BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH No. 2016101091

DECISION

Carmen D. Snuggs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 12, 2017, June 20, 2017, and July 19, 2017, in Culver City, California.

Lisa Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency). Claimant's[1] mother and her authorized representative, Dick Stusser, represented Claimant, who was not present. Claimant's father was present throughout the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on July 19, 2017.

ISSUE

Is Claimant eligible to receive regional center services and supports under a

[1] Family and party titles are used to protect the privacy of Claimant and her family.

diagnosis of autism?[2]

EVIDENCE

Documents: Service Agency's exhibits 1-14; Claimant's exhibits A-E.

Testimony: Thompson J. Kelly, Ph. D., Chief Psychologist and Manager of Intake Services, Service Agency; Valerie Lattanza, M.S., Intake Counselor, Service Agency; Soryl Markowitz, L.C.S.W., Service Agency; Claimant's mother; and Claimant's father.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 26-year-old woman. In the spring of 2016, on referral by her parents, Claimant applied to the Service Agency to determine her eligibility for regional center services and supports under a diagnosis of autism.

2. By a Notice of Proposed Action (NOPA) letter dated July 15, 2016, the Service Agency notified Claimant of its determination that she is not eligible for regional center services because she does not meet the eligibility criteria set forth in the

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[2] The parties stipulated at the beginning of the fair hearing that the issue is Claimant's eligibility under the category of autism. However, during the latter part of the fair hearing, both parties elicited testimony regarding Claimant's possible "fifth category" eligibility. (See Legal Conclusion 5 regarding categories of eligibility.) Since that "fifth category" eligibility was not a part of the parties' original stipulation, and since the applicability of that category was not established, the Administrative Law Judge references the "fifth category" testimony only as it relates to the Service Agency's analysis of eligibility under the category of autism.

Lanterman Developmental Disabilities Act (Lanterman Act).

3. On August 2, 2016, Claimant's mother, on Claimant's behalf, filed a fair hearing request to appeal the Service Agency's decision. Claimant's mother disagreed with the Service Agency's decision and asserted that Claimant "has a [diagnosis] of autism and has substantial handicaps in many areas of her life." (Ex. 2.)

CLAIMANT'S BACKGROUND AND 2008 SERVICE REQUEST

4. Claimant lives at home with her parents. She was born prematurely at 23 weeks' gestation, and received occupational therapy, physical therapy, and speech therapy services under WRC's Early Start program until age three when Claimant aged out of the program.[3]

5. On May 12, 2008, Claimant's mother requested that WRC "reactivate"

[3] "Early Start" is the name used in California to refer to a federal program for children under age three who are at risk for certain disabilities. The governing law for Early Start is The Individuals with Disabilities Education Act (IDEA), Subchapter III, Infants and Toddlers with Disabilities (20 U.S.C. §§ 1431-1445) and the applicable federal regulations found in Title 34, Code of Federal Regulations (C.F.R.), section 303, et seq. The California Early Intervention Services Act is found at Government Code section 95000, et seq. California also adopted regulations to implement the statutory scheme. (Cal. Code Regs., tit. 17, sections 52000-52175.)

Claimant's case.[4] (Ex. 6.) In response, Service Agency's consulting psychologist, Mayra Mendez, Ph.D., reviewed the following records provided by Claimant:

A. January 21, 1999, Santa Monica/Malibu Unified School District Psycho-Educational Report. On December 10, 1998 and January 7, 1999, when Claimant was in the first grade, the Santa Monica-Malibu Unified School District (District) performed a Psycho-Educational Evaluation of Claimant due to the concerns of Claimant's parents and her teacher regarding academics, attention, and behavior. The District performed a record review, and its assessment tools included the Wechsler Intelligence Scale for Children – Third Revision (WISC-III), the Woodcock Johnson – Revised: Tests of Achievements, Burks Behavior Rating Scale – Home and School Versions, and the Attention Deficit Disorder Evaluation Scale (ADDES) – Home and School Versions. Claimant's general cognitive ability was found to be in the low average range of intellectual functioning, her ability to sustain attention, concentrate, and exert mental control was determined to be average, and she performed slightly better on verbal than on nonverbal reasoning tasks. Her Full Scale IQ was 86. The District noted a "severe discrepancy . . . between ability and achievement" in the areas of arithmetic calculations and basic reading skills. (Ex. 11, p. 9.) The District further found "[e]vidence of an educationally significant disorder" in the visual motor, visual perceptual, and visual psychological processes, and the written expression and attention

