BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>CLAIMANT,<br><br>vs.<br><br>FAR NORTHERN REGIONAL CENTER,<br><br>Service Agency. | OAH No. 2014050944 |

# DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Redding, California, on August 20, 2014.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Claimant was represented by her aunt, who is also her guardian.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on August 20, 2014.

## ISSUE

Is claimant eligible to receive regional center services and supports based on a qualifying condition of autism pursuant to Welfare and Institutions Code section 4512?[1]

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## FACTUAL FINDINGS

1. Claimant is a fifteen-year-old girl who lives in the family home with her aunt/guardian (aunt) and uncle. They have three grown children, who are living independently, and have also adopted a young nephew who lives with them in the family home.

Claimant's aunt obtained guardianship over her when she was approximately five years old. It was reported that claimant was born with drugs in her system and was neglected by her biological mother who, from birth to age three, would leave claimant at her aunt and uncle's house for months at a time when she and claimant's father were fighting. At age three, claimant's father went to jail, leaving only her mother to care for her. At age five, claimant's mother left her at her aunt and uncle's home and never returned.

2. Over the years, claimant's aunt reports struggling with claimant's behaviors. She originally sought regional center services for claimant in 2008, based on a concern of "significant cognitive delays." After testing, claimant was not found eligible and her case was closed. In November, 2010, claimant's aunt again approached the regional center as she "continued to think that something was going on with [claimant] that has not yet been

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[1]Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

diagnosed." She requested an autism evaluation and FNRC referred claimant to Clifford Graham, Ph.D.

3. Dr. Graham completed an Autism Assessment on January 14, 2011, and concluded that claimant's "scores do not qualify her for a diagnosis of Autistic Disorder. She does exhibit a number of behaviors associated with Autism, which are primarily in the domain of social interaction. Her scores do qualify her for a diagnosis of Pervasive Developmental Disorder NOS." (PDD-NOS).

4. FNRC chose to serve claimant based on her PDD-NOS diagnosis, with reassessment recommended in three years, in January 2014. The regional center provided case management services and authorized in-home respite services.

5. On November 7, 2012, claimant was placed in a crisis stabilization home for children with Autism or other Pervasive Developmental Disorders (PDD) after her aunt and uncle were no longer able to manage her behavior. She reportedly did not demonstrate any significant behavior problems in the crisis home and was transferred to the Remi Vista Bear Mountain Home, which is designed for long-term care for children with Autism or another PDD. She returned to the family home on April 26, 2013.

6. Robert Boyle, Ph.D., is a FNRC Staff Psychologist. He testified that, on January 3, 2014, as claimant's reassessment date approached, he completed a Psychological Records Review. In his review, Dr. Boyle considered Dr. Graham's evaluation, as well as evaluations from the Tehama County Department of Evaluation and Remi Vista psychologist, Benjamin Ford, Ph.D.

Based on his records review, Dr. Boyle recommended reevaluation for "a couple of reasons. First, in looking at Dr. Graham's evaluation- [claimant] did not meet any DSM-IV criteria under the category of restricted and repetitive behaviors. With DSM-5 now being used, it is possible that the results (ASD dx) might be different. Second, I think this is a fairly complex case with many 'strands'; possible organic deficits, already established psychiatric

diagnoses/issues, and a complicated guardian/client relationship (relationship between [aunt] and [claimant])."

Dr. Boyle recommended taking the case to the FNRC Eligibility Review Team for approval of an autism spectrum evaluation. He recommended Dr. Reid McKellar because "he had seen [claimant] in the past and since he is one of the evaluators we refer to with more complex cases with psychiatric components." The Eligibility Review Team approved an Autism Spectrum Disorder (ASD) evaluation through Dr. McKellar.

7. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500 et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines "developmental disability" as follows:

> "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual…. [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 [commonly known as the "fifth category"], but shall not include other handicapping conditions that are solely physical in nature.

