frustrated or nervous. However, these behaviors were not observed in the home. When Claimant becomes anxious, she tends to "suck her upper lip, play with her hands, and roll her eyes." (Id. at p. A21.)

21. Dr. Vazquez noted Claimant's severe deficits in her speech and language skills. She also noted, "Socially, she tends to be quiet, shy, and withdrawn. She has difficulty initiating communication with others. She can initiate social interactions with her peers but does not do it frequently. At home and with her family, she tends to be social. She plays well with her cousin and some neighbors." (Exhibit 5, p. A21.)

22. Dr. Vazquez documented her clinical observations as follows:

> [Claimant] came to the assessment accompanied by her mother. She was quiet and appeared extremely shy. She did not engage in back-and-forth conversation and did not respond to most of the questions. She used some gestures (i.e., nodding and moving shoulders) to communicate with the examiner and very few verbal responses. She seemed to prefer to respond verbally to her mother, in a low tone. [Claimant] maintained eye contact for short periods [and her facial expression[s] were directed towards others. She displayed difficulty expressing and recognizing her emotions. No restricted or repetitive behaviors were observed.
>
> [Claimant] exhibited symptoms of Selective Mutism during the assessment. Selective Mutism is a childhood anxiety disorder characterized by a child or adolescent's inability to

> speak in one or more social settings (e.g., at school, in public places, with adults) despite being able to speak comfortably in other settings (e.g., at home with family). [Claimant] did not use an adequate level of language and gave minimal responses. Therefore, scores are not considered to be related to the presence of [ASD] and a clinical diagnosis of Autism is not made.

(Exhibit 5, p. A22.)

23. Dr. Vazquez tested Claimant' cognitive functioning. She noted, "Prior cognitive testing is congruent and demonstrate[s] below average cognitive abilities with average nonverbal abilities. Therefore, a diagnosis of Intellectual Disability is not considered." (Exhibit 5, p. A23.)

24. To assess Claimant's adaptive functioning, Dr. Vazquez administered the Adaptive Behavior Assessment System – Third Edition (ABAS-3), with Claimant's mother providing the responses. Claimant's overall adaptive functioning was in the extremely low range. She scored in the "average" range for self-care; in the "below average" range for home living and health and safety; in the "low" range for communication, community use, and functional academics; in the "extremely low" range for self-direction, leisure, and social skills. (Exhibit 5, p. A24.)

25. To address autism concerns, Dr. Vazquez administered the Autism Diagnostic Observation Schedule – 2 (ADOS-2). Dr. Vazquez documented the following observations:

> During the construction task, [Claimant] worked slowly and required that the instructions be explained several times.

She did not vocalize, and her eye contact was fleeting. She stopped working, several times, like if she had forgotten what she had to do. She did not indicate the need for more pieces. However, when she was prompted to finish the puzzle, she completed it.

During make-believe play, she nods her head "Yes" confirming that she wants to play with the action figures. However, she stares at the action figures and smiles. It seemed like if she did not know how to play with them. When the examiner tried to engage in joint interactive play, she smiled but did not play.

During the demonstration task, she had to be prompted several times by the examiner and by her mother, to complete the task. She made gestures of how she brushes her teeth but did not give any verbal response. During the description of the picture, she seemed very shy and only responded to her mother. She used single words that included "tree", "house", "clouds", "dog", ""cat", and "water". She engaged in eye contact with her mother when she responded to her.

During the conversation, she did not engage in back-and-forth conversation, and she did not respond to most of the questions. She tended to respond more to her mother than to the examiner. She appeared shy with the examiner but maintained eye contact for short intervals. [¶]

> During the break, she did not play or initiate conversations. She looked at the examiner (making eye contact), made some gestures, and her facial expressions were directed towards the examiner.

(Exhibit 5, p. A25.)

26. Dr. Vazquez determined Claimant's score on the ADOS-2 exceeded the cut off for a classification of ASD. However, Dr. Vazquez deemed the score invalid. She explained:

> When interpreting the scores, it was evident that [Claimant] did not use an adequate level of language or social interactions, which would translate into higher ratings for reasons that are not related to the presence of ASD. Her minimal responses appeared to be due to selective mutism or social anxiety. Individuals with comorbid conditions (i.e., anxiety, behavioral problems) may have elevated scores, because these conditions impact some of the social communication behaviors that are associated with ASD. Therefore, these scores are not considered valid, and a clinical diagnosis of autism is not considered.