[4] Although Claimant was eligible to receive Early Start services, this did not automatically render her eligible to receive regional center services after age three. Such eligibility is governed by the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), which contains different eligibility requirements than Early Start.

psychological processes. (*Ibid.*) The District cautioned that Claimant's hearing loss in her left ear and lack of attention may have had a profound effect on her scores. The District determined that Claimant's handicapping condition was Specified Learning Disability and referred Claimant to the District's Individualized Education Program Team for placement, goals, and objectives.

B. May 16, 2003, report of Robert D. Byrd, Psy.D, A.B.P.S. Dr. Byrd's report indicates that he performed a psychological evaluation at the request of Claimant's parents due to their concerns regarding Claimant's attention, mood, and academic progress. Claimant was in the fifth grade at this time. Dr. Byrd used the following tools in completing his assessment: the WISC-III, Developmental Neuropsychological Assessment (NEPSY), Delis-Kaplan Executive Function System (DKEFS), Wechsler Individual Achievement Test-Second Edition (WIAT-II), and the ADDES – School Version. The WISC-III results revealed that Claimant's verbal IQ of 89 was at the upper end of the low average range, her Performance IQ of 77, was at the borderline range, and her Full Scale IQ was 81. Dr. Byrd found the discrepancy between Claimant's verbal IQ and performance IQ to be clinically significant in that it indicated that Claimant's full scale IQ does not present an accurate estimate of her overall intellectual abilities. He found her cognitive abilities are most accurately reflected by her verbal IQ and performance IQ scores. Dr. Byrd diagnosed Claimant with Attention-Deficit/Hyperactivity Disorder, Predominately Inattentive Type (ADHD-I), based upon her "long history of inattention, inconsistent performance, distractibility, and impulsivity," which she displayed despite environmental modifications and changes. (Ex. 10, p. 11.)

C. August 22, 2006, UCLA Healthcare Emergency Room Psychiatric Consultation Report. On August 21, 2006, Claimant was taken to the emergency room after one month of increasing withdrawal, fearful behavior, and statements that she wanted to kill herself. The report notes that Claimant has a history of developmental delay and an Attention Deficit Disorder (ADD) diagnosis by a neurologist, for which she was taking Strattera. The report also notes that Claimant was previously in a special education class but was currently placed in a general education class and receiving As and Bs. The report describes Claimant as having poor relatedness and fixed eye contact. Claimant was selectively mute, with evidence of thought blocking. She alternated between being extremely fidgety and agitated, with moods described as being scared and afraid. Claimant had paranoid and persecutory delusions. Claimant's insight and judgment were severely impaired. Claimant was admitted to UCLA Neuropsychiatric Hospital and started on Risperidone.[5] Claimant's admitting diagnosis was pervasive developmental disorder (PDD), personality disorder not otherwise specified (PDNOS), rule out depression with psychotic features, and rule out post-traumatic stress disorder due to possible trauma.

D. August 29, 2006 UCLA Neuropsychiatric Hospital Inpatient Discharge Summary Report. Claimant was discharged from UCLA Neuropsychiatric Hospital on August 28, 2006 with a diagnosis of depression with psychotic features, PDD, and history of ADD. Claimant was directed to follow-up with psychiatric treatment and therapy.

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[5] Risperidone is an antipsychotic medicine used to treat schizophrenia and symptoms of bipolar disorder (manic depression).

E. January 15, 2008 UCLA Neuropsychiatric Hospital Inpatient Case Coordinator Discharge Note. On December 31, 2007, Claimant's father took Claimant to the UCLA Healthcare emergency room due to Claimant's suicidal ideation and increasing paranoia. She met the criteria for inpatient hospitalization and was admitted for stabilization. The report references a history of ADHD. Claimant was taking Lithium[6] and Risperdal[7] at that time. She was discharged on January 14, 2008 with a diagnosis of Depressive Disorder with Psychotic Features, Asperger's Disorder, rule out Bipolar Disorder NOS. The report, signed by Dana McMakin, M.A., is silent as to who made the Asperger's Diagnosis, and Claimant introduced no evidence in support of the diagnosis made by UCLA. Claimant was referred to step down care and transition back to school.