8. California Code of Regulations, title 17, section 54000, further defines the term "developmental disability" as follows:

> (a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy,

autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of

generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

9. Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" as:

(l) The existence of significant functional limitation 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.

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

(a) "Substantial disability" means:

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

(2) The existence of functional limitation, 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:

(1) Receptive and expressive language.

(2) Learning.

(3) Self-care.

(4) Mobility.

(5) Self-direction.

(6) Capacity for independent living.

(7) Economic self-sufficiency.

11. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR[2]) was the standard for diagnosis and classification at the time claimant received her PDD-NOS diagnosis from Dr. Graham.

DSM-IV-TR section 299.00, Autistic Disorder, states:

> The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual . . . The impairment in reciprocal social interaction is gross and sustained . . . The impairment in communication is also marked and sustained

[2] The DSM-IV-TR is a multiaxial system which involves five axes, each of which refers to a different domain of information as follows:

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| Axis I | Clinical Disorders |
| | Other Conditions That May Be a Focus of Clinical Attention |
| Axis II | Personality Disorders |
| | Mental Retardation |
| Axis III | General Medical Conditions |
| Axis IV | Psychosocial and Environmental Problems |
| Axis V | Global Assessment of Functioning |

and affects both verbal and nonverbal skills . . . Individuals with Autistic Disorder have restricted, repetitive, and stereotyped patterns of behavior, interests, and activities.

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

12. The DSM-IV-TR classified PDD-NOS separately from Autistic Disorder as follows:

299.80 Pervasive Development Disorder Not Otherwise Specified: This category shall be used when there is a severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotyped behaviors, interests, and activities, but the criteria are not met for a specific Pervasive Developmental Disorder, Schizophrenia, Schizotypal Personality Disorder, or Avoidant Personality Disorder.

13. Dr. McKellar completed his comprehensive "best practices" assessment of claimant and provided his report dated May 1, 2014. The Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5) was released in May 2013. It no longer recognizes a specific diagnosis of autistic disorder. The DSM-5 established a diagnosis of autism spectrum disorder which encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

The plain language of the Lanterman Act's eligibility categories includes "autism" but does not include other Pervasive Developmental Disorders (PDD) diagnoses in the DSM-IV-TR (Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and PDD-NOS). The Lanterman Act has not been revised since the publication of the DSM-5 to reflect the current terminology of Autism Spectrum Disorder. Claimant was originally diagnosed under the DSM-IV-TR, while the DSM-5 was the operative version during her most recent evaluation. Dr. McKellar evaluated claimant's eligibility under both the DSM-IV-TR and the DSM-V.

14. DSM-V section 299.00, Autism Spectrum Disorder, states:

> The essential features of Autism Spectrum Disorder are persistent impairment in reciprocal social communication and social interaction (Criterion A), and restricted, repetitive patterns of behavior, interests or activities (Criterion B). These symptoms must be present in early childhood and limit or impair everyday functioning. (Criterion C and D). . . The impairments in communication and social interaction specified in Criterion A are pervasive and sustained . . . Manifestations of the disorder also vary greatly depending

on the severity of the autistic condition, developmental level, and chronological age; hence, the term *spectrum*. Autism spectrum disorder encompasses disorders previously referred to as early infantile autism, childhood autism, Kanner's autism, high-functioning autism, atypical autism, pervasive developmental disorder not otherwise specified, childhood disintegrative disorder, and Asperger's disorder.

To diagnose Autism Spectrum Disorder, it must be determined that an individual has persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history: (1) deficits in social-emotional reciprocity, (2) deficits in nonverbal communication behaviors used for social interaction, and (3) deficits in developing, maintaining, and understanding relationships. The individual must also have restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history: (1) stereotyped or repetitive motor movement, use of objects or speech, (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior, (3) highly restricted, fixated interests that are abnormal in intensity or focus, and/or (4) hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment. In addition, symptoms must be present in the early developmental period and must cause clinically significant

impairment in social, occupational, or other important areas of current functioning.

