BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. SAN GABRIEL/POMONA REGIONAL CENTER, Service Agency.	Case No. 2015100786

DECISION

The hearing in the above-captioned matter was held on April 6, 2016, at Pomona, California, before Joseph D. Montoya, Administrative law Judge (ALJ), Office of Administrative Hearings. San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Santana, Fair Hearing Manager. Claimant was not in attendance, but was represented by her mother and father.[1] Homero Cano acted as interpreter, translating English to Spanish and vice versa.

Evidence was received, argument was heard, and the case was submitted for decision on April 6, 2016. Thereafter, the record was ordered to be reopened by the ALJ so that he could obtain a clear copy of exhibit 7. At that tine, the ALJ gave notice of his intent to take official notice of source materials, i.e., the Diagnostic and Statistical Manual 5, and the Best Practice Guidelines for Screening, Diagnosis, and Assessment.

[1] Titles are used in the place of names to protect Claimant's privacy.

The copy of exhibit 7 was timely received, and placed with the other documents received in evidence. No objection to taking official notice was made. The matter was again submitted for decision, on May 2, 2016.[2]

STATEMENT OF ISSUES

The issue is whether Claimant is eligible for services due to Autism Spectrum Disorder (ASD).

FACTUAL FINDINGS

THE PARTIES, AND JURISDICTION:

1. Claimant is a 13-year-old girl who seeks services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.[3] She was assessed by the Service Agency and considered for eligibility during the period June 3 through September 4, 2015.

2. On September 4, 2015, the Service Agency wrote to Claimant's mother and informed her that Claimant was not found eligible for services. (Ex. 1.) The letter was accompanied by a Notice of Proposed Action, the formal document that denied eligibility. Thereafter, Claimant's mother filed a Fair

[2] The order to reopen the record required filing of the document to occur by April 30, 2016, a weekend, and the due date therefore carried over to the next business day, May 2.

[3] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Hearing Request, dated October 9, 2015. All jurisdictional requirements have been met.

CLAIMANT'S FAMILY HISTORY AND GENERAL BACKGROUND

3. Claimant lives with her parents and two younger brothers within the Service Agency's catchment area. She speaks both English and Spanish. Her parents speak primarily Spanish; at the hearing, Mother was able to communicate to some extent in English. Both of Claimant's siblings had received regional center services under the "Early Start" program, but they did not receive services under the Lanterman Act.

4. As a baby, Claimant met important developmental milestones. She was sitting up at six months. She did not crawl, but by the time she was one year of age she was walking. She said her first word at about eight months, and used phrases soon after she turned one. She was toilet trained by three. There was no report of regression in key areas. It was reported to the Service Agency that as a toddler she would point, and demonstrate joint attention, and respond to her name. (Ex. 6, p. 2.)

5. Since at least age three, Claimant, who is now in the eighth grade, has had problems in building and maintaining social relationships. Her mother reported that Claimant attended Head Start from ages three to five, and staff reportedly observed problems of Claimant isolating or not engaging with peers. (Ex. 9. p. 3.) This failure to socialize continued in school. Claimant's kindergarten teacher commented that Claimant kept to herself, rarely talked to peers, and was very quiet in class. (Ex. 7, p. 3.) In first grade teachers reported that Claimant seldom interacted with peers in either the classroom or the playground. (*Id.*) Lack of interaction with others was reported by a third grade teacher, and

succeeding teachers through the seventh grade. (*Id.*, pp. 2-3.) It was also observed by a school psychologist, as set out in Factual Finding 10(B).

6. It was reported that Claimant currently takes piano lessons, and likes to swim, watches shows about animals, or cartoons on the television, and does not socialize outside of school. (Ex. 6, p. 2.)

7. (A) Mother reported in August 2015 that Claimant's behaviors had become worse over the prior three year period. Claimant was tending to isolate herself in her room, and would laugh to herself. She had anxiety about being watched by others, is afraid of the dark and mosquitos, and says she can hear those insects when others cannot hear them. She began cutting herself out of family photos. She has been having several tantrums per day. The record does not disclose any reason for the tantums.