(Exhibit 5, p. A25.)

27. Dr. Vazquez diagnosed Claimant with "Speech and Language Impairment," with other diagnoses still needing to be ruled out including "Selective Mutism," "Social Anxiety Disorder," and "Specific Learning Disability."

28. Although Dr. Vazquez did "not consider" a diagnosis of ASD due to what she deemed an invalid ADOS-2 score, she never definitively ruled it ASD. Dr. Vazquez did not specifically conclude Claimant's language and social deficits were solely caused by her "Speech and Language Impairment" or by the rule out diagnoses of selective mutism, anxiety disorder, or learning disability. Dr. Vazquez failed to sufficiently explain why Claimant's language and social deficits could not be related to a dual diagnosis which included ASD.

Notice of Proposed Action and Fair Hearing Request

29. On February 26, 2020, SGPRC sent Claimant a Notice of Proposed Action (NOPA), finding her ineligible to receive regional center services because she did not meet eligibility criteria.

30. Claimant's mother filed a Fair Hearing Request to appeal the denial of eligibility.

Additional Assessments

31. On December 9, 2021, Foothill psychologist, Patricia Valdez, Ph.D. conducted a psychological evaluation of Claimant at the request of Claimant's treating therapist, Gloria Gomez. Ms. Gomez sought the re-evaluation because she observed:

> [Claimant] remains largely socially unresponsive (even nonverbally), displays poor peer-relatedness, has aggressive outbursts (throwing things, pushing), is becoming increasingly tearful, and fails to communicate her wants and needs. . . . After years of therapy, [Claimant] has reportedly not made appreciable progress.

(Exhibit 13, p. A91.)

32. At the December 2021 evaluation, Dr. Valdez observed Claimant's behaviors during testing as follows:

> [Claimant] refused to speak the entire time, and even the typical accommodations for mutism (whispering, speaking while examiner turned her chair away) did not work. On top of this, [Claimant] rarely utilized non-verbal cues and also refused to provide responses to test items via paper and pencil (in written form). This forced the examiner to abort a number of test procedures. . . . [Claimant] sat motionless, even for extended periods of time. On occasions where she independently completed paper and pencil tasks, she made no attempt to inform the examiner (even non-verbally) when done, resulting in [Claimant] sitting motionless until the examiner intervened. Her behavior suggested poor nonverbal communication skills, as well as mutism. . . . At various times, she was simply unresponsive, both verbally and nonverbally. . . . Early on, it seemed quite apparent that [Claimant] is developmentally delayed.

(Exhibit 13, p. A94-A95.)

33. Dr. Valdez diagnosed Claimant with ASD, Attention Deficit Hyperactivity Disorder (ADHD), predominantly inattentive presentation, Selective Mutism, and Unspecified Anxiety Disorder. Dr. Valdez's compellingly explained her diagnoses as follows:

Based on the collective information gathered during this evaluation (behavioral observations, collateral professional reports, record review, formal testing, and parent report), this examiner finds [Claimant's] history of symptom presentation to be consistent with an [ASD] as recognized by her school district dating as far back as kindergarten. As is often the case with children on the spectrum, [Claimant] is struggling with co-occurring ADHD and some affective disturbance (anxiety and depressive symptoms). [Claimant's] developmental disorders appear to lie at the center of her collective general challenges and unusual presentation.

Children on the spectrum very often struggle with affective disturbances (anxiety and depressive disorders). [Claimant] has been previously identified with an anxiety disorder and with Selective Mutism. A diagnosis of autism DOES NOT preclude the diagnoses of anxiety disorder nor selective mutism. In fact, the condition of Selective Mutism may mask very real problems with language delay, communication deficits, and qualitative deficits in reciprocal social interactions. Conversely, it is known that children with Selective Mutism sometimes have parallel developmental delays (e.g., ASD, ADHD, language deficits), and so it is generally recommended that they undergo evaluation. During the current evaluation, mother informed the examiner that a prior 2020 [regional center] evaluation ruled out autism, though no records were made available

> for review. If this was indeed the case, the examiner suspects that mother's compromised reporting may have largely factored into those diagnostic impressions. In direct interview, mother is quick to describe [Claimant] as "normal" at home, though she did incidentally acknowledge problems with communication, stereotypy, and sensory issues with more probing. Fortunately, the examiner had access to childhood Head Start records, and was able to conduct collateral interviews with [Claimant's] current and prior therapists, [Claimant's] teacher, and review psychiatrist notes. This team of professionals shared similar observations. To the school district's credit, it has recognized [Claimant] as a child with autism, including with real delays in language development. and some aggressive outbursts.

