BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: ISABELLA B., Claimant, vs. NORTH LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2012010521

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on May 29, 2012, in Van Nuys, California. Isabella B. (Claimant) was represented by Maria Luisa B. and Ismael B., her parents and authorized representatives.[1] North Los Angeles County Regional Center (NLACRC or Service Agency) was represented by it Contract Officer, Rhonda Campbell.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on May 29, 2012.

ISSUE

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

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[1] Claimant's and her parents' initials are used in lieu of their last names to protect their privacy.

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FACTUAL FINDINGS

1. Claimant is a 7-year-old female (born July 3, 2004). She seeks to be eligible for regional center services based on a diagnosis of autism or mental retardation or under the "fifth category" of eligibility.[2] (Exhibits 1 and 10.)

2. The Service Agency determined that Claimant is not eligible for regional center services because she does not meet the criteria set forth in Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, sections 54000 and 54001. Based on this determination, the Service Agency denied services to Claimant. (Exhibit 1.)

3(a). On May 9, 2007, when she was 34 months old, Claimant underwent a developmental evaluation on referral by NLACRC. Claimant's mother's main concern was Claimant's expressive communication skills (Claimant's vocabulary was about 50 words). At that time, Claimant's mother reported that Claimant first sat at six months, first walked at 12 months, and spoke her first word ("agua") at nine months. (Exhibit 4.)

3(b). The examiner determined that Claimant's cognitive skills were at the 27 to 30 month level; her gross motor skills were at the 30 to 33 month level; her fine motor skills were at the 30 to 33 month level; her receptive communication skills were at the 18

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[2] For an explanation of "fifth category" eligibility, see Factual Finding 20(d)(1) and Legal Conclusion 5.

to 21 month level; her expressive communication skills were at the 21 to 24 month level; her personal skills were at the 30 to 33 month level; and her social-emotional skills were at the 24 to 27 month level. The examiner noted that Claimant was excited by the toys presented to her, and she handled them properly. (Exhibit 4.)

3(c). The examiner recommended that Claimant and her mother participate in a "Mommy and Me" program to establish strong communication and social skills and that Claimant be referred to her local education agency at age three to afford her "an opportunity to strengthen [her] social and language development." (Exhibit 4.)

4. On May 9, 2007, Claimant also underwent a Speech and Language Evaluation on referral by NLACRC. Her language comprehension was at the 18 to 21 month level, and her language expression was at the 21 to 24 month level. The speech and language pathologist recommended: individual speech and language therapy, two times per week; a center based pre-school program; a formal hearing assessment; and caregiver education and training. (Exhibit 5.)

5. Since 2007, Claimant has attended a public elementary school in the Los Angeles Unified School District (LAUSD).

6(a). In October 2007, an Individualized Education Plan (IEP) was created for Claimant by LAUSD. Claimant was found eligible for special education services under the category of Mental Retardation (but see Factual Findings 20(c)(1) through 20(c)(4)). The IEP noted that the level of Claimant's cognitive functioning and her academic performance were "within the well below average" range. Her communication skills were significantly delayed and her deficits in social-emotional development and adaptive functioning were primarily in the area of language. The IEP noted that Claimant's "primary area of need is in using language to express herself in play, which will impede her growth in academic areas that rely on social foundation, such as sharing in circle time." Claimant was toilet trained and could feed herself using utensils. (Exhibit

23.)

6(b). Claimant was placed in special day class, and the IEP set five goals for her, including: transitioning from a preferred to non-preferred task and remaining engaged for six to eight minutes; answering basic "wh" questions; following school-related safety directions with minimal prompts and redirection; sorting familiar objects by at least two attributes with minimal cues; and using two to three word phrases to request, ask or answer with minimal prompts. (Exhibit 23.)