(B) Mother has also reported significant behavioral problems with Claimant. She behaves inappropriately at home, walking about undressed. She is demonstrating problems with hygiene, needing prompts to carry out hygiene tasks that most teenage girls would take care of. (Ex. 7, p. 9; Ex. 6, p. 3.) Her mother reported that Claimant is picky about what clothes she will wear, resisting certain fabrics. (*Id.*)

SPECIAL EDUCATION ASSESSMENT IN APRIL 2015

8. In April 2015, Claimant's school district evaluated her to determine if she were eligible for special education services. When she was referred for a psycho-educational assessment, areas of suspected disability were Specific Learning Disability, Autistic Like Behaviors, and/or Emotional Disturbance. (Ex. 7, p. 1.)

9. (A) A school psychologist and a special education teacher performed the assessment. A number of test instruments were used, including

but not limited to the Behavior Assessment System for Children, Second Edition (BASC-II), with various reporters or sources of information; the Gilliam Autism Rating Scale, Third Edition (GARS); Test of Auditory Processing Skills, Third Edition (TAPS); and, Woodcock-Johnson III Tests of Achievement. In some cases, a test instrument was utilized with more than one reporter. Thus, Mother, and four teachers each rated Claimant with the BASC-II instrument. (Ex. 7, p. 2.)

(B) A brief educational history was set out in the assessment report. As noted in Factual Finding 5, for most years teachers noted her poor socialization. In November of 2008, when Claimant was in first grade, a One Student Study Team meeting was held to address "the following concerns: mostely (sic) nonverbal with peers, whispers to adults, jerky movements, licks fingers, smells everything, inattention, very anxious, does not play with others, difficulty with following directions." (Ex. 7, p. 3.) The assessment report does not show what response, if any, the Study Team made in the face of the aforementioned returns.

(C) During fifth grade (2012-2013) it was noted that Claimant had shown improvements in her social skills, but it was also stated that she may have participated in a social skills training program. (Ex. 7, p. 3.) That tended to be confirmed in another part of the report, which stated that a number of interventions had been tried, including social skills training, Study Teams, counseling, and peer partner. (*Id.*, p. 4.)

10. (A) The assessors conducted a school observation in both a class (language arts) and during the lunch period. In the classroom, Claimant was working in a small group on an article that had to be read. She appeared fidgety, tapping or shaking her leg and looking around the room. She had neat penmanship, but would frequently erase what she wrote, and would rewrite it "over and over." (Ex. 7, p. 4.) At one point she tossed a crumpled up paper at

another student. When the teacher told Claimant to pick it up and throw it away, she did so, smiling and giggling to herself as she did. When back at her desk, Claimant was observed to be rocking back and forth in her chair.

(B) During lunch, Claimant did not interact with her peers, and "instead, she paced back and forth in front of one of her classrooms." (Ex. 7, p. 5.) She paced repetitively for most of the lunch period. At times she moved her fingers in a stereotyped pattern, and she generally kept her head down. When the bell rang, she took her things and went into class.

11. An IQ test was not administered, but the Kaufman Assessment Battery for Children, Second Edition, was utilized to assess cognitive function. Claimant was in the average to low average range in all subparts. Administration of the TAPS yielded an overall score in the low average range; it did not suggest an audio processing deficit. (Ex. 7, p. 8.)

12. The results of the Woodcock-Johnson Achievement tests indicted that Claimant's academic achievement was scattered. She was in the average range for Broad Math, Broad Written Language, Math Calculation Skills, Academic Skills, Basic reading and Basic Writing Skills. She was in the low range for written expression, and the very low range for Academic Fluency. Other low average or very low scores were generated in subtests such as Reading Fluency, Writing Fluency, and Reading Vocabulary. At bottom, she fell overall into the average range for Broad Reading and Broad Written Language, and high average range for Broad Math. (Ex. 7, pp. 12-14.)

