

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

T. D.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2013110074

DECISION

The hearing in the above-captioned matter was held on June 16, 2014, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings.

Claimant was represented by her mother, L.M., her authorized representative.¹ The Service Agency, North Los Angeles County Regional Center (NLARC or Service Agency) was represented by Rhonda Campell, Contract Officer.

Evidence was received, the case argued, and the matter submitted for decision on the hearing date. The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

ISSUE PRESENTED

The question presented in this case is whether Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.²

¹ Initials are used in the place of surnames in the interests of privacy, and Claimant's mother will be referred to as Mother for the same reason.

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

FACTUAL FINDINGS

The Parties, Procedural History, and Jurisdiction

1. Claimant is a 19-year-old woman residing with her mother in the Service Agency's catchment area.³

2. In approximately April 2012, Claimant sought services from the Service Agency. She had received services under the Lanterman Act as a child, but as detailed below, the Service Agency later decided that its determination of eligibility was incorrect, and she was exited from the system.

3. On October 15, 2013, the Service Agency issued a Notice of Proposed Action (NOPA) to Claimant. That NOPA, along with a letter, informed her that she was not deemed eligible for services. Claimant's mother filed a Fair Hearing Request on October 28, 2013; Claimant had signed it designating Mother as her authorized representative. (Ex. 2, pp. 15, 18-20.)

4. A hearing date was set, and mediation occurred as well; this apparently led to further assessments of Claimant, and a continuance of the hearing, with the appropriate time waiver. When further assessments did not resolve the matter, the hearing went forward on June 16, 2014. All jurisdictional requirements have been met.

Claimant's Prior Status as a Consumer of Regional Center Services

5. In July 2000, when Claimant was five years old, she sought services from NLACRC after being referred there by the Los Angeles Unified School District (District). At that point Claimant had already been in various therapeutic regimes because her mother reported aggressive and other maladaptive behavior. In May of 2000 she had been diagnosed by a psychiatrist as suffering from Anxiety Disorder, Not Otherwise Specified (NOS), and he utilized several rule-out diagnoses, including Generalized Anxiety Disorder, Separation Anxiety Disorder, Panic Disorder, and Depressive Disorder. The psychiatrist, Dr. Arthur Pogosyan, M.D., (Pogosyan) made no diagnosis on Axis II, and on Axis IV found "Problems with Primary Support Group." (Ex. 3, p. 4.)

6. In August 2000 Lisa M. Doi, Ph.D., a licensed clinical psychologist, performed an evaluation of Claimant, who was then five years and eight months old. Dr. Doi used the Wechsler Preschool and Primary Scale of Intelligence—Revised (WPPSI-R) and obtained a full scale IQ score of 80. (Ex. 5, p. 9.) She administered the Vineland Adaptive Behavior

³ Claimant was born on December 15, 1994.

Scales (Vineland), with Mother serving as the reporter, and derived an Adaptive Behavior Composite of 63. The Daily Living Skills score was 64, with the Socialization score being 59. (*Id.*) Those scores placed Claimant in the bottom two percent of others her age.

7. Dr. Doi stated that “given the present information, while [Claimant] meets criteria for a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), social-emotional factors, including anxiety and attachment issues should be considered in gaining a comprehensive understanding of [Claimant's] presentation.” (Ex. 5, p. 8.) Dr. Doi also diagnosed Borderline Intellectual Functioning on Axis II.

8. In October 2000, the Service Agency determined that Claimant was eligible under what is known as the “fifth category” of eligibility, as a person with a condition similar to mental retardation or one that requires treatment similar to that required by mentally retarded individuals. (See § 4512, subd. (b).) The eligibility team also recommended that Claimant be re-assessed in two years to clarify her cognitive skills as well as her eligibility for service. (Ex. 6.)

9. The reassessment that the eligibility team recommended began in earnest in October 2003, when Catherine L. Scarf, Ph.D, then the Service Agency's supervising psychologist, began conducting tests and other steps to evaluate Claimant's condition. On October 30 and November 19, 2003, she administered, or attempted to administer, the Wechsler Intelligence Scale for Children, Third Edition (WISC-III), the Wide Range Achievement Test, Revision 3 (WRAT 3), the Autism Diagnostic Observation Schedule, (ADOS), module 2 as well as the Gilliam Autism Rating Scale (GARS), the Rorschach Ink Blot Test, and the Adaptive Behavior Assessment System (ABAS), both in the parent form, and the teacher form. Dr. Scarf also reviewed numerous records pertaining to Claimant's prior assessments, therapies, and special education services. (Ex. 13.)