7(a). In a September 2008 IEP, it was noted:

> [Claimant] is a social, affectionate 4-year-old, who runs into school every morning with an excited 'hello!' and a big hug. . . . She demonstrates great pride in her growing skills by seeking adult's [*sic*] attention ahead of time in order to shows [*sic*] them what she can do, and celebrating successes with an enthusiastic, 'I did it!' She labels her own and others' feelings and expresses ways to take care of feelings (when another child is sad, 'He needs cozy corner' or 'He wants mommy.'). She shows empathy for other children with both words and actions, comforting them when they are upset (especially younger children). . . . She sometimes has difficulty playing in small groups when planning and cooperation is required. When conflicts arise with peers, she does not yet engages [*sic*] in a negotiation or suggest ways to solve the problem, and may quickly dissolve into tears. She has difficulty accepting solutions that require compromise, but is recovering increasingly more quickly from her disappointment. [Claimant] is sensitive to

> redirection and criticism, and can take a while (10 -15 mins) to recover from an upset. She can have great difficulty with turn-taking with high-preference toys, and needs adult support and facilitation of the turn-taking. (Exhibit 24.)

7(b). The IEP further noted that Claimant's "language and cognitive delays can impact her social interactions, ability to express her emotions, and emotional composure (due to frustration of not being able to fully express herself)." Additionally, Claimant's language and cognitive delays, "especially in the area of memory retrieval and language comprehension, affect her ability to acquire new vocabulary and concepts." However, she had made "tremendous progress in both receptive and expressive language, as well as speech production. She surpassed all three language goals from her previous IEP." (Exhibit 24.)

7(c). The following additional observations were made:

> [Claimant] is curious about the world around her and shows great enthusiasm with new classroom activities and materials. She puts materials and objects together in new ways to see what will happen, and asks basic questions to further her understanding of new materials/activities/experiences. When engaged in a high-preference task, she maintains attention even in a distracting environment and is increasingly persisting [*sic*] even when encountering difficulties. . . . Her actions demonstrate memory of simple routines, and she is able to communicate a few key details about an event that happened in the past. She shows understanding of familiar cause and effect

> through language and action. She engages in problem-solving by avoiding solutions that clearly will not work, while not necessarily trying out all possibilities. She engages in much pretend play. (Exhibit 24.)

7(d). Since Claimant had met her previous five goals, five new goals were set for her including: solving conflict with peers by suggesting solutions; following two-step directions; counting, recognizing and ordering up to 10 objects with 80 percent accuracy; maintaining a topic of conversation for four or more turns with peers or adults; and identifying upper and lowercase letters with 80 percent accuracy. (Exhibit 24.)

8. On June 4, 2009, November 20, 2009, and March 5, 2010, IEPs were conducted. Claimant continued to meet the goals set for her. (Exhibits 25, 26, and 27).

9. In the November 20, 2009 IEP, it was noted that Claimant was at grade level in mathematics, and there were no areas of need noted in that subject. She continued "to have difficulty interacting in large groups in the classroom and on the yard when not closely supervised by an adult. When problems [arose], she [could] become quick to anger and [use] physical means to solve her problems (biting, hitting, pushing, kicking, spitting, scratching)." (Exhibit 26.)

10(a). In February 2010, a psychological study of Claimant was conducted by LAUSD. The evaluator found:

> Current assessment, review of records, reports and observation suggest that [Claimant] is functioning within the average to low average range of general abilities. Functioning level is impacted by short attention span and distractibility. Areas of relative strength are in visual processing, conceptualizing and nonverbal reasoning skills. . .

> . Areas of relative weakness including [*sic*] auditory memory and sequencing, auditory comprehension and reasoning, phonological awareness as well as visual perceptual-motor skills. (Exhibit 7.)

10(b). Claimant was administered the Cognitive Assessment System (CAS) and obtained a full scale standard score of 76, which is below average. However, she earned standard scores which ranged from a low of 64 to a high of 94 on the various separate scales that comprise the full scale. The evaluator noted, "as the CAS is not an individualized intelligence test, caution should be used when interpreting the Full Scale standard score." (Exhibit 7.)