13. Four of Claimant's teachers provided feedback via the BASC-II. The Assessment contains statements from her math teacher, science teacher, her PE teacher, and English/social studies teacher. The math teacher stated:

(A) Claimant "spends all the time in class rocking back and forth. Is she listening? Hard to say. . . She is mildly distracting when she is rocking, swatting at the air or giggling to herself." (Ex. 7, p. 16.)

(B) Regarding communication skills, the teacher explained that Claimant "has a hard time expressing herself especially when asked a question. . . As mentioned before, she is a non-participant in any group work." (*Id.*)

(C) As to adaptive behavior functioning, the math teacher stated that Claimant spent most of her time by herself, sitting quietly, and that when she was seen sitting with another student, there was no verbal communication between the two. (*Id.*)

14. The science and art teacher stated the following:

(A) Claimant had great penmanship, had trouble paying attention, and she could not paraphrase information. (Ex. 7, p. 16.)

(B) She rarely completed assignments, would get frustrated when she didn't understand directions, but wouldn't ask for help. (*Id.*)

(C) Regarding communication, she was described as seeming to understand orally from teacher and peers, could ask questions and communicate verbally, but would not participate in a group. (*Id.*)

(D) As to "adaptive behavioral functioning" the teacher stated that in art class the students act toward Claimant in an accepting way, but Claimant gravitates toward the students from ESC. (*Id.*, p. 17.)

15. The English and social studies teacher reported the following, all found at exhibit 7, p. 17:

(A) In terms of academic functioning, Claimant was improving on turning work in on time, but it was usually incorrect. The teacher also reported that "we do a lot of partner work which she does not participate well in, . . . "

(B) As to classroom task functioning, her biggest issue was turning work in on time. The teacher also commented that "she is often off task, due to 'rocking and giggling.'"

(C) Regarding communication skills, Claimant was described as being very difficult to understand as her voice had gotten almost to a whisper. Further, "she does not communicate [with] many in the class."

(D) In terms of adaptive behavioral functioning, the English teacher stated Claimant is seated with a student who is to keep her focused. She was not a verbal distraction but a visual one due to her rocking and giggling, which caused other students to lose focus. The other students could not tell if Claimant was laughing at them or with them.

16. Claimant's P.E. teacher provided information, also found at exhibit 7, p. 17:

(A) Regarding academic functioning, Claimant could complete written P.E. assignments. As to classroom task functioning, the teacher noted that Claimant struggled in performing activities and did not give much effort. The teacher believed she was self-conscious about performing physical tasks in front of the other students.

(B) As to communication skills, the teacher stated that Claimant could communicate with her, but the teacher "rarely see her communicating with other students."

(C) In the area of adaptive behavioral functioning, the teacher stated Claimant had only one behavioral issue up to that point in the year, which was Claimant going into another student's backpack. The teacher also stated: "I have yet to see [Claimant] interact with other students in a friendly manner. She is usually by herself during PE."

17. (A) The BASC-II was administered to Claimant's mother. Mother's responses established "clinically significant" issues in the areas of anxiety, depression, internalizing problems composite, atypicality, withdrawal, and social skills. According to the report, clinically significant scores "suggest a high level of maladjustment." (Ex. 7, p. 18.)

(B) The BASC-II results from administration to the math teacher were in many ways similar to those from mother. In terms of attention problems, atypicality, social skills, leadership, functional communication, and at the adaptive skills composite, Claimant was in the clinically significant range. (Ex. 7, pp. 20-21.)

(C) The science and art teacher's responses to the BASC-II indicated clinically significant scores in the areas of atypicality, withdrawal, social skills and leadership. The adaptive skills composite was in the "at risk" range. (Ex. 7, p. 22.)

18. (A) The GARS was used to screen for possible Autism Spectrum Disorder. Claimant's mother and one of Claimant's teachers were respondents. The Autism Index score fell into the very likely range. The score derived from mother's input was 114, and for the teacher, 90. (Ex. 7, pp. 9-10.)