F. January 22, 2008 UCLA Neuropsychiatric Hospital Case Coordinator Admission Summary. On January 22, 2008, Claimant was seen at UCLA Neuropsychiatric Hospital. The admission summary indicates that Claimant's mood was sad and afraid and that she displayed a childlike affect that was "oddly related and mildly inappropriate to context." (Ex. 7, p. 3.) Claimant's thought process was positive for suicidal ideation with thoughts of harming herself, and her concentration and attention were intact, "as evidenced by [her] ability to appropriately answer questions." (*Ibid.*) Claimant's intellect and fund of knowledge was described as average based upon her use of language, vocabulary, and educational background. The Case Coordinator, Dana

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[6] Lithium is a medication used to treat bipolar disorder.

[7] Risperdal is a brand name for Risperidone.

McMakin, M.A., notes that at that time, and at the time of Claimant's hospitalization in 2006, Claimant "described symptoms commensurate with a diagnosis of Major Depressive Disorder with Psychotic features, as well as Asperger's Disorder." (*Ibid.*) However, the report does not specify what those symptoms are and who made the diagnosis. UCLA rejected a primary psychotic diagnosis because Claimant's symptoms were episodic and remitted "almost completely with treatment." (*Ibid.*) Specifically, once Claimant started taking Lithium and Risperdal in 2006, Claimant's symptoms diminished to the point where she could attend high school for over a year without difficulty. It was not until a couple of months before the January 22, 2008 visit to UCLA, when Claimant experienced an extreme social stressor, stopped seeing her therapist, and began taking her medication without supervision, that her symptoms increased. Claimant's Axis I diagnoses were Major Depressive Disorder with Psychotic Features, Asperger's Disorder, and history of ADHD. UCLA provided Claimant with therapy referrals, and it was noted that she would likely return to her previous psychiatrist.

G. February 29, 2008, Santa Monica/Malibu Unified School District Psycho-Educational Report. The District completed a psycho-educational assessment upon request of Claimant's parents due to Claimant's hospitalizations for Major Depressive Disorder with Psychotic Features. At this time Claimant was in the tenth grade. The purpose of the assessment was to determine Claimant's eligibility for special education placement and services. The District noted that Claimant received special education services in elementary school. The District administered the Wechsler Intelligence Scale for Children-Fourth Edition. Claimant's full scale IQ was not computed because it was impacted by a "very low processing speed index." (Ex. 9, p. 4.) Instead, Claimant's index

scores were used to describe her cognitive strengths and weaknesses. Claimant's cognitive ability was estimated to be in the low average to average range. The report notes that Claimant has a diagnosis of Asperger's Syndrome and that she "struggles in social situations, misses social cues, and her mother reports that she has 'excessive shyness, fear of groups, crowds, and loud noises.'" (*Id.* at p. 7.) Claimant's mother also reported that she was "concerned about [Claimant's] lack of 'social skills, confusion about human behavior around her and her withdrawing, growing fearful and reclusive.'" (*Ibid.*) The District's report notes that the reported symptoms and issues support a diagnosis of Asperger's and that the more pressing concern is the degree to which emotional disturbance rather than Asperger's was impacting Claimant's school performance. The District concluded that Claimant did not meet the specific learning disability criteria for special education services and supports, but she did meet the emotional disturbance criteria.

H. March 9, 2008, letter from Mudita Bahadur, Ph.D. The letter identified Dr. Bahadur as Claimant's outpatient clinician upon Claimant's discharge from UCLA on February 27, 2008[8]. Dr. Bahadur recommended that Claimant be transferred to a "highly structured, self-contained special education setting for her entire day." (Ex. 8.) Dr. Bahadur further recommended that Claimant be provided with the necessary mental health component on site to provide Claimant with the appropriate support and monitoring to ensure her safety. (*Ibid.*)

6. Following her review, Dr. Mendez concluded that the records demonstrated a chronic history of mental illness, including ADHD, psychosis, and

[8] No evidence was introduced regarding Claimant's hospitalization on this date.

depressive disorder, and they did not support "consistent symptomology of autistic spectrum." (Ex. 12.) Dr. Mendez further found that Claimant's social deficits were explained by the effects of mental illness and that Claimant's cognitive and adaptive skills appeared consistently within the high borderline range. On May 14, 2008, the Service Agency notified Claimant's mother that, following its records review, the Service Agency determined that Claimant did not have a Service Agency eligible condition. Claimant did not appeal the 2008 determination.