10. (A) Claimant had trouble completing some of the tests, including the ADOS and the WISC-III. Dr. Scarf noted that on the WISC-III Claimant had subtest scores running from average to borderline. The score on the GARS did not support a diagnosis of Autistic Disorder. Dr. Scarf was unable to obtain a valid ABAS result from Claimant's school, as the teacher was new, and could only make guesses in response to many questions. (Ex. 13, p. 4.) The results of the WRAT 3, a test of academic achievement in reading, spelling, and arithmetic indicated better school performance than the prior IQ score obtained in 2000 would have predicted. This is because Claimant scored 91 in reading and in spelling, and a 75 in arithmetic. The first two scores were in the average range, though the arithmetic score was in the borderline range. This supported an opinion by Dr. Scarf that Claimant's intellectual functioning was in the average range, despite her failure to complete the WISC-III. (*Id.*, p. 3.)

(B) Dr. Scarf noted that Claimant appeared depressed both times that she saw her, and she found Claimant met the criteria for Major Depressive Disorder. Dr. Scarf took note of Claimant's history of other maladies, including a diagnosis of Bipolar Disorder, but she found a disturbance of mood predominated in the presentation. (*Id.*, p. 4.)

(C) Dr. Scarf diagnosed Major Depressive Disorder with Catatonic Features, and she made no diagnosis on Axis II. She did not find Autistic Disorder or Borderline Intellectual Functioning. (*Id.*, p. 5.)

11. (A) Claimant was reevaluated by Dr. Doi in January 2004, a month after the child's ninth birthday. Dr. Doi utilized the Test of Nonverbal Intelligence—Third Edition (TONI-3), and she attempted to administer the WRAT-3 and ADOS, Module 3. She also used the Vineland, with Mother as the reporter. She reviewed many records, conducted a clinical interview, and an observation. (Ex. 14, p. 2.)

(B) Claimant would not complete many of the tests, and she was not able to separate from her mother. Thus, Dr. Doi could not complete the WRAT-3 or the ADOS. The TONI-3 indicated an IQ of 111, near the top of the average range of intelligence. (*Id.*, p. 9.) While the Vineland scores were low, including in socialization and communication, Dr. Doi noted that reports from Claimant's school indicated that she communicated and socialized better than her mother reported.⁴ (*Id.*, pp. 4, 5.)

(C) Dr. Doi concluded that a diagnosis of PDD NOS was not appropriate given the available information. She diagnosed Depressive Disorder NOS with rule out Major Depressive Disorder.

12. (A) Both Dr. Scarf and Dr. Doi took notice of reports made prior to their assessments, and after Claimant was made eligible for regional center services, that were inconsistent with eligibility. (Ex. 13, p. 1; Ex. 14, pp. 1-2.) One such report was written by a behavioral psychologist, Willie Brown, Ph.D., who performed a behavioral assessment of Claimant in early 2001.

(B) Dr. Brown saw Claimant and her mother twice in their home, once on December 27, 2000, and again on January 2, 2001. He also interviewed Claimant's teacher on January 11, 2001, and he reviewed records. He understood the problem behaviors to be tantrums, aggression, and panic attacks. Mother described numerous other maladaptive behaviors, such as sensitivity to touch, noise, and smells. She said Claimant would bark like a dog, and stomped her feet, and flapped her hands. Numerous other behaviors were described. (Ex. 7, p. 2.)

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⁴ Dr. Doi cited an Individual Education Plan (IEP) from October 2003, where it was stated that Claimant exhibited adequate peer relations and social skills, although she was shy and soft-spoken, doing better with a small group. (Ex. 14, p. 5.) As to communication, Dr. Doi perceived no oddities of speech during the evaluation, and noted that the school wanted to exit Claimant from speech and language services, and that on some tests she was at or above chronological age. (*Id.*, p. 4.)