(B) The examiners observed Claimant in the classroom, and noted behaviors such as rocking, giggling, peculiar hand movements, sensory seeking behavior, impaired social interaction, impaired communication, including idiosyncratic words and phrases, lack of reciprocal conversation, and other behaviors consistent with ASD. (*Id.*, p. 10.)

SERVICE AGENCY ASSESSMENT, AUGUST 2015

19. Claimant was seen at the Service Agency on August 6, 2015, when she was 13 years and 4 months of age. She was assessed by a two person team, comprised of Deborah Langenbacher, Ph.D., and Judith Aguilera, MA, CCC-SLP. A

report was generated, and was received in evidence as exhibit 6. Dr. Langenbacher had previously reviewed the school district's report. (Ex. 4.)

20. Aside from reviewing records, the assessors used standardized tests, including the Autism Diagnostic Observation Schedule-2, Module 4 (ADOS), the Childhood Autism Rating Scale-2H (CARS), and the Adaptive Behavior Assessment System-II (ABAS).

21. The results of the ADOS did not indicate that Claimant has ASD. Her score was a five, below the threshold of seven. (P. 9.) According to the report, Claimant demonstrates some autistic like behaviors, primarily in regard to her social problems, but the team found repetitive movements at a minimum, and perceived some of them as indicative of anxiety.

22. The ABAS scores were low, but the team thought they might be an underestimation. Claimant's mother was the reporter, and she stated that Claimant could not do some things that the assessment team observed Claimant to do. That being said, the highest age equivalency reported was 6-8 to 6-11 years. In many cases the age equivalency was reported as less than 5 years. This included communication, self-direction, social, and home living. Scores for Conceptual, Social, and Practical—the three broad categories—were all below the first percentile. (P. 9.)

23. (A) In the general area of communication, the team found that expressive language, and comprehension of verbal and visual language was within functional limits for age. (P. 6.) As to pragmatics, she "demonstrated significant differences in [that] area as would be expected for age." (*Id.*) It appears her behavior was varied; on the one hand, she maintained topic and demonstrated turn taking, but on the other hand, she crossed social boundaries by asking personal questions of the examiner, or moved on to other topics. She

asked the examiner if she like avocados, and then related the topic of avocados with the benefits to hair growth. Likewise, she was described as sometimes showing no interest in others, and then showing too much interest in others. Claimant showed limited use of gesture and change of facial expression, and required cues and re-direction in order for her to provide facial expressions or affect. When she finished an assessment she was asked if she had any questions. She asked "do you like yourself." (*Id.*, p. 7.)

(B) At the end of the discussion on communication, the assessment team wrote: "[Claimant's] comprehension of when and what to state appropriately in a given contexts or social situations was severely reduced for age, and social skills were also compounded by lack of gestured language, facial expressions, interest in others for social interaction, and misinterpretations of other's reason for verbal or non-verbal interaction." (P. 7.) This concluding statement was emphasized by bold print.

24. Ultimately the assessment team concluded that many of Claimant's behaviors could indicate some type of schizophrenia or other psychotic disorder. This was based on information to the effect that Claimant was hearing things, thought people were watching her, and was showing signs of disorganized behavior. The team concluded that Claimant does not suffer from ASD.

ASSESSMENT BY FOOTHILL FAMILY SERVICES, JULY 2015

25. Claimant has been receiving therapy from Foothill Family Services (Foothill), a provider of mental health services, since September 2014. She had an admitting diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS). Claimant's therapist at Foothill, Maria Baltazar, referred her for further evaluation to formally rule out ASD and to assess her level of functioning. Patricia Valdez, Ph.D., a licensed psychologist performed the

assessment. She used a number of test instruments, including but not limited to an IQ test, the Wechsler Intelligence Scale for Children-Fourth Edition (Wechsler); Connors' Continuous Performance Test II (Connors), GARS-2, Gilliam Asperger's Disorder Scale (GADS), and the BASC-II. (Ex. 9, pp. 1-2.)