(Exhibit 13, p. A96.)

34. On June 13, 2022, while awaiting fair hearing, an admissions coordinator for the Service Agency conducted a Social Re-assessment of Claimant including review of Dr. Valdez's December 2021 evaluation, Dr. Vazquez's February 2020 evaluation, and March 2017 psycho-educational evaluation. The admissions coordinator noted Claimant "was previously evaluated by SGPRC by Dr. Yadira Vazquez, licensed psychologist and ASD was ruled out." (Exhibit 11, p. A81.) This notation was slightly inaccurate because Dr. Vazquez's report never specifically ruled out ASD. The admissions counselor recommended a psychological evaluation be scheduled for

Claimant and an interdisciplinary team meeting be held to determine Claimant's eligibility for regional center services.

35. On August 4, 2022, clinical psychologist Deborah Langenbacher, Ph.D. conducted a psychological evaluation of Claimant to determine her eligibility for regional center services under the category of Autism. Dr. Langenbacher documented her evaluation findings in an Autism Clinic Assessment Report provided to SGPRC. (Exhibit 12.)

36. Dr. Langenbacher's evaluation included a records review, parent interview, observation of Claimant at play, and administration of the Autism Diagnostic Interview - Revised (ADI-R), Childhood Autism Rating Scale -2HF (CARS-2HF), and Adaptive Behavior Assessment System - 3 (ABAS-3).

37. Dr. Langenbacher documented the following observations during her evaluation:

> [Claimant] responded to examiner's greeting immediately, and she responded verbally, but then became silent. [Claimant] responded to questions with gestures (e.g., nodding, shaking her head for no, shrugging). Towards the end of her visit, [Claimant] became quite upset and tearful. She then spoke in complete sentences (e.g., "I hate you.") and hit out at her mother. She used emotional gestures to express her distress. [¶] [Clamant] refused to participate in any structured assessment activities and became visibly distressed when pressed to participate.

(Exhibit 12, p. A84.)

38. Dr. Langenbacher also documented Claimant's reported and observed social interaction and communication as follows:

> In the area of social interaction, [Claimant] was reported to have responded to her name and to have pointed to show things or interest and to request at or before one year of age, or in the normal range. No concerns were noted with her eye contact in the home, however, some school records indicated reduced eye contact. [Claimant's] mother indicated that she was more interactive at ages four to five, but that other children usually needed to initiate with her, and she would respond to their overtures. Currently, [Claimant] was said to have a few friends at school. She was said to play appropriately with her cousin. As a young child, [Claimant] was reported to have shared her interests with others and to offer comfort if a person familiar to her was distressed. Her mother indicated that she has always shown her emotions through facial expressions, and this was observed during her visit as well.
>
> Regarding communication, no difficulties were noted in the use of conventional gestures, either when younger or currently. As a young child, [Claimant] was reported to have spontaneously imitated actions of others and she engaged in pretend play, however, her play with peers was limited. [Claimant] can converse with her parents and others who are quite familiar to her, however, she does not engage in

> conversation with those who she does not know. Either by history or currently, there is no indication of stereotyped, repetitive or idiosyncratic speech.

(Exhibit 12, p. A85.)

39. Dr. Langenbacher noted Claimant had previously been diagnosed with Selective Mutism. She confirmed Claimant met the criteria for that diagnosis. These criteria included Claimant' failure to speak in certain social situations, which interfered with her social and educational success, and which "is not better explained by another diagnosis." (Exhibit 12, p. A88.) Dr. Langenbacher ruled out ASD, explaining her diagnostic impressions as follows:

> [Claimant] has a long history of difficulty in speaking with others and in maintaining a conversation, however, these deficits were not noted until after the early developmental period. Her eye contact is said to be inconsistent, however, she can use a variety of gestures and facial expressions. [Claimant] has had difficulty with forming peer relationships, as she tends to be quite passive. She was said to respond to the social overtures of others. [Claimant] was said to sometimes wiggle her fingers when anxious, but no other stereotypic body movements or language were reported or observed. [Claimant] does not adhere to nonfunctional routine, and she does not demonstrate restricted interests of abnormal intensity. There is no reported history of such behavior. No sensory processing

differences were reported, either currently or by history.

[Claimant] does not meet criteria for a diagnosis of [ASD].