(C) Claimant's teacher informed Dr. Brown that she had not seen the behaviors described by Mother, and that as to alleged panic attacks, the teacher noted that the only one she had heard of had reportedly occurred in the school parking lot. However, there were no witnesses to the event, except for Mother.

(D) Dr. Brown did not observe any of the behaviors described by Mother, and he noted that they had not been observed by the teacher, school nurse, school psychologist, and others interviewed. In his report, dated February 25, 2001, he stated that Mother was reluctant to answer questions about Claimant's behaviors, and would just give him written statements about the behaviors, and Mother's reactions to them. He perceived she was only willing to talk about what she wanted to talk about, and when questioned or asked for details, was non-responsive. She also stated that she could not take data on the problem behaviors because there was too much going on. Such data is necessary for sound behavioral interventions. Dr. Brown recommended that no behavioral interventions be provided. (Ex. 7, pp. 3-4.) The Service Agency followed that recommendation.

(E) Doctor Scarf also reviewed a letter by Dr. Pogosyan, dated April 27, 2001, where he stated that his working diagnosis of Claimant's condition was Anxiety Disorder NOS, and that she was receiving Zoloft to target her anxiety symptoms and some depressive symptoms, and to reduce certain repetitive behaviors. He closed his letter with the comment that "this case is very complicated from the aspect that some of the symptoms presented by [Claimant's] mother are not observed by other care-providers or specialists who are involved in [Claimant's] case." (Ex. 9. Quoted in Scarf's report, exhibit 13, at p. 1.) There is no evidence he was referring to Dr. Brown's report, which had issued just two months before Dr. Pogosyan's letter, and such was unlikely, as Brown was a vendor of the Service Agency, which would not generally circulate such reports to other mental health care providers, such as Dr. Pogosyan, who were not working with or for NLACRC.

(F) Doctors Scarf and Doi reviewed a report issued on behalf the County of Los Angeles Department of Mental Health, by Darleen Kuwahara, L.C.S.W., on April 20, 2001, which determined that Claimant was eligible for mental health services under AB 3632. That report showed that Claimant was not exhibiting problem behaviors of the type reported by Mother, either in the intensity she reported, or at all. Thus, the school psychologist reported that in counseling sessions the Claimant was always "very engaging, very appropriate, curious, and talkative in counseling sessions. She is able to engage in conversation easily and shares her interests readily." (Ex.8, p. 7.)

(G) To be sure, school personnel perceived that the Claimant was anxious, at times, about coming to school. But, District staff had estimated Claimant's cognitive ability to be in the average to high averaged range. When a school psychologist completed autism rating scales, with Mother as the reporter, the score fell between non-autistic and mildly to moderately autistic. (Ex. 8, p. 7.) However, none of the problem behaviors described by Mother had been observed by the school psychologist when the evaluation was performed. (*Id.*)

(H) During her assessment by the County, Claimant was initially anxious, but her mood quickly shifted, and she became cheery, and was laughing and playing. She engaged well and was cooperative, and there were none of the perceptual problems previously reported by Mother, nor did she exhibit any of the reported behavioral problems exhibited. Ultimately, Ms. Kuwahara noted that “currently, it is difficult to ascertain the root of [Claimant's] difficulties due to the complexity of neuro-biological and psychosocial issues which appear to be operating simultaneously.” (Ex. 8, p. 10.) Dr. Doi took note of this statement in her 2004 report. (Ex. 14, p. 2.)

13. The Service Agency determined that Claimant was not eligible for further services, and gave Mother written notice of that decision on October 6, 2004, stating further the opinion that Claimant suffered from a psychiatric disorder, and not a developmental disorder of the type that would make Claimant eligible. (Ex. 16.) Mother did not appeal the decision, and services ended.

Claimant Does Not Suffer From Mental Retardation/Intellectual Disability

Results of Tests and Assessments of Claimant's Cognitive Ability

14. Since 2004, Claimant has been tested for cognitive ability, and found to have an average IQ. In June 2012, she was tested by Sandi J. Fischer, Ph.D, a psychologist at the Service Agency. Her full scale IQ was 99, which is average. (Ex. 21, p. 11.) Although the District does not use IQ tests, other measures utilized by the District indicate that Claimant was of low average cognitive ability. (Ex. 18, p. 21.)