15. As part of Dr. McKellar's evaluation he conducted observations and interviews, and completed a full records review that included prior psychological testing/records, educational records and mental health clinical records. He also utilized the following testing instruments:

Autism Diagnostic Observation Schedule-2, Module 4 (ADOS)

Adaptive Behavior Assessment System-Second Edition (ABAS)

16. Dr. McKellar first evaluated claimant on January 22, 2009, at the request of the Tehama County Mental Health Children's Access Treatment Team, for the purpose of obtaining treatment diagnoses and related treatment recommendations. At that time, Dr. McKellar concluded as follows:

| | | |
|---|---|---|
| Axis I | 309.81 | Post Traumatic Stress Disorder in partial remission |
| | 314.00 | Attention Deficit Hyperactivity Disorder inattentive type |
| | 319.00 | Learning Disorder NOS |
| Axis II | r/o 299.80 | Pervasive Developmental Disorder NOS |
| Axis III | Organic Impairment r/o seizure disorder | |
| Axis IV | attachment issues | |
| Axis V | 37 | |

17. Dr. McKellar's May 2014 report indicates that claimant "has exhibited deficits in impulse control, frustration tolerance and attention span, and has had difficulty processing intense affect throughout development." He noted that she was receiving mental health treatment through Greenville Rancheria and has received counseling services through Remi Vista. She was "prescribed Invega (for anger control), Prozac and Strattera". . .and "her symptoms of emotional reactivity and unusual behaviors have been muted due to the

impact of her medication." Claimant also receives special education services due to a qualifying condition of Specific Learning Disability.

Claimant received medication management from Greenville Rancheria based on their clinical assessment of ADHD NOS (314.9), Obsessive Compulsive Disorder (300.3) and Mood Disorder, Other (293.83)

18. In a DSM-IV Review of Symptoms, Dr. McKellar concluded that claimant did not meet criteria for any deficits in the Reciprocal Social Interaction domain. Specifically, he included that "[claimant] responds positively to praise, she reportedly asks for help at school and she tries to please her teachers . . . although she was subdued and withdrawn for much of the evaluation, [claimant] did exhibit empathy for others, and she is apparently capable of reciprocal interactions in her educational setting."

In the Deficits in Communication domain, claimant met criteria for one item, "play that is not appropriate for developmental level," based on past reports.

In the Restricted, Repetitive Behaviors, Interests or Activities domain he concluded that claimant does not meet criteria for any of the items.

Dr. McKellar concluded this review by stating "[in] summary, the DSM-IV review of symptoms indicates that [claimant] does not meet criteria for Autistic Disorder, Asperger's Disorder or Pervasive Developmental Disorder, NOS."

19. In a DSM-5 Review of Symptoms, Dr. McKellar concluded that claimant does not meet criteria for any of the items in the Persistent Deficits in Social Communication and Social Interactions Across Multiple Contexts domain or the Restricted, Repetitive Patterns of Behavior, Interests or Activities domain.

Dr. McKellar concluded this review by stating "[in] summary, the DSM-5 review of the diagnostic criteria for Autism Spectrum Disorder indicates that [claimant] does not meet diagnostic criteria for Autism Spectrum Disorder."

20. Claimant was administered the Autism Diagnostic Observation Schedule-2 Module 4 (ADOS-2). The Autism Diagnostic Observation Schedule, Second Edition is "a semi-structured, standardized assessment of communication, social interaction, play/imaginative use of materials, and restricted and repetitive behaviors for individuals referred due to possible presence of an Autism Spectrum Disorder." The ADOS is considered by practitioner's to be "the gold standard" when assessing for ASD. Her scores were as follows:

> Communication
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> During administration of the ADOS-2, [claimant] did not exhibit use of stereotyped words/phrases. [Claimant] had some difficulty engaging in conversations, as she tended to ignore leads and her responses to overtures were subdued. [Claimant] utilized minimal use of gestures during the evaluation process.
>
> On the communication domain, [claimant] obtained a score of 2.
>
> Reciprocal Social Interaction
>
> [Claimant's] eye contact was fairly well sustained, and her facial expressions were affectively congruent. [Claimant's] social responses were muted due to the presence of depressed affect, and she rarely used social overtures. [Claimant's] responses to the writer's overtures were quiet and lacking in enthusiasm.