CLAIMANT DOES NOT SUFFER FROM AUTISM SPECTRUM DISORDER

7. The criteria for Autism Spectrum Disorder as set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM)[9] (set forth more fully at Legal Conclusion 8) consists of two primary areas: deficits in social communication/interaction and the presence of restricted, repetitive patterns of behavior. A person must meet all three listed criteria in the first area (deficits in social-emotional reciprocity; deficits in nonverbal communication used for social interaction; and deficits in developing and maintaining relationships) and must exhibit two of four listed restricted behaviors. Additionally, the symptoms must cause clinically significant impairment in social, occupational, or other important areas of functioning.

8a. On December 11 and 12, 2015, David L. Raffle, Ph.D., performed a psychological evaluation of Claimant. His purpose in performing the evaluation was to "clarify [Claimant's] current level of neuropsychological functioning [and] determine

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[9] The Administrative Law Judge takes official notice of the Diagnostic and Statistical Manual of Mental Disorders (DSM) as a generally accepted tool for diagnosing mental and developmental disorders. The most recent edition, the DSM-5, was published in May 2013.

possible etiologies for relative weaknesses in cognitive impairment and reported psychological problems." (Ex. 5, p. 1.) Dr. Raffle reviewed Claimant's records including the reports listed in Factual Finding 5, and he performed a battery of tests including the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) and Wechsler Memory Scale, 4th Edition (WMS-IV). The cognitive testing revealed that Claimant was performing in the low-average range, with a Full Scale IQ of 83. Claimant's Verbal IQ was in the average range. Dr. Raffle diagnosed Claimant as having Autism Spectrum Disorder (ASD) without Accompanying Language Impairment and without Intellectual Impairment (formerly Asperger's Disorder), as defined by the DSM-5, which he opined was likely associated with a neurodevelopmental disorder due to prematurity. In support of his diagnosis, Dr. Raffle stated:

> [Claimant] has adult symptoms of Autism, including limited social interaction, talking excessively about favorite topics, and difficulty recognizing social cues. [Claimant's movements included] hand wringing and body rocking, using idiosyncratic phrases to communicate, rigid thinking patterns, and hypersensitivity to sensory input. She has difficulty creating and maintaining normal friendships and relationships, and there is evidence of atypical responses to social overtures of others, leading to her inappropriate infatuation with a physician, a singer, and perhaps others. Her language is often one-sided and lacking in social or emotional reciprocity, and while she may have developed compensation strategies for some social challenges, she likely suffers from the effort and anxiety of consciously calculating what is socially intuitive to others.

(Ex. 5, p. 15-16.)

8b. Dr. Thompson Kelly, Chief Psychologist and Manager of Intake Services for the Service Agency testified on the Service Agency's behalf. Dr. Kelly is licensed as a clinical psychologist in California and New York. He has been overseeing the Service Agency's Psychology Department for the last seven years. Prior to that, Dr. Kelly conducted assessments as a contract psychologist in the regional center system for 10 years. Dr. Kelly's work history includes service as the Director of a hospital program for youth with serious emotional disturbance, and he has worked as both an outpatient psychologist and in an inpatient psychiatric unit. Dr. Kelly is a qualified expert in psychology and provided credible testimony analyzing Dr. Raffle's diagnosis and testing.[10] Dr. Kelly acknowledged that Claimant's case is complex. Dr. Kelly disagreed with Dr. Raffle's diagnosis, and his credible testimony established that Dr. Raffle did not perform the tests commonly used to identify and diagnose ASD, i.e., the Autism Diagnostic Observation Schedule (ADOS). The tests administered by Dr. Raffle are more commonly used to perform a differential diagnosis of mental health conditions. Dr. Kelly credibly opined that Dr. Raffle's diagnosis is deficient because Dr. Raffle did not address the DSM-5 criteria for autism, and the information in Dr. Raffle's report did not lead to the conclusion of autism. For example, Dr. Raffle's diagnosis was in part based on Claimant's history of inattention and distractibility. Dr. Kelly credibly established that those symptoms could be caused by ADD, ASD, a learning disability, or Claimant's psychiatric conditions.