10(c). The evaluator made the following conclusions and recommendations:

> Based on present testing and information, there appears to be a discrepancy between [Claimant's] average to low ability and her achievement in basic reading, reading comprehension, written language skills, numerical reasoning and listening comprehension. This discrepancy appears to be due to a disorder in the psychological processes involved with auditory processing, sensory-motor and attention skills. This discrepancy does not appear to be primarily the result of limited school experience, social maladjustment, unfamiliarity with the English language, mental retardation, environmental, economic or cultural disadvantage, or visual, hearing or motor impairment. Although [Claimant] does have some attentional issues, she does not appear to meet the criteria of "Other Health Impaired" due to "ADHD-like"

> characteristics at this time because she does not exhibit these behaviors in the home setting. A committee may agree that an eligibility of Specific Learning Disability appears appropriate at this time. (Exhibit 7.)

11(a). In the March 2010 IEP, it was noted that Claimant had been mainstreamed into a general education preschool for part of the day. Claimant's teacher and her parents were given the Behavior Assessment System for Children, Second Edition (BASC2), to complete. The information gathered from this test measures a child's adaptive and problematic behaviors in the school and home settings. Claimant's parents did not rate any behavioral areas to be within the "At-Risk" or "Clinically Significant" levels. On the BASC2 in the school environment, Claimant's teachers rated the areas of "Hyperactivity," "Aggression," "Atypicality," "Withdrawal," and "Attention Problems," within the "At-Risk" level. No areas were rated at the "Clinically Significant" level. Claimant's SDC teacher reported:

> [Claimant] continues to need prompting to sit appropriately, be aware of the personal space of others, and solve conflicts without a physical response. She often demands the teacher's attention immediately and may raise her voice when her needs are not met instantly. (Exhibit 27.)

11(b). In the March 2010 IEP, Claimant's eligible condition for receiving special education services was changed from Mental Retardation to Specific Learning Disability. (Exhibit 27.)

12. In a February 25, 2011 IEP, it was noted that Claimant was able to read grade level material independently and was working at grade level in mathematics. She eagerly participated in classroom discussions on reading topics, but "need[ed] teacher

support in the area of comprehension. She [was] easily distracted and [had] a difficult time retaining focus." (Exhibit 9.) It was also noted that:

> [Claimant] is concerned with the welfare of others and will often praise other students. [Claimant] likes to participate in classroom discussion and will often raise her hand to be called on. [Claimant] understands the schedule and routine of the day. She transitions from her classroom to a general education classroom for ELD and math. [Claimant] can follow multi-step directions. [Claimant] is capable of following classroom and school rules. . . . [Claimant] struggles with peer relationships. She is eager to be friends with the other students[.] [H]owever, she has a difficult time maintaining those friendships. [Claimant] often intrudes on the personal space of others and appears unsure and awkward when trying to initiate conversations with others. (Exhibit 9.)

13(a). On September 8, 2011, NLACRC conducted a Social Assessment via interview of Claimant's mother. The following was noted: Claimant's mother reported that Claimant is clumsy and falls often and that she cannot sit still. Claimant is impulsive and has no safety awareness. Socially, Claimant seems to be immature compared to her peers and does not know how to interact with them. However, she is very affectionate towards others and shares enjoyment, interest and achievement with others. She can recognize if others are happy or sad, although she does not recognize personal space. She has sometimes flapped her hands for no apparent reason, and she has shown some sensitivity to certain sounds, crowds and light. She does not have any restricted

interests. Claimant has demonstrated aggressive behaviors and is often clingy. She has not demonstrated resistant or self injurious behaviors. (Exhibit 10.)

13(b). Claimant's mother reported Claimant's developmental milestones at ages which differed from those reported during the developmental evaluation on May 9, 2007. During the September 8, 2011 NLACRC Social Assessment, Claimant's mother reported that Claimant first sat at one year, six months and walked at age two (not at six months and 12 months respectively, as previously reported). (See Factual Finding 3(a).) (Exhibit 10.)

14(a). On October 12, 2011, licensed psychologist Anna Levi, Psy.D., conducted a psychological evaluation of Claimant to determine her current functioning level and to rule out a diagnosis of Autistic Disorder. The evaluation included an interview with Claimant's mother, observations of Claimant, and administration of diagnostic tools for measuring cognitive functioning, academic functioning and adaptive skills and for ascertaining characteristics of autism. (Exhibit 12.)