26. Dr. Valdez obtained a history from Claimant's mother, which indicated normal development before age three, and importantly, no loss of skills of any kind. Mother reported that Claimant attended head start from ages three to five, and staff reportedly observed normal language, motor, and cognitive development, but Head Start staff also observed problems with isolating or not engaging with peers. Such challenges continued during school years, becoming more marked and prominent, while stereotypic language and motor behaviors and sensory sensitivities began to emerge at about age seven or eight. (Ex. 9, p. 3.)

27. Testing of Respondent's IQ showed significant inter-scale scatter, with skills from the average to extremely low range. A 31-point discrepancy between the lowest and highest index score made computation of the full scale IQ problematic, but Dr. Valdez calculated a General Ability Index in the average range. Claimant also showed significant problems with attention and impulse control, according to the Connors. Dr. Valdez stated that Claimant would qualify for a diagnosis of ADHD, but gave the ASD diagnosis that she made "diagnostic precedence." (Ex. 9, p. 7.)

28. Dr. Valdez also noted that Claimant's collective test scores indicate a significant weakness, both personal and normative, in the area of executive functioning skills, that being the ability to start, organize, monitor, and adapt different strategies to accomplish a task efficiently. Executive function, she

stated, also allow one to anticipate outcomes and adapt to changing situations. (Ex. 9, p. 7.)

29. (A) Dr. Valdez was required to work under the constraints and guidelines of the Department of Mental Health, which had not, as of the date of the report, transitioned to the DSM-5 from the earlier DSM-IV. She concluded that Claimant suffers from an atypical autism, and that therefore the appropriate DSM-IV criteria was PDD-NOS. She further stated that if the transition had been made to the DSM-5, she would diagnose ASD.

(B) The test results from the GARS and the GADS tended to support the diagnosis, in that the GARS, administered to Mother, yielded a quotient of 92, making autism "very likely." The GADS score was 92, indicating that the probability of Asperger's Disorder was "High/Probable." (Ex. 9, p. 15.)

30. (A) Regarding the possibility of a psychosis, Dr. Valdez stated that test results did not highlight psychotic processes as of the time of the testing. She cited both the Thematic Apperception Test (TAT) and the Millon Adolescent Clinical Inventory (MACI) in support of her conclusion. The narratives from the TAT were not marked by bizarre content, loose associations, tangential thinking, rambling, or other aspects that sometimes indicate psychotic process. Likewise, the MACI did not suggest Schizoid or Schizotypal features or traits, but instead suggested Antisocial and Negative Personality Traits with Self-Demeaning and Avoidant Features. Mother reported no known family history of psychosis. (Ex. 9, p. 6.)

(B) Claimant's MACI results produced scores consistent with Dysthymic Disorder. She had elevated scores on the following scales: Doleful, Self-demeaning, Self-devaluating, and Depressive Affect. Mother's responses to

the BASC yielded two of the highest elevations, in the areas of Depression and Withdrawal. (Ex. 9, p. 6.)

(C) Dr. Valdez was aware of behaviors by Claimant that could indicate a psychosis, including reports of seemingly paranoid behaviors and isolated report of perceptual disturbance. But, she noted there were no reported overt hallucinations, imaginary friends, and the reported issues did not appear pervasive. (*Id.*)

//

TESTIMONY OF MARIA BALTAZAR

31. Maria Baltazar (Baltazar) is an Intern Marriage and Family Therapist, employed at Foothill. She has worked every week with Claimant for approximately one and one-half years. The weekly sessions last 50 minutes. Baltazar sees Claimant at school, and obtains information from Claimant's teachers.

32. Ms. Baltazar stated that Claimant either makes over-sustained eye contact, or will avoid eye contact. Claimant will isolate herself by hiding from Baltazar, despite working together for so long. While Claimant might sit with other students, she is not engaged with them. She cannot transition from one conversation topic to another, can't understand jokes, and can't understand if she is being teased or bullied.