On the reciprocal social interaction domain, [claimant] obtained a score of 4.

Imagination/Creativity

[Claimant's] approach to play was concrete and lacking in creativity or use of imagination.

On imagination/creativity, [claimant] obtained a score of 2.

Stereotyped Behaviors and Restricted Interests

During administration of the ADOS-2, [claimant] did not exhibit unusual sensory interests, motor mannerisms, repetitive behaviors or compulsions.

[Claimant] obtained a score of 0 on the stereotyped behaviors and repetitive interests domain.

ADOS-2 Summary

[Claimant's] performance on the ADOS-2 resulted in a score of 6, which is below cutoff for an Autism Spectrum classification.

21. Dr. McKellar also administered the Adaptive Behavior Assessment System-Second Edition (ABAS-II). "The ABAS-II is an instrument designed to provide a norm-referenced assessment of adaptive skills for individuals ages birth to 89 years. The range of adaptive skills and broad domain scores correspond to the specifications identified by the American Association on Mental Retardation and the DMS-IV."

The test is administered as a questionnaire, measuring adaptive skills in nine areas as reported by claimant's aunt. The following scores were obtained:

| | | Composite Score | Percentile Rank |
|---|---|---|---|
| General Adaptive | Composite | 53 | 0.1 |
| Conceptual | | 61 | 0.5 |
| Social | | 55 | 0.1 |
| Practical | | 50 | <0.1 |

22. Part of the evaluation process included obtaining information through an interview with claimant's aunt, who described issues she was having with claimant's behaviors in the home. She reported that claimant continues to struggle with interpersonal relationships, has difficulty with pragmatics, struggles with conversation skills and engages in frequent use of monologues. She reportedly has few interests, other than watching television, has an odd sense of humor and has difficulty understanding sarcasm. She is not affectionate with others and exhibits a deficit in empathy. Claimant has exhibited unusual finger posturing and she is prone to obsessive thinking and rigid behaviors; however, these symptoms seem to be mitigated by her medication regime.

23. Dr. McKellar also reviewed school records from the Tehama County Department of Education. Claimant was first identified for special education for language delays while in kindergarten. She received speech and language services and resource specialist services for reading. She met, and continues to meet, eligibility requirements for special education as a student with a Specific Learning Disability (SLD).

24. Red Bluff Joint Union High School District completed claimant's most recent triennial special education evaluation on May 1, 2014. In the area of speech and language, it was noted that claimant was exited from speech and language services after reevaluation in the sixth grade. She remained eligible for services under the SLD category. There was no mention of ASD concerns, and of specific interest are the comments written under Social/Behavioral Functioning:

> [Claimant's] teachers indicate that she interacts well with others including peers and adults. She doesn't tend to seek out others as much but responds appropriately in conversation with adults and other students. Teachers indicate that she is always on task and very motivated to do well. Strengths were indicated in that she demonstrates a great attitude, positive influence, extremely conscientious, nice, friendly, fun, attentive and diligent about her work. In a conversation with [claimant], she indicated that she likes High School and would like to participate in more extra-curricular sports next year such as track and cross-country. Science is her favorite subject while math is her most difficult subject. She indicated that she has a couple small groups of friends that she will hang out with although she does describe herself as shy and therefore sometimes it's more challenging to establish new friendships. She mentioned her strengths in her willingness to work hard. [Claimant] appears to have successfully transitioned into High School. No significant concerns at this time.

25. Claimant's current Tehama County SELPA Individualized Education Program (IEP), dated May 6, 2014, notes a primary disability as Specific Learning Disability (SLD), with no secondary disability. She is on a diploma track.