9a. On May 26, 2016, Melissa Bailey, Psy.D., a licensed clinical psychologist, performed a psychological evaluation of Claimant for purposes of diagnostic

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[10] Dr. Raffle did not testify at the fair hearing to explain or defend his diagnosis of ASD.

clarification, eligibility, and treatment planning. She performed a record review and behavioral observations. Because Claimant had recently undergone extensive cognitive testing with Dr. Raffle, Dr. Bailey did not perform cognitive testing. She administered the ADOS and the Vineland Adaptive Scales, 2nd Edition (Vineland). Dr. Bailey reported that she used the interview portions of the ADOS and that Claimant "showed poor eye contact," her voice was extremely monotone, and when asked to perform a demonstration task, Claimant "used very poor gestures, had very little eye contact, and again a very poor range of affect." (Ex. 3, p. 3.) Dr. Bailey found it extremely difficult to have an age-appropriate conversation with Claimant. With respect to Claimant's adaptive functioning, Claimant's Vineland scores revealed that Claimant is functioning in the moderately delayed range on all domains (communication, daily living skills, and socialization). Dr. Bailey diagnosed Claimant as having ASD without Accompanying Language Impairment and without Intellectual Impairment, Unspecified Psychotic Disorder, and Unspecified Depressive Disorder.

9b. Dr. Kelly credibly testified that the Service Agency's multi-disciplinary team disagreed with Dr. Bailey's diagnosis because the descriptors used by Dr. Bailey regarding Claimant's difficult time describing emotions, poor insight, etc., could be caused by co-occurring conditions. Dr. Kelly explained that the ADOS is an observational measure and uses a scripted interview to determine the level of functioning as it relates to communication and socialization, among other things. The reliability of the ADOS in identifying the presence of autism can be affected by any other condition the test subject may have. Although Dr. Bailey used the DSM-5 language and noted poor eye contact and reciprocal deficiencies, based on Claimant's total record, the multi-disciplinary team suspected Claimant's deficits were caused by her psychiatric

condition.[11] Dr. Kelly testified that the multi-disciplinary team also sought to determine whether Claimant was eligible for WRC services under the "fifth category."[12] The Service Agency conducted further testing and observation of Claimant as described in Factual Finding 10.

10a. The multi-disciplinary team met on November 9 and 11, 2016, to observe Claimant and administer achievement tests. During the behavioral observation, Dr. Kelly and other members of the multi-disciplinary team observed Claimant behind a two-way mirror. During that observation, Claimant told Dr. Bailey that she was seeing Dr. Raffle on a regular basis and they worked on life skills and Claimant's anxiety problems. She reported that she does not have many friends, her typical day was going to school, and she often cried in bed. Claimant writes songs and started a band consisting of one other person. Claimant has been unable to obtain a job although she has applied for several. She reported that she can become very obsessed with looking up medical information, and that she does not like it when other people touch her. Claimant's Wechsler Individual Achievement Test-Third Edition (WIAT-III) results revealed that Claimant placed in the below-average range of functioning. Claimant placed in the average range of essay composition, numerical operations, and word count. Dr. Bailey concluded,

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[11] Dr. Bailey did not testify at the fair hearing to explain or defend her diagnosis of ASD.

[12] The multi-disciplinary team determined that Claimant is not eligible under the "fifth category." Claimant does not have a condition similar to Intellectual Disability because Claimant's cognitive abilities were fairly consistent and were in the average to borderline range. Additionally, there was no evidence that Claimant required treatment similar to that of people with Intellectual Disability.

based on Claimant's scores on the academic testing and her previous IQ scores, that Claimant "fit the criteria of a Specific Learning Disability Related to Reading Comprehension Skills." (Ex. 14, p. 3.) Dr. Bailey also determined that Claimant "fit the criteria of someone with mental health issues related to psychosis and possible Obsessive-Compulsive Disorder." (*Ibid.*) Dr. Bailey's diagnoses were Unspecified Psychotic Disorder, Specific Learning Disability related to Reading Comprehension, and Major Depression.