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14(b). Dr. Levi noted:

> [Claimant] is a 7-year-3-month old girl who lives with her parents and 4-year-old brother with autism. She is shy and does not make eye contact when she is not comfortable, but when comfortable she makes eye contact. She smiles back at others and has a range of facial expressions sharing them with others, including shared enjoyment. She tends to act very young, like a 3-4-year-old. She plays pretend with her brother only. She does not comprehend what peers want from her and observes them with a blank look. She plays tag and ball with others, but tends to act silly, [fools] around, and

her peers get upset . . . She is too affectionate and offers comfort to others. . . . The does not give others physical space, wants to hug and kiss even unfamiliar children.

[Claimant] has bladder and bowel accidents every day. She will walk around school being 'dirty,' not telling anyone. She has no nonfunctional routines or rituals or an encompassing preoccupation. She has no repetitive motor movements. She needed a one-on-one assistant to walk between classes at school. . . . She sits by herself in the after-school program. . . . [I]t is too hard for her to imitate social play. For example, during hide-and-seek, she wants to look where the children are hiding instead of closing her eyes and counting. She mixes up past and present experiences together, uses poor grammar and verb tense. She gets off topic right way and cannot sustain a conversation.

. . . There is no history of repetitive language or stereotypic language. (Exhibit 12.)

14(c). To assess Claimant's cognitive functioning, Dr. Levi administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). The measure of her overall intellectual abilities was in the borderline range (Full Scale IQ of 76). Her perceptual reasoning abilities were on the low end of the average range (90). Her verbal comprehension abilities were on the low end of the low average range (81). Her short-term memory was borderline (74), and her performance speed was in the high borderline range (78). (Exhibit 12.)

14(d). In the area of adaptive functioning, Dr. Levi administered the Vineland

Adaptive Behavior Scales II (VABS-II); Claimant's parents provided the responses necessary for the completion of this test. Her general adaptive functioning was in the borderline range (standard score 74). Her communication skills were in the low average range (82), her daily living skills were in the borderline range (74), and her socialization skills were in the borderline range (71). (Exhibit 12.)

14(e). To address autism concerns, Dr. Levi administered the Autism Diagnostic Observation Schedule - Module 3 (ADOS-3) and the Autism Diagnostic Interview – Revised (ADI-R), with Claimant's parents providing the necessary responses. The ADOS-3 is based on examiner ratings of direct social and play interactions via semi-structured play scenarios designed to give samples of typical communication patterns and social interactions. On the ADOS-3, Claimant met the autism cutoff in communication, but the social interaction and overall score were below the autism cutoff, although Dr. Levi noted that it was "in the autism spectrum range." (Exhibit 12.) Claimant's scores on the ADI-R "indicated social interaction meeting the autism cutoff, but communication and repetitive behaviors were below the cutoff for autism." (Exhibit 12.)

14(f). In assessing whether Claimant had mental retardation, Dr. Levi noted:

> The DSM-IV-TR (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision; Washington, DC; American Psychiatric Association; 2000)[3] diagnosis of mental retardation requires significantly sub-average intellectual functioning with concurrent deficits in adaptive functioning. Her adaptive skills are borderline on the VABS-

[3] The Administrative Law Judge takes official notice of the DSM-IV-TR as a generally accepted tool for diagnosing mental and developmental disorders.

> II. [Claimant's] intellectual abilities are in the borderline range, but her verbal abilities are in the low average range and perceptual reasoning is in the low end of average range, thus, she does not appear to be mentally retarded. (Exhibit 12.)

14(g). In assessing whether Claimant has autistic disorder, Dr. Levi considered the 12 criteria set forth in the DSM-IV-TR for a diagnosis of autistic disorder, "six of which must be present (including qualitative impairment in at least two areas of social interaction, qualitative impairment in one area of communication and one restricted or repetitive activity) Dr. Levi found qualitative impairment in two areas of her social interaction in that she demonstrated a "failure to develop peer relationships appropriate to developmental level," and a "lack of social or emotional reciprocity" (in being too affectionate, and being immature, failing to socially reciprocate at her age level").[4] Dr. Levi also found qualitative impairment in one area of her communication in that she demonstrated "delay in . . . the development of spoken language." However, Dr. Levi noted:

> [Claimant] demonstrated [only] 3 qualitative impairments, and thus, she does not meet the DSM-IV-TR criteria for Autistic Disorder. Based on the current observation, ADOS results and report about current autistic-like symptoms, she meets the DSM-IV-TR criteria for Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS). Although she

[4] "Qualitative impairment" means that the impairment interferes with the person's ability to function in their environment. (Testimony of Sandi J. Fischer, Ph.D.)