(Exhibit 12, p. A87.)

Testimony at Fair Hearing

40. Claimant's mother testified at the fair hearing with the assistance of Spanish-language interpretation. She was respectful and candid, and she presented as a credible witness. However, her testimony was succinct, requiring further questioning to prompt descriptions of Claimant's specific behavioral concerns. Claimant's mother reported Claimant's atypical behaviors began when she was a toddler. By age three or four, she would isolate herself from groups, even at home if there were a lot of people there. From a very young age, Claimant would wring her hands and continually move her eyes back and forth when nervous. Claimant will not initiate a conversation, including in the home environment. She will use signals instead of responding verbally when asked questions. She does not use proper eye contact when talking. Claimant's aggressive behavior began at about age seven, and they have been increasing.

41. Claimant's special education teacher testified credibly at the fair hearing. His testimony was straightforward, and he presented as a credible witness. He confirmed Claimant's behaviors are similar to behaviors he observes in other students with Autism. Claimant tends to sit by herself during nutrition time, although she does occasionally approach others to talk. Claimant becomes frustrated if there is a change in the typical classroom routine. Claimant has a behavior plan in place due to her aggressive tendencies, and when she loses emotional control and engages in aggression, her "eye contact disappears" and she engages in arm flapping. Claimant also tends to become excessively attached to things. For example, last year she wore

the same pair of shoes every day, and she refused to change to newer shoes when the old ones were torn. Claimant became very upset when adults attempted to take her old shoes away. However, after working for several weeks on the change, she was able to wear a new pair of shoes.

42. Claimant's therapist, Ms. Gomez testified at the fair hearing. She was professional and forthcoming, and she presented as a credible witness. Ms. Gomez noted that Claimant has engaged in arm flapping across several domains. Claimant's mother had shared with Ms. Gomez videos of Claimant engaging in arm flapping at home, and Claimant has engaged in that behavior in Ms. Gomez's presence. Ms. Gomez also observed Claimant's other behaviors giving rise to concerns of ASD, including limited eye contact and avoiding social interaction.

43. Dr. Langenbacher testified at the fair hearing in conformity with her evaluation report.

44. Dr. Langenbacher opined a diagnosis of Selective Mutism was the "most appropriate and had been made at [Foothill] and with consulting psychologist Vazquez." This testimony is inaccurate because Dr. Vazquez never diagnosed Claimant with Selective Mutism. Instead, she diagnosed Claimant with "Speech and Language Impairment" and with other possible "rule out" diagnoses including "Selective Mutism," "Social Anxiety Disorder," and "Specific Learning Disability." Additionally, Dr. Vazquez never specifically determined Claimant did not have ASD but instead determined Claimant's ADOS-2 score invalid to indicate ASD.

45. Dr. Langenbacher explained she did not diagnose Claimant with ASD because ASD "difficulties . . . start very early on in development," and Claimant's mother reported no delays in pointing, understanding her name, or using first words.

Dr. Langenbacher apparently discounted Claimant's severe language delays and other noted behaviors (limited eye contact, echolalia) observed when Claimant was preschool age.

46. Dr. Langenbacher placed significance on the portions of Claimant's records where her mother reported Claimant was "talkative," could speak "normally," and could have "typical conversations" at home, and that she played with her cousins. Dr. Langenbacher pointed out that, with ASD, there is difficulty in socialization across many areas, and in Claimant's case, there is "lack of concern" about her ability to socialize in the home. However, the documentation of Claimant's socialization abilities at home is inexact. As noted by Dr. Valdez, Claimant's mother's reporting appeared compromised since she tended to describe Claimant as "normal" at home and would only acknowledge problems with communication, stereotypy, and sensory issues with more probing. Dr. Valdez's assessment of Claimant's mother's reporting was borne out by Claimant's mother's testimony. She is not a descriptive reporter but needed prompting to elicit specific concerns about Claimant's communication, socialization, and behavioral concerns in the home. Consequently, Claimant's mother's prior reports do not provide a full picture of how Claimants communicates and socializes at home (i.e., what does Claimant's mother consider a "normal," or "typical" conversation, and how does Claimant "play" with cousins?). As fleshed out during testimony, Claimant has communication, socialization, and behavioral concerns at home, although less pronounced than at school.