26. Dr. McKellar obtained information from School Psychologist Nancy Williams on April 30, 2014, and May 1, 2014. He reported receiving the following information from Ms. Williams:

> Ms. Williams spoke to several of [claimant's] teachers, and the information she collected was inconsistent with family reports regarding [claimant's] behavior. [Claimant] was described as an adolescent who is able to engage in reciprocal conversations with peers and adults, and in one class she has a "best friend." [Claimant] is described as kind, considerate and sensitive about the feelings of others. [Claimant] is able to verbalize her academic needs and wants, and she asks for help when necessary. [Claimant] is somewhat socially insecure, thus at times she comes across as shy. [Claimant's] interactions with peers and teachers is described as "great, excellent," and she is described as a hard worker who is "always on task." [Claimant] can be "friendly and fun" in her peer interactions.
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> [Claimant] exhibits self-directed behaviors at school, and she is well liked by teachers and peers. Ms. Williams also shared that educational staff are "surprised" that [claimant] is being evaluated for an Autism Spectrum Disorder, and neither Ms. Williams nor [claimant's] teachers could identify any concerns suggestive of autism.

27. Dr. McKellar also considered a Remi Vista, Inc. Psychological Evaluation conducted by Benjamin Ford, Ph.D., on February 8, 2013 and February 14, 2013. In his report dated March 19, 2013, Dr. Ford stated that the reason for the evaluation was "for the purpose of clarifying [claimant's] diagnosis and assessing her cognitive and psychological functioning to facilitate the development of treatment recommendations."

According to the referral, claimant's aunt "reported the following problems with claimant's behavior: verbal aggressiveness, temper tantrums, yelling, threatening, and targeting her aggression towards her 1-year-old cousin (who also lives in the aunt's home)."

28. Dr. Ford assessed claimant in areas including intellectual functioning, behavioral functioning, and personality functioning. For behavioral functioning, he utilized the Child Behavior Checklist for Children (CBCL) and the Teacher's Report Form (TRF). Claimant's aunt completed a CBCL and her former middle school resource teacher completed a TRF. In addition, two residential staff counselors, Marcus and Joel, from claimant's then-current residential placement at Bear Mountain each completed separate CBCLs.

On the CBCL completed by Marcus, claimant's "Total Problems, Internalizing, and Externalizing scores were in the normal range for girls her age. Her scores on the Anxious/Depressed, Somatic Complaints, Social Problems, Thought Problems, Attention Problems, Rule-Breaking Behavior, and Aggressive Behavior syndromes were in the normal range. Her score on the Withdrawn/Depressed syndrome was in the borderline clinical range. On the DSM-oriented scales, [claimant's] scores on all rated scales were in the normal range."

On the CBCL completed by Joel, claimant's "Total Problems, Internalizing, and Externalizing scores were again in the normal range for girls her age. Her scores on the Anxious/Depressed, Withdrawn/Depressed, Somatic Complaints, Social Problems, Thought Problems, Rule-Breaking Behavior, and Aggressive Behavior syndromes were in the normal range. Her score on the Attention Problems syndrome was in the borderline clinical range. On the DSM-oriented scales, [claimant's] scores on all rated scales were again in the normal range."

The CBCL completed by claimant's aunt provided the following information:

> claimant's "Total Problems, Internalizing, and Externalizing scores were all in the clinical range above the 90th percentile for girls her age (in stark contrast to the two prior raters). Her scores in the Anxious/Depressed, Withdrawn/Depressed, Somatic Complaints, Social Problems, Thought Problems and Aggressive Behavior syndromes were in the clinical range (above the 97th percentile) and her score on the Rule-Breaking Behavior syndrome was in the borderline clinical range (93rd to 97th percentiles). No scores were in the normal range (another stark contrast to the two previous raters). On the DSM-oriented scales [claimant's] score on the Somatic Problems scale was in the normal range. Her scores on the Anxiety Problems, Oppositional Defiant Problems, and Conduct Problems scales were in the clinical range (above the 97th percentile). Her scores on the Affective Problems and Attention Deficit/Hyperactivity Problems scales were in the borderline clinical range (93rd to 97th percentiles). These results often suggest that the DSM should be consulted to determine whether the client meets diagnostic criteria for anxiety disorders, Oppositional Defiant Disorder, and conduct problems. Her scores in the borderline clinical range often suggest that the DSM should be consulted to determine whether the client might meet diagnostic criteria for disorders characterized by problems included on those scales."

Finally, on the TRF completed by claimant's former resource teacher, "Total Problems and Externalizing scores were again in the normal range for girls her age and her

Internalizing score was in the borderline clinical range. Her scores on the Withdrawn/Depressed, Somatic Complaints, Social Problems, Thought Problems, Attention Problems, Rule-Breaking Behavior, and Aggressive Behavior syndromes were in the normal range. Her score on the Anxious/Depressed syndrome was in the borderline clinical range. On the DSM-oriented scales, [claimant's] scores on Affective Problems, Somatic Problems, Attention Deficit/Hyperactivity Problems, Oppositional Defiant Problems, and Conduct Problems were all in the normal range. Her score on the Anxiety Problems scale was in the borderline clinical range (93rd to 97th percentiles)."

29. Dr. Ford's Diagnostic Impression included the following pertinent information:

> There are blatant distinctions between the information reported by [claimant's] aunt and the information conveyed by [claimant's] residential counselors and teacher, and my observations of [claimant]. It is the evaluator's belief that the problematic behaviors reported exclusively by [claimant's aunt] (e.g., verbal aggressiveness, temper tantrums, yelling, threatening, etc.) are an accurate description of her experiences with [claimant] (and are not feigned). It is believed that these problematic behaviors (on the part of [claimant]) are only present in the presence of [claimant's aunt] (as suggested by the CBCLs and TRF) due to dynamics of [claimant's aunt's] and [claimant's] parent-child interaction style (the evaluator understands [claimant's aunt] is not [claimant's] biological mother but she is her acting parent at this point in [claimant's] life).

30. In Dr. Ford's summary, he concluded that claimant "has exhibited problematic behaviors in the home of her aunt and uncle. [Claimant] is fully capable of demonstrating appropriate behavior as evidenced by the fact that she has consistently demonstrated it in a variety of places and situations. Based on the results of this evaluation, it appears that the dynamics between [claimant] and [her aunt] best explain her problematic behaviors and provide the best paradigm from which to create a treatment plan . . . [t]he results of this evaluation suggest a treatment plan that focuses on altering the dynamics between [claimant] and [her aunt]. The plan should focus on decreasing negativity, increasing nurturance, and breaking the parent-child coercive cycle."

31. Dr. McKellar also considered the results of Dr. Graham's January 14, 2011, assessment. While Dr. Graham gave claimant a PDD-NOS diagnosis, he concluded that she did not meet the DSM-IV-TR diagnostic criteria for Autistic Disorder. Specifically, he found that claimant did not exhibit any restricted, repetitive and stereotyped pattern of behavior, interests, or activities.

32. Upon completion of his evaluation, Dr. McKellar concluded that claimant "does not meet diagnostic criteria for a DSM-IV Autism Spectrum Disorder (including PDD-NOS) or DSM-5 Autism Spectrum Disorder." He gave the following diagnoses:

DSM-5 Clinical Diagnoses

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| 311 | Unspecified Depressive Disorder |
| V61.20 | Parent-Child Relational Problem |

Dr. McKellar recommended that claimant and her family "may benefit from functional family therapy to address longstanding family discord." And, claimant "may benefit from Cognitive Behavior Therapy."