> demonstrated a lot of symptoms of Attention-Deficit/Hyperactivity Disorder, it is not diagnosed separately in the presence of the PDD NOS, however, it is important to address the symptoms of inattention and hyperactivity as well. (Exhibit 12.)

14(h). Dr. Levi diagnosed Claimant with PDD NOS. She recommended that Claimant's special education class and supports be continued due to her deficits in social, language, inattention, hyperactivity, and autistic symptoms. Additionally, she recommended Applied Behavioral Analysis intervention to help Claimant interact with people in socially appropriate ways, increase ability to converse, and improve reciprocity and peer relationships. (Exhibit 12.)

15. On December 14, 2011, the NLACRC eligibility committee determined that Claimant is not eligible for regional center services. (Exhibit 15.)

16. On December 20, 2011, NLACRC sent a letter and a Notice of Action to Claimant's parents, informing them that they had determined Claimant was not eligible for regional center services. On December 23, 2011, Claimant's mother requested a fair hearing. (Exhibit 1.)

17. On February 2, 2012, NLACRC Contract Officer, Rhonda Campbell, met with Claimant's parents to discuss Claimant's appeal of NLACRC's denial of eligibility. The parties agreed that a school observation and teacher interview would be conducted by a regional center vendored psychologist. (Exhibit 16.)

18(a). On February 8, 2012, clinical psychologist, Sandi J. Fischer, Ph.D., arrived at Claimant's school to conduct the agreed-upon school observation and teacher interview. She had reviewed several documents in preparation for the school observation, including: the May 2007 developmental evaluation and speech and language evaluation; the September 2011 NLACRC social assessment; the October 2011

psychological evaluation by Dr. Levi; Claimant's February 2011 IEP; and a note from Claimant's special education teacher. (Exhibit 17.)

18(b). Claimant's teacher reported that her "biggest concern about [Claimant] is her social skills." She stated that Claimant "wants friends desperately," but she does not have the skills to maintain friendships. Claimant hits, grabs and "sometimes says inappropriate things." She fails to "read facial expressions or body language" and "invades the proximity" of her peers. (Exhibit 17.)

18(c). Based on her records review, her observations and her interview with Claimant's teacher, Dr. Levi opined that Claimant does not meet diagnostic criteria for a DSM-IV-TR diagnosis of Autistic Disorder. (Exhibit 17.)

18(d). Although Dr. Fischer did not see behaviors suggestive of Autistic Disorder, she did note that Claimant is socially immature and had trouble problem solving. She recommended that Claimant receive more intensive services for her speech and language delays and that she participate in a social skills small group training through a community mental health agency. (Testimony of Dr. Fischer.)

19. On February 23, 2012, NLACRC sent Claimant's parents a letter, informing them that, following Dr. Fischer's school observation, the eligibility committee determined that Claimant does not have a developmental disability entitling her to regional center services. (Exhibit 18.)

20. At the fair hearing, Dr. Fischer testified credibly on behalf of the Service Agency. Her testimony established the following:

(a) Pervasive developmental disorders include Autistic Disorder, Asperger's Disorder, and PDD NOS. With PDD NOS, a person will demonstrate marked impairment typical of Autistic Disorder in some areas but not as globally as with Autistic Disorder. Only Autistic Disorder is an eligible diagnosis for

regional center services. A claimant with a pervasive developmental disorder which is not Autistic Disorder is not eligible to receive regional center services.

(b)(1).In reviewing Claimant's 2007 developmental evaluation and her speech and language evaluation, there were no documented behaviors that were suggestive of Autistic Disorder. At that age (34 months), evaluators would typically observe more autistic type behaviors, such as hand flapping, lining up toys or repetitive language.