33. Baltazar has observed Claimant's rocking behavior, and her odd finger movements. She also has observed Claimant's fixation on things. She described a day when Claimant spent the entire session in a conversation about Baltazar's shoes.

34. While Claimant has told various people that she has friends, Baltazar related that Claimant does not have any friends, and had admitted that was why she was not going to a school dance.

35. According to Baltazar, Claimant has insight, and that is why she is depressed.

THE DSM-5 DISGNOSTIC CRITERIA FOR ASD

36. The Lanterman Act defines autism as one of the developmental disabilities that makes a person potentially eligible for services from the regional centers. (See Legal Conclusion 2, below.) That is the term that has been used for many years in the applicable statute. However, the definition of autism, and indeed, the name for that malady, was substantially revised with the May 2013 publication of the DSM-5. "Autism Spectrum Disorder" is now the diagnostic nomenclature, and it encompasses several diagnostic criteria previously used in the DSM-IV-TR. Thus, individuals who in the past might receive a diagnosis of autistic disorder, Asperger's Disorder, or PDD-NOS, are now given the diagnosis of Autism Spectrum Disorder. (DSM-5, at p. 51.) As seen above, the Service Agency used the DSM-5 criteria in evaluating Claimant, while Dr. Valdez at Foothill used the older DSM-IV.

37. The DMS-5 diagnostic criteria for Autism Spectrum Disorder are set out as follows at pages 50-51 of the manual:

> 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 interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sound or textures, excessive smelling or touching of objects, visual fascination with lights or movement). [¶] . . . [¶]

C. Symptoms must be present in 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 developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make co-morbid diagnosis of autism spectrum disorder and intellectual disability, social

communication should be below that expected for general developmental level.

38. (A) Some other important diagnostic information is to be found in the DSM-V. ASD is found in nearly one per cent of the population. (DSM-5, p. 55.) It occurs four times as often in boys as in girls, and girls are more likely to show accompanying intellectual disability, which suggests that "girls without accompanying intellectual impairments or language delays may go unrecognized, perhaps because of subtler manifestation of social and communication difficulties." (*Id.*, p. 57.)

(B) Where an individual shows impairment in social communication and social interactions but does not show restricted and repetitive behaviors or interests, criteria for social (pragmatic) communication disorder may be met. In making the diagnosis, care must be taken to enquire carefully regarding past or current restricted or repetitive behavior. (DSM-5, p. 58.)

(C) However, the DSM-5 also provides, under the heading of "differential diagnosis" in connection with Social (Pragmatic) Communication Disorder the following. "Autism spectrum disorder is the primary diagnostic consideration for individuals presenting with social communication deficits. . . . Individuals with autism spectrum disorder may only display restricted/repetitive patterns of behavior, interests, and activities during the early developmental period, so a comprehensive history should be obtained. A diagnosis of social (pragmatic) communication disorder should be considered only if the developmental history fails to reveal any evidence of restricted/repetitive patterns of behavior, interests, or activities." (DSM-5, p. 49.)

//

(D) "Adolescents and adults with autism spectrum disorder are prone to anxiety and depression." (DSM-5, p. 55.)

THE GUIDELINES

39. The Department of Development Services (DDS) published Autism Spectrum Disorders, Best Practice Guidelines for Screening, Diagnosis and Assessment (Guidelines), in 2002, after extensive study and with the assistance and participation of numerous experts. The book is not a diagnostic manual per se, but gives guidance in the areas of screening, evaluation, and assessment of those who may suffer from what it labels an "autistic spectrum disorder" a reference to the concept that at least some of the maladies categorized as separate pervasive developmental disorders in the DSM-IV might be seen as a singular condition, on a continuum of related disorders.[4] The Guidelines provide information that may assist the diagnostic analysis. However, the Guidelines do not have the force of law, and are not established as regulations adopted by DDS.