47. Dr. Langenbacher also pointed out, "There was a moment in our evaluation where [Claimant] became agitated and tearful and able to speak in full sentences and express herself." Dr. Lagenbacher did not adequately explain why the

display of emotion and use of a full sentence, such as "I hate you," precludes ASD diagnosis.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to appeal a regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing following the Service Agency's denial of eligibility, and therefore, jurisdiction for this appeal was established.

2. When a party seeks government benefits or services, she bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Where a change in services is sought, the party seeking the change bears the burden of proving that a change in services is necessary. (Evid. Code, § 500.) The standard of proof in this case is a preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

3. In seeking eligibility for regional center services, Claimant bears the burden of proving by a preponderance of the evidence that she meets all eligibility criteria. Claimant has met her burden of proof in this case.

Determination of Claimant's Eligibility under Lanterman Act

4. To be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

> 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. . . [T]his 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. A claimant must show that her disability fits within one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: intellectual disability, epilepsy, autism, and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability." (Welf. & Inst. Code, § 4512.)

6. Although the first four categories of eligibility are very specific, the disabling conditions under the residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of

learning or behavioral disability. The Legislature requires the fifth category qualifying condition to be "closely related" to intellectual disability (Welf. & Inst. Code, § 4512) or "require treatment similar to that required" for individuals with intellectual disability (Welf. & Inst. Code, § 4512). The definitive characteristics of intellectual disability include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" to intellectual disability, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with intellectual disability. However, this does not require strict replication of all the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability. If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on her performance renders her like a person with intellectual disability. Furthermore, determining whether a claimant's condition "requires treatment similar to that required" for persons with intellectual disability 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, living skills training, speech therapy, or occupational therapy). The criterion is not whether someone would benefit. Rather, it is whether someone's condition requires such treatment.

7. A claimant's disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512; Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled

either with a psychiatric disorder, a physical disorder, or a learning disability could still be eligible for services. However, someone whose conditions originate only from the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does not have a developmental disability would not be eligible.

8. Claimant does not suffer from epilepsy or cerebral palsy. She did not assert eligibility under the category of intellectual disability or fifth category. Furthermore, the evidence did not demonstrate Claimant suffers from intellectual disability or that her disability is "closely related to intellectual disability" or required "treatment similar to that required for individuals with an intellectual disability."

9. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "autism." Consequently, when determining eligibility for services based on autism, that qualifying disability has been defined as congruent to the definition of ASD set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). (The ALJ takes official notice of the DSM-5 as a generally accepted tool for diagnosing mental and developmental disorders.)

10. The DSM-5, section 299.00 discusses the diagnostic criteria which must be met to provide a specific diagnosis of ASD, as follows:

> 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.

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or

> global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5, at pp. 50-51.)

11. As determined by Dr. Valdez, Claimant meets the criteria under the DSM-5 for a diagnosis of ASD. Dr. Valdez compellingly explained her diagnosis, which was based on behavioral observations, collateral professional reports, interviews with Claimant's therapists and teacher, record review, formal testing, and parent report. Dr. Valdez noted credibly that a diagnosis of ASD does not preclude the diagnoses of Anxiety Disorder or Selective Mutism.

12. Dr. Langenbacher's opinion that Claimant did not suffer from ASD was given less weight due to weaknesses in the factual bases underlying her opinion. From an early age Claimant has suffered from severe communication and socialization deficits at school, including language delays, social isolation, and lack of eye contact. While Claimant may suffer less severe communication and socialization deficits at home, those deficits still exist. The Service Agency did not establish that differing severity of deficits across environments should preclude an ASD diagnosis. Additionally, the Service Agency failed to adequately explain how Claimant's behaviors noted by school observers (lack of eye contact, echolalia, insistence on sameness and adherence to routine) and by Claimant's therapist and mom (arm flapping, hand wringing), were related to selective mutism or some other diagnosis.

13. A claimant must prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512. Thus, in addition to falling within an eligibility category, a claimant must show that she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (*l*)(1):

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

14. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

> (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.

15. Claimant has significant functional limitations for a person her age in at least three areas: receptive and expressive language, learning, and self-direction. Consequently, Claimant has established her ASD constitutes a substantial disability as defined by Welfare and Institutions Code section 4512, subdivision (l)(1), and California Code of Regulations, title 17, section 54001.

16. The preponderance of the evidence established Claimant is eligible to receive regional center services under the diagnosis of Autism.

//

ORDER

Claimant's appeal is granted. San Gabriel / Pomona Regional Center's denial of Claimant's eligibility to receive regional center services is overruled.

DATE:

JULIE CABOS-OWEN
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.