(b)(2).In reviewing Claimant's 2008 IEP, when she was four years old, Claimant was described as social, affectionate, seeking adult attention, and curious about the world around her. This was a time when obvious autistic features would have manifested, but there was nothing in the 2008 IEP that was suggestive of Claimant suffering from Autistic Disorder. Furthermore, all her later IEPs noted that Claimant continued being affectionate, loved making others happy, had no problems with transitions and accepted change, all of which were not suggestive of Autistic Disorder.

(b)(3).Despite some autistic-like behaviors, Claimant does not meet the full criteria for a diagnosis of Autistic Disorder.

(c)(1).The school district's initial categorization of Claimant under the category of "Mental Retardation" was made solely for the purposes of determining Claimant's eligibility for special education services under the school district's categories and was not a formal diagnosis of Mental Retardation using accepted diagnostic tools. The school district's educational categorization was based upon different and less stringent criteria than those set forth in the DSM-IV-TR; school districts are not allowed to use IQ tests to evaluate a child's cognitive functioning.

(c)(2).For a DSM-IV-TR diagnosis of Mental Retardation, administration of an IQ test will elicit a Full Scale IQ score of 70 or below. However, it is important to look at the configuration of subtest scores; Mental Retardation profiles are flat, without areas of weakness and strength. Cognitive functioning will be significantly below others of similar age, and there will also be significant deficits in adaptive functioning. It is important to note that deficits in adaptive functioning can result from many factors other than cognitive deficits, such as lack of motivation and mental illness. Students with learning disabilities may have problems with social interaction due to difficulty reading social cues.

(c)(3). Despite Claimant's school district finding her eligible for special education services as child with Mental Retardation, Claimant met virtually all the goals set in her program and then began performing at grade level in mathematics, which is not expected with a mentally retarded child. Despite her performing at grade level in mathematics, the school district incorrectly continued to categorize Claimant under the category of Mental Retardation. The school district ultimately recognized that she was functioning in the average to low average range, and her category for eligibility was changed from Mental Retardation to specific learning disability. Thereafter, Claimant continued to work at grade level in mathematics and was able to read grade level material independently.

(c)(4).Claimant does not meet the criteria for a diagnosis of Mental Retardation.

(d)(1).When the NLACRC eligibility committee assesses whether a claimant is eligible for regional center services under the "fifth category," it must determine whether the person either functions in a manner similar to persons with mental retardation or requires treatment similar to that for persons with

mental retardation. The committee first looks at the claimant's IQ and the configuration of scores from the IQ test to ascertain information about the claimant's cognitive ability. A person who functions similar to someone with mental retardation typically obtains scores at the lower end of the borderline range of cognitive functioning. As IQ scores rise above 70, the committee looks to the claimant's adaptive deficits to determine what is causing the deficits and must determine that the adaptive deficits are related to cognitive functioning rather than other factors such as depression or mental status. In determining if a claimant needs treatment similar to that for persons with mental retardation, the committee must find that the claimant requires treatment that is concrete and requires skills to be broken down into small steps with repeated practice.

(d)(2).In this case, Claimant's subtest scores in perceptual reasoning and verbal comprehension were both in the average range, and she was able to work at grade level in mathematics and reading. This would suggest against a finding that she suffers from a condition similar to mental retardation. There was no evidence that she requires treatment similar to a person with mental retardation. Consequently, Claimant does not meet the criteria for fifth category eligibility.

21. Claimant's parents did not testify at the fair hearing.

22. The totality of the evidence did not establish that Claimant suffers from Autistic Disorder.

23. The totality of the evidence did not establish that Claimant suffers from Mental Retardation.

24. The totality of the evidence presented at the fair hearing did not establish that Claimant suffers from a condition similar to mental retardation or requiring

treatment similar to persons with mental retardation.

LEGAL CONCLUSIONS

1. Claimant did not establish that she suffers from a developmental disability entitling her to Regional Center services. (Factual Findings 1 through 24.)

2. 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 her eligibility for services, the burden is on the appealing claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met her burden of proof in this case.

3. In order 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 which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . This [includes] mental retardation, cerebral palsy, epilepsy and autism. [It also includes] disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4(a). To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a

"substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (l):

> "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:

(1) Self-care.