40. (A) Some important concepts may be gleaned from the Guidelines. First, when determining whether or not a person suffers from an ASD, there is no substitute for sound clinical judgment based on experience, familiarity with the population, and familiarity with the research. (Guidelines, p. 4.) Professionals with such experience and expertise are not just found in the regional centers, but also in private health systems and university settings. (*Id.*)

[4] The DSM-IV, in place when the Guidelines were published, did not recognize the concept of autism spectrum disorder, which became the standard in 2013 when the DSM-5 was published.

(B) Information obtained from parents is quite valuable. "Because parents are the experts regarding their children, eliciting and valuing parental concerns is imperative." (Guidelines, p. 14.) The Guidelines make this general statement in the context of screening, but the concept cannot be ignored in any case where the parent can provide information pertaining to the child's development and behavior. While potential reporter bias is an issue that should not be ignored, the possibility of reporter bias should not be allowed to swallow up a parent's report.

(C) A substantial number of children with an ASD 0068ave normal to superior cognitive function; 20 to 25 percent demonstrate such in at least one of the two major cognitive domains, verbal and non-verbal. (Guidelines, p. 49.)

(D) Impairment in communication, rather than in language, is a key issue, as children with ASD have a vast range of language skills. As taught by the Guidelines, "it is clear that the fundamental difficulty is with communication, of which speech and language are components." Further, "Delays in speech and language alone are not specific to autism, nor are the presence of intact language skills contraindicative of an ASD." (Guidelines, p. 60, citations omitted.)

(E) ASD's are associated with a tremendous range in syndrome expression, and symptoms change over the course of development.

(F) Diagnosis of ASD's, and especially PDD-NOS in children and adolescents, must be differentiated from other problems, such as language and sensory impairments. "Since comorbidity and differentiation of psychiatric diagnoses are so vital in this age group [children and adolescents], knowledge and/or consultation with specialists in child psychiatry is required." (Guidelines, p. 115.) "Depression is one of the most common coexisting syndromes found in children and adolescents with an ASD. This is particularly true for 'higher

functioning' children who have an awareness of their difficulties. [Citation omitted]." (*Id*., p. 119.) Anxiety disorders are also common in children with an ASD. (*Id*., p. 120.) And, differentiating ADD or ADHD from an autism spectrum disorder can be especially difficult. (*Id*, pp. 120-121.)

(G) "Children suspected of suffering from an ASD can present with a wide range of language abilities at school age and in adolescence. With verbally fluent children, the evaluation should focus on the social pragmatic use of language in addition to more structural skills." (Guidelines, p. 104.)

ULTIMATE FINDINGS OF FACT

41. (A) Based on all the foregoing, the weight of the evidence establishes that Claimant suffers from ASD. The evidence is very clear that she meets all of the requirements of part A of the diagnostic criteria. (See Factual Findings 5, 7, 9. 10(B). 13-17, 22, 23, 26, 31, 34.) There is no real dispute that she meets the criteria A-3, as she has deficits in developing and understanding relationships. She has no relationships with peers that she can maintain. She demonstrates deficits in social-emotional reciprocity, by failing to initiate or respond to social interactions, thus satisfying criteria A-1. She also shows deficits in non-verbal communication, meeting the criteria A-2.

(B) As to part B of the diagnostic criteria, Claimant has demonstrated repetitive motor movements, rocking routinely, and demonstrating odd finger movements. (Criteria B-1.) She has, by history, shown unusual interest in sensory aspects of her environment, including excessive smelling or touching of objects. (Criteria B-4.) (See Factual Findings 7, 9, 10, 13(A), 15(B), 26.)

(C) While symptoms do not appear before age three, by that age she demonstrated impaired social interaction. While the former diagnosis of autism required symptomology before age three, that is not required for ASD. And, the

former diagnostic requirements for Asperger's Disorder and PDD-NOS, now essentially subsumed into the ASD diagnosis, clearly did not require onset before age three.