10b. Dr. Kelly's credible testimony established that Dr. Bailey's diagnoses resulting from the November 9 and 11, 2016 evaluations better explained Claimant's deficits based upon the total record. Although there was a reference to Asperger's in the 2008 UCLA records, Claimant did not introduce evidence of any autism testing or analysis of criteria under the DSM-IV, the current version of the DSM at that time. Claimant's school records from 2008 do not reference autism but demonstrate that Claimant met special education requirements based on emotional disturbance. Claimant's early evaluations by Dr. Byrd and the District described in Factual Finding 6 make no reference to autism but instead concluded that Claimant suffered from ADHD and Specific Learning Disorder, respectively.

CLAIMANT'S EVIDENCE

11. Soryl Markowitz, L.C.S.W., testified on behalf of Claimant. Ms. Markowitz is the Service Agency's Autism and Behavior Specialist. She has worked for the Service Agency for 28 years. She has a bachelor's degree in psychology and is certified in Early Childhood Education. Ms. Markowitz was present at the November 11, 2016 multi-disciplinary team's observational evaluation. She also reviewed Claimant's records including Dr. Raffle's report. Ms. Markowitz credibly testified that when she observed Claimant, Claimant's presentation did not support a diagnosis of autism. Ms. Markowitz disagrees with Dr. Raffle's ASD diagnosis because Dr. Raffle did not perform autism

testing. She noted that Claimant has significant limitations in the areas of self-care, self-direction, learning, and economic self-sufficiency, and she could benefit from WRC services. However, the fact that Claimant can benefit from the services does not establish eligibility.

12. Valerie Lattanza, M.S., is the Service Agency's Intake Counselor. In reference to Dr. Mendez's 2008 review of Claimant's records, Ms. Lattanza testified that it was rare for the Service Agency to perform solely a record review and that the Service Agency usually meets with the individual requesting service. Ms. Lattanza further testified that she supported an eligibility decision in favor of Claimant. Ms. Lattanza stated that she believed that Claimant could benefit from the services provided by the Service Agency as a person with a condition similar to autism. However, the fact that Claimant can benefit from the services does not establish eligibility, nor is there a category of eligibility for those who have conditions similar to autism, or who require treatment similar to individuals with autism.

13. Claimant introduced a January 26, 2017 intake assessment report from UCLA's Autism Clinic prepared by Christie E. Lin, Ph.D. Dr. Lin assessed Claimant on that date in order to provide Claimant and her family recommendations to enhance Claimant's independent functioning. Dr. Lin references Claimant's ASD diagnosis, which is based on Dr. Raffle's 2015 diagnosis of Asperger's disorder and Dr. Bailey's 2016 ASD diagnosis. Dr. Lin notes that Claimant is capable of completing daily living tasks but needs prompts from her parents to complete them because she does not remember on her own. She further notes that Claimant can take public transportation on her own once she is shown how to do it. Dr. Lin observed that Claimant demonstrated appropriate integrated eye gaze, that Claimant's affect was restricted, and that Claimant's voice was high pitched and slightly monotone. Dr. Lin diagnosed Claimant as having ASD. However, Dr. Lin's diagnosis is not afforded much weight because she did

not perform any autism testing or an evaluation of the DSM-5 criteria for a diagnosis of ASD. Dr. Lin's report does not present any new information or determinations. Instead, in arriving at her diagnosis, Dr. Lin relied on the diagnoses of Dr. Raffle and Dr. Bailey, which are deficient as set forth in Factual Findings 8 and 9.

14. Claimant also introduced a December 10, 2016 letter from Dr. Raffle confirming his ASD diagnosis, and a November 30, 2016 letter from David Fogelson, M.D., Claimant's treating psychiatrist. Dr. Fogelson reported that Claimant suffers from ASD, Somatoform Disorder, Intellectual Disability, and possible Schizophrenia. The correspondence from Dr. Raffle and Dr. Fogelson are not persuasive. Dr. Raffle did not provide any new information, and his conclusions are based on his earlier evaluation and testing, which was found to be deficient in Factual Finding 8b. Similarly, while Dr. Fogelson described ASD symptoms such as Claimant's difficulty building and sustaining social relationships and her marked inability to maintain eye contact during a conversation, he did not perform any tests to identify autism. Additionally, Dr. Fogelson's Intellectual Disability diagnosis, which is based upon Claimant's cited Full Scale IQ of 83, is not credible. Claimant's Full Scale IQ falls within the low average range.