15. Claimant's school performance indicates that she does not suffer from an intellectual disability. In March 2012, she took the Woodcock Johnson Achievement Test III, and her overall score was 95, which was average; 100 being the median score for that test. In four of the nine subtests, her score was 100 to 104. In four others she scored 93, 95 twice, and 99. Her only score below 93 was in Academic Fluency, where she scored an 86. (Ex. 17, p. 6.)

16. When the District performed a psycho-educational assessment of Claimant in March 2012, she was then in the 10th grade. At that time she had six classes, and was then earning A grades in five of them. Her one B was in Advanced Placement Biology. (Ex. 17, p. 10.) This was consistent with performance in middle school, when she generally had an A average, including in subjects such as Algebra, Algebra II, English and Language Arts. (Ex. 18, p. 3.) Since that time, Claimant has applied for and has been accepted to the University of California, Irvine, for the 2014-2015 school year.

17. The Lanterman Act has long made Mental Retardation one of the five categories of developmental disability that make a person eligible for services, if other requirements are met. In the spring of 2013, the standard text that defined Mental Retardation, and upon which eligibility decisions were based by all of the regional centers, changed the

nomenclature, replacing the term Mental Retardation with Intellectual Disability. There were changes made to the diagnostic criteria. That standard text is now known as the Diagnostic and Statistical Manual, Fifth Edition. (DSM-5.)

Mental Retardation as Defined in the DSM-IV-TR

18. (A) Under the DSM-IV-TR,⁵ the predecessor to the DSM-5, Mental Retardation was defined, generally, as significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM-IV, p. 41.) “Significantly subaverage intelligence” was defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id.*) Put another way, “significantly subaverage” translates to IQ scores falling in the second percentile, two standard deviations below the mean in most standardized tests. It must also be noted that for a person to receive a diagnosis of mental retardation, the onset must occur before age 18.

(B) The DSM-IV also provided that:

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute. (DSM-IV, p. 42. Emphasis in the original.)

Thus, it can be seen that as of 2012, when Claimant applied for eligibility, and the DSM-IV-TR definition of Mental Retardation controlled, her average IQ and average to above average school performance, disqualified her from a diagnosis of Mental Retardation. And, in all the available reports and assessments of Claimant's condition, no professional has ever diagnosed her as suffering from Mental Retardation.

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⁵ Standing for Diagnostic and Statistical Manual, Fourth Edition, Text Revision.

Intellectual Disability Under the DSM-5

19. (A) DSM-5 defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” (DSM-5, p. 33.) The following three criteria must be met:

- A. Deficits in intellectual functions, such as reasoning, problems solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
- B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

(B) Thus, the definitive characteristics of intellectual disability include deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual’s age, gender, and socio-culturally matched peers (Criterion B). To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Onset is during the developmental period (Criterion C). A diagnosis of intellectual disability should not be assumed because of a particular genetic or medical condition. Any genetic or medical diagnosis is a concurrent diagnosis when Intellectual Disability is present. (DSM-5, pp. 39-40.)

20. The authors of the DSM-5 note that the most significant change in diagnostic categorization accompanying the change from DSM-IV-TR to DSM-5 nomenclature of intellectual disability is emphasis on the need for an assessment of both cognitive capacity and adaptive functioning, and that the severity of intellectual disability is determined by adaptive functioning rather than IQ score. (*Id.* at 37.) The authors note no other significant changes.

21. The authors of the DSM-5 have indicated that “[i]ntellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the general population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5).” (DSM-5, p. 37.) At the same time, the authors of the

DSM-5 recognize that “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” Thus, “a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.” (*Id.*)

22. According to the DSM-5, “[a]daptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations.” (*Id.*) Whether it is intellectual functioning or adaptive functioning, clinical training and judgment are required to interpret standardized measures, test results and assessments, and interview sources.

23. A claimant asserting fifth category eligibility is required to establish by a preponderance of evidence significant deficits in intellectual functions or deficits in adaptive functioning, or both. Fifth category eligibility does not require strict replication of all of the diagnostic features of intellectual disability. If this were so, the fifth category would be redundant. Eligibility under the fifth category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of how well that claimant meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. The evidence must establish that a claimant has a disabling condition that does not fall within the regulatory exclusions described in Legal Conclusion 3, below. Furthermore, the evidence must establish that the claimant’s disabling condition requires treatment similar to the treatment needs of an individual with intellectual disability. The DSM-5 revisions do not appear to have altered the Lanterman Act’s fifth category eligibility analysis.