(D) Claimant's symptoms are causing clinically significant impairment in the social area of current functioning, and are impairing her ability to learn at school, thus satisfying part D of the ASD diagnostic criteria. The record established that she could not work with other students in an effective manner.

(E) Claimant's disturbances are not better explained by intellectual disability, as she has an average to low average IQ. (Part E.) (Factual Findings 11, 25, 27.)

42. Claimant demonstrates significant functional limitations in self-direction, capacity for independent living, self-care, and economic self-sufficiency, relative to her age. Based on the entire record, it does not appear that she could engage in simple employment as a baby-sitter, as some eighth grade girls do. She has demonstrated problems in self care, as reported by her mother. (Factual Finding 7(B).) While she has receptive and expressive language, the pragmatics of her language use are so deficient as to undercut the fact that she can otherwise communicate with people. (See Ex. 6, p. 6-7.) Even when Dr. Langenbacher found the ABAS results to be an underestimate of Claimant's capacity, at bottom the child was in the area of less than the first percentile. (Factual Finding 22.)

43. The onset of Claimant's condition is before age 18, and it appears that her condition will continue for the foreseeable future; her social function has been impaired for years, even though the school system took some effort to improve her social skills.

44. Claimant's condition is not solely the result of a learning disorder or a psychiatric disorder, nor is it physical in nature. While the Service Agency assessment team was concerned with a psychosis, Dr. Valdez's assessment tends to rule that out. (See Factual Finding 30.)

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction exists to conduct a fair hearing in the above-captioned matter, pursuant to Code section 4710 et seq., based on Factual Findings 1 through 4.

LEGAL CONCLUSIONS PERTAINING TO ELIGIBILITY GENERALLY

2. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

> "Developmental disability" means a disability which originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual.
>
> . . . this 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.

This latter category is commonly known as "the fifth category."

3. (A) Regulations developed by the Department of Developmental Services, pertinent to this case, are found in title 17 of the California Code of Regulations (CCR).[5] At section 54000 a further definition of "developmental disability" is found which mirrors section 4512, subdivision (a).

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions 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

[5] All references to the CCR are to title 17.

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.

4. Section 4512, subdivision (l), provides that,

"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.

6. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that she suffers from an eligible condition, i.e., autism, intellectual disability, cerebral palsy, epilepsy, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability that she falls into the fifth category. This Conclusion is based on section 4512, subdivision (a) and Evidence Code section 500.

(B) For many years, the undersigned and other ALJ's have considered that since the governing statute uses the term autism, and did not use the term autism spectrum disorder, Asperger's Disorder, or PDD-NOS, then only the former condition was an eligible one. However, since the DSM-5 has been published, the term Autistic Disorder has been abandoned. When used in a statute, technical words are given their peculiar and appropriate meaning. (*Handlery v. Franchise Tax Bd*. (1972) 26 Cal.App.3d 970, 981; Civ. Code § 13.) Because that technical definition has changed, it appears appropriate to use the provisions of the DSM-5 to determine eligibility in this area. Otherwise, an absurd result could follow; that nobody could obtain services under the statutory rubric of autism. And, while it might be argued that the DSM-IV definition should continue to bind the definition of the condition, it has to be noted that the definition of autism was substantially different under the DSM-IV than it had been in prior editions of the DSM. Since the Lanterman Act was enacted in the mid-1970's, the definition of autism has changed more than once, without barring services to those deemed autistic within the technical definition then in place. The definition has changed again, and the latest definition should be utilized.

7. Claimant has established she is eligible for services by having an Autism Spectrum Disorder, based on Factual Findings 3 through 44, and Legal Conclusions 1 through 6.

//

//

ORDER

Claimant's appeal is granted, and she shall be eligible for services under the Lanterman Act. The Service Agency shall schedule an Individual Program Plan meeting within statutory guidelines.

May 16, 2016

_____

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.