15. Claimant also submitted Autism Speaks articles to support her eligibility. These articles are not persuasive. The articles suggest that persons with autism also struggle with ADHD, depression, or both and that there are biological links between autism and schizophrenia; however, they do not establish that Claimant suffers from autism.

16. Claimant's mother testified that Claimant has no history of treatment for epilepsy or cerebral palsy. Claimant is currently taking Lamictal for mood swings and Abilify for psychosis. Claimant attended and graduated from a high school whose student population included some students with ASD. Claimant's mother described Claimant's inability to complete even one step of a task because Claimant does not

understand. Claimant's mother testified that Claimant cannot maintain a job because she cannot fulfill the job duties, and Claimant's last employer suggested that Claimant would benefit from job coaching. With respect to social cues, Claimant engages in the same conversational sentences, stating that she is hot or cold or asking where her father is. Claimant has no friends who seek to socialize with her. Claimant's mother also testified to the behaviors noted by Dr. Raffle.

17. Claimant's father testified that Claimant struggles socially and emotionally. Claimant experiences extreme anxiety about people and places outside her home. She has trouble following directions and paying attention. Claimant has no friends, and she has rarely been able to get past the interview stage in obtaining a job, or when she has obtained a job, Claimant does not make it past the first day.

18. The preponderance of the evidence does not establish that Claimant suffers from ASD.

LEGAL CONCLUSIONS

1. Claimant did not establish that she suffers from a developmental disability (ASD) which would entitle her to regional center services under the Lanterman Act. (Factual Findings 1 through 18; Legal Conclusions 2 through 10.)

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. A claimant seeking to establish eligibility for government benefits or services has the burden of proving by a preponderance of the evidence that she has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd*. (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greatorex v. Board of Admin*. (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.) Where a claimant seeks to establish eligibility for regional center services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the

Service Agency's decision is incorrect and that the appealing claimant meets the eligibility criteria. 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. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

> a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. . . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4a. To prove the existence of a qualifying 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*)(1):

> "Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

4b. 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. In addition to proving that she suffers from 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: intellectual disability, epilepsy, autism, and cerebral palsy. The fifth and last category of eligibility is listed as "Disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability." (Welf. & Inst. Code, § 4512.)

6. 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; Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, a person with a "dual diagnosis," that is, a developmental disability coupled either with a psychiatric disorder, a physical disorder, or a learning disability could still be eligible for services. However, someone whose conditions originate only from the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does not have a qualifying developmental disability would not be eligible.

7. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "autism." Consequently, when determining eligibility for services and supports on the basis of autism, that qualifying disability has been defined as congruent to the DSM-5 definition of "Autism Spectrum Disorder."

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

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to

reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. [¶] . . . [¶]

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).
4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature,

adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement). [¶] . . . [¶]

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

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

9. Claimant does not meet the criteria under the DSM-5 for a diagnosis of Autism Spectrum Disorder. Although records from UCLA and from Claimant's District reference a diagnosis of Asperger's Disorder, there were no stated bases for such a diagnosis. Additionally, although Dr. Raffle and Dr. Bailey diagnosed Claimant with ASD, those diagnoses are deficient, as set forth in Factual Findings 8 and 9. Furthermore, Dr. Lin's and Dr. Fogelson's diagnoses of ASD were deficient, as set forth in Factual Findings 13 and 14. After conducting testing to identify autism, administering academic testing to Claimant and observing her, Dr. Bailey and the multidisciplinary team found that Claimant did not meet the criteria for a DSM-5 diagnosis of Autism Spectrum Disorder. Based on the testing and application of the DSM-5 criteria, the evidence established that while she does have deficits, Claimants deficits are the result of unspecified psychotic disorder, major depression, and a learning disability. Claimant has not established that

she is eligible for regional center services under the diagnosis of autism.

10. The preponderance of the evidence does not establish that Claimant is eligible to receive regional center services.

ORDER

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

DATED:

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CARMEN D.SNUGGS

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.