(2) Receptive and expressive language.

(3) Learning.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

4(b). 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.

5(a). In addition to proving a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512. The first four categories are specified as: mental retardation, epilepsy, autism and cerebral palsy. The fifth and last category of eligibility, also known as the "fifth category," is listed as "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).) This category is not further defined by statute or regulation.

5(b). Whereas the first four categories of eligibility are very specific, the disabling conditions under this 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. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them.

5(c). While the Legislature did not specifically define the fifth category, it did require that the qualifying condition be "closely related" (Welf. & Inst. Code, § 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." (Welf. & Inst. Code, § 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 and/or adaptive deficits which render that individual's disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). 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 his performance renders him like 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.

6. In order to establish eligibility, a claimant's substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of "developmental disability" (Welf. & Inst. Code, § 4512 and 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 with either a psychiatric disorder, a physical disorder, or a learning disability, could still be eligible for services. However, someone whose conditions originate from just 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.

7. Although Claimant maintains that she is eligible for regional center

services, she currently does not have any of the qualifying diagnoses.

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8. The DSM-IV-TR discusses autism in the section entitled "Pervasive Developmental Disorders." (DSM-IV-TR, pp. 69 - 84.) The five "Pervasive Developmental Disorders" identified in the DSM-IV-TR are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS. The DSM-IV- TR, section 299.00 states:

> The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual. Autistic Disorder is sometimes referred to as early infantile autism, childhood autism, or Kanner's autism. (Emphasis in original.)
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> (*Id.* at p. 70.)

9. The DSM-IV-TR lists criteria which must be met to provide a specific diagnosis of an Autistic Disorder, as follows:

A. A total of six (or more) items from (1), (2) and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

(d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gestures or mime)

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

(c) stereotyped and repetitive use of language or idiosyncratic language

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals.

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

(d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in communication, or (3) symbolic or imaginative play.

C. The disturbance causes clinically significant impairment in social, occupational, or other important areas of functioning.

(*Id.* at p. 75.)

10. In this case, Claimant alleges that she should be eligible for regional center services under the qualifying disability of autism. However, she has not been diagnosed with Autistic Disorder. According to the DSM-IV-TR, specific clinical criteria must be evident to diagnose Autistic Disorder. While Claimant does manifest some impairment in her communication and social skills, no psychologist specifically found that she satisfied the required number of elements within the criteria of the DSM-IV-TR to diagnose her with Autistic Disorder. Instead, she has met only the criteria sufficient to diagnose her with PDD NOS. Consequently, Claimant has not established that she is eligible for regional center services under the diagnosis of autism.

11. The DSM-IV-TR describes Mental Retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas:

communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the

> subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.
>
> Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR at pp. 39 - 42.)

12. Regarding Mild Mental Retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

> [Persons with Mild Mental Retardation] typically develop social and communication skills during the preschool years

> (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(*Id.* at pp. 42 - 43.)

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13. Regarding the differential diagnosis of Borderline Intellectual Functioning (IQ level generally 71 to 84), the DSM-IV-TR states:

> Borderline Intellectual Functioning describes an IQ range that is higher than that for Mental Retardation (generally 71-84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

(*Id.* at p. 48.)

14. Claimant does demonstrate deficits in certain academic skills and some areas of cognitive functioning, as well as some deficits in adaptive functioning (in the area of communication and social skills). However, Claimant does not meet all the criteria under the DSM-IV-TR for a diagnosis of Mental Retardation or Mild Mental Retardation. Consequently, Claimant has not established that she is eligible for regional center services under the diagnosis of Mental Retardation.

15. Furthermore, the evidence did not demonstrate that Claimant suffers from a condition similar to Mental Retardation or that she requires treatment similar to that required for mentally retarded individuals. Based on the foregoing, Claimant has not met her burden of proof that she falls under the fifth category of eligibility.

16. Claimant has also failed to meet her burden of proof that she has a substantial disability as defined by Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54001.

17. The weight of the evidence does not support a finding that Claimant is eligible to receive regional center services.

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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

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

DATED: June 8, 2012

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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.