24. In this case standard testing indicates an average IQ, one point below the median of 100. Standardized testing of academic performance indicates performance commensurate with an average IQ. Claimant's school performance has not been consistent with the performance that one expects from a person with an intellectual disability, and the University of California is known to accept students who show intellectual ability, not disability.

25. While standardized tests such as the Vineland indicate poor adaptive function, and such has been reported by Mother, other observers have not perceived such problems with Claimant, and certainly not to the level of substantial disability. This was illustrated by Dr. Brown, the behaviorist, more than 13 years ago, and noted by Dr. Pogosyan at about that time, seemingly independent of Dr. Brown. (See Factual Findings 12(B)-(E).) School records, for a period of years, paint a different picture of Claimant as well, as will be detailed hereafter. Further, it appears that whatever Claimant's adaptive deficits might be, they stem from mental health issues, hers and her family's. On this record, it cannot be found that Claimant suffers from Intellectual Disability.

Claimant Does Not Suffer From Autism Spectrum Disorder

26. Dr. Fischer has written two assessments of Claimant's condition since she re-applied for eligibility. In each instance, she has concluded that Claimant does not suffer from Autism or Autism Spectrum Disorder (ASD). (See Ex's. 21, 27.) Based on those assessments, and other available evidence, it must be found that Claimant has not established eligibility due to ASD.

27. (A) Dr. Fischer performed the first of two assessments in June 2012. She reviewed the material cited above, and other reports, including a social assessment performed at the Service Agency in April 2012. Dr. Fischer used a number of standardized tests. At that time, Autistic Disorder was the eligible condition, and it was defined by the DSM-IV-TR.

(B) As noted in Factual Finding 14, Dr. Fischer tested Claimant's IQ and found it to be average, at 99. She used the math subtest of the K-FAST test to assess math skills. Claimant had an average score. According to Dr. Fischer, the test indicated that Claimant could perform tasks that Mother testified Claimant can't do, such as handle money. (Ex. 21, p. 6.)

(C) When Dr. Fischer utilized the ADOS, which is based on the observations of the person conducting the assessment, i.e., Dr. Fischer's observations, she found that Claimant did not meet the cut-off for autism, on any of the three subtests: communication, social interaction, stereotyped behavior and restricted interests. (Ex. 21, p. 12.) This was in contrast with the GARS, which was based on Mother's reports; in every instance the autism classification was "very likely." (*Id.*)

(D) Dr. Fischer noted that the sort of behavioral problems noted by Mother during administration of the GARS, and when Mother was interviewed by Dr. Fischer, have not been reported by other observers, such as teachers or therapists. (Ex. 21, p. 7.) This was especially true in the area of stereotyped, restricted, or repetitive behaviors. For example, Mother reported that Claimant would frequently flick her fingers in front of her eyes, would spin objects not meant for spinning, and frequently rock back and forth, as well as hand flap. Dr. Fischer saw none of this sort of behavior, and could not find reports of it from persons other than Mother. A review of the numerous reports in this record by the ALJ confirms Dr. Fischer's analysis.

(E) As another example, Mother described significant problems in functional communication, reporting to Dr. Fischer that Claimant did not use sentences with a noun and a verb. But Claimant did so when speaking to Fischer. Mother reported Claimant is not able to speak clearly and distinctly, but Fischer did not perceive that when talking to Claimant. This is not to say that Dr. Fischer found all of Claimant's functional communication to be excellent, but it simply was not impaired as Mother contended. (Ex. 21, p. 8.) It should appear that if Claimant could not speak in sentences using nouns and verbs, she would be unlikely to be earning A's in her classes, for a period of years.

(F) When interviewed in June 2012, Claimant had no problem separating from Mother to work with Dr. Fischer, and was able to speak to Dr. Fischer in an animated way, complete with facial expressions, when talking about her school.