33. The FNRC Eligibility Team determined that claimant did not meet the eligibility criteria for regional center services. As a result of that determination, a Notice of

Proposed Action (NOPA) was issued on May 9, 2014, informing claimant that FNRC determined she was not eligible for regional center services. The NOPA stated:

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> Reason for action:
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> [Claimant] does not have intellectual disability and shows no evidence of epilepsy, cerebral palsy, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. Psychological records from J. Reid McKellar dated 04/09/2014 show evidence of Unspecified Depressive Disorder and Parent Child Relational Problem, but that is not a qualifying condition for regional center services.

34. Claimant's aunt filed a Fair Hearing Request dated May 15, 2014, disputing claimant's ineligibility for regional center services. The reason for requesting a fair hearing was, "I disagree with [claimant] being dropped from FNRC services." The Request sought "A full assessment without [claimant] being medicated to determine autism or any other disabilities, such as organic impairment or intellectual disability."

35. Claimant's aunt testified to her concerns with claimant's various behaviors that she finds difficult or unusual and questioned whether those behaviors evidence autistic traits. She explained her experience with claimant in the home setting and expressed concern with what claimant would do when she graduated from high school. She also asked to have claimant removed from her medications and reevaluated.

36. Lisa Benaron, M.D., FAAP, FACP, is the Medical Director for FNRC. She is double-board certified in internal medicine and pediatrics and is an expert in neurodevelopmental disabilities. Diagnosing components of autism spectrum disorders is

one of her main areas of expertise. As a member of the FNRC Eligibility Team, Dr. Benaron completed a thorough review of all available records and determined that claimant does not meet the qualifications for an ASD.

Dr. Benaron testified, "Dr. McKellar did not see any behaviors suggestive of an autism spectrum disorder, nor was the score on the ADOS consistent with an ASD." Dr. Benaron agreed with Dr. McKellar's conclusions and noted that claimant would also fail to meet the Lanterman Act requirement that an individual be "substantially handicapped." She testified, "it was clear in everything you read that [claimant's] behaviors outside the home are very different than those in the home. A variety of observers in a variety of settings did not see the same behaviors that were documented in the home setting."

Dr. Benaron opined that claimant's aunt's concerns are "very real" and "this does not mean that there are no issues or struggles. But, there is overwhelming evidence that she does not have an Autism Spectrum Disorder."

37. Dr. Boyle also testified that, in his professional opinion, claimant does not have an ASD. Both Dr. Boyle and Dr. Benaron addressed claimant's aunt's request to reassess claimant without her medications. Dr. Boyle explained that removing claimant from her medications would require guidance from her prescribing physician. They both explained that claimant's medications "bring her to baseline, controlling for the variability in her focus and concentration." They do not mask symptoms of ASD.

## LEGAL CONCLUSIONS

1. Eligibility for regional center services is limited to those persons meeting the eligibility criteria for one of the five categories of developmental disabilities set forth in section 4512 as follows:

> "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be

> expected to continue, indefinitely, and constitutes a substantial disability for that individual….[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 intellectual disability [commonly known as the "fifth category"], but shall not include other handicapping conditions that consist solely physical in nature.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. Claimant bears the burden of establishing that she meets the eligibility requirements for services under the Lanterman Act.[3] FNRC provided services for a specific period of time with a reevaluation scheduled to determine eligibility. She has not met that burden. The evidence presented did not prove that claimant is substantially disabled by a qualifying condition that is expected to continue indefinitely. She did not meet the diagnostic criteria for an ASD and there was no evidence to show that she has epilepsy, cerebral palsy, intellectual disability, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. Accordingly, claimant does not have a

[3] California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

developmental disability as defined by the Lanterman Act and she is not eligible for regional center services.

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## ORDER

Claimant's appeal from the Far Northern Regional Center's denial of eligibility for services is DENIED. Claimant is not eligible for regional center services under the Lanterman Act.

DATED: August 28, 2014

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SUSAN H. HOLLINGSHEAD

Administrative Law Judge

Office of Administrative Hearings

NOTICE

**This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)**