28. (A) On April 23, 2014, Dr. Fischer conducted an observation of Claimant at her high school. At that time she observed Claimant to interact with other students, although she was hardly the discussion leader in the class. However, she was seen to talk with and interact with one or two classmates during the session, and Claimant smiled and gestured while doing so. When the teacher engaged the student who Claimant had been talking to, Claimant listened in and joined the discussion, resuming her “animated discussion” with the student when the teacher walked away. (Ex. 27, p. 6.)

(B) Dr. Fischer interviewed the teacher of the class she observed, one where Claimant had been perceived by the school psychologist to display anxiety. The teacher, Ms. Boyd, informed Dr. Fischer that there were no problems with Claimant's use of facial expressions, eye contact, and gestures. She further reported that Claimant did not have preoccupations, or restricted, repetitive behaviors or rituals, nor did Claimant exhibit sensory sensitivities. (Ex. 27, p. 7.) She did describe Claimant socially as “to herself,” noting she usually worked with the girl she had been talking to during class, and spent her free time with her boyfriend. (*Id.*, p. 6.)

29. In her report following the school observation, Dr. Fischer referenced several reports that had been obtained from therapists who have provided mental health treatment and counseling to Claimant. While the reports support diagnoses of a psychiatric condition, such as Anxiety Disorder, they do not support a diagnosis of an ASD. Furthermore, the observations of Claimant do not match Mother's statements about Claimant's behaviors. While the District has provided special education services to Claimant for a period of years, she is (and has been) eligible for them on the basis of Emotional Disturbance.

30. Ultimately, using DSM-5 criteria, Dr. Fischer concluded that Claimant does not suffer from ASD. Instead, she diagnosed Anxiety Disorder. She pointed out that given the close relationship between Claimant and Mother, there may be problems with boundaries, and it was likely that there is a Parent-Child Relationship problem. (Ex. 27, p. 8.)

31. (A) Aside from Dr. Doi's 2000 diagnosis of PDD-NOS, only one other mental health professional has ever diagnosed Claimant with an ASD, though some have done so by reference to the history of Doi's first diagnosis. In September 2013, Claimant was seen by Roxanne R. Prilutsky, Ph.D, a clinical psychologist. While her report states, at the outset, that is a summary report of a psychological evaluation, every page, at the bottom, identifies the document as a “clinical interview report.” (Ex. 24.)

(B) Under the list of tests administered, Dr. Prilutsky wrote “psychological evaluation.” (Ex. 24, p. 1.) While the report states that Claimant provided numerous emotional complaints, and other information, Mother may have had a hand in the assessment,

as the document refers at least twice to information provided by Mother. (*Id.* pp. 2, 3.) In describing Claimant, Dr. Prilutsky stated her speech was mildly pressured, accelerated in rhythm and rate, but understandable and fluent in English. No verbal tics or repetitive statements were noted. She was cooperative and serious, though eye contact was “fleeting at times during the interview.” (*Id.*, p. 8.) She appeared depressed, and her intellectual functioning appeared to be in the average to above average range. She appeared generally alert, though visibly lethargic and fatigued, and was “generally responsive” to questions a (*Id.*, p. 9.)

(C) Although the DSM-5 had been published several months before the interview, Dr. Prilutsky utilized the prior version, the DSM-IV-TR, to diagnose Bipolar Disorder, Most Recently Manic, Panic Disorder with Agoraphobia, and Asperger's Disorder, provisional. (Ex. 24, pp. 10-11.)

32. (A) Dr. Prilutsky's report is not credited in this proceeding. There was no standardized testing of any type utilized, which is completely outside of best practices. And, it should be noted that she set out a significant disclaimer at the end of her report:

LIMITATIONS OF PSYCHOLOGICAL EVALUATION

It is important for the reader to understand that a Psychological Evaluation is a means of generating hypotheses and are not intended to be the final answer. Because malingering is difficult to detect solely based on one interview, other records, and/or psychological testing may be needed to reach the most reliable determination.

(Ex. 27, p.12. Emphasis in original.)

(B) Not only did Dr. Prilutsky fail to use any standardized tests, she reviewed no records, and consulted none of the professionals who have worked with Claimant for a period of years. The “evaluation” does not begin to meet the best practices for diagnosing an ASD. (See generally, Autistic Spectrum Disorders, Best Practice Guidelines for Screening, Diagnosis, and Assessment (2002), California Department of Developmental Services.) Further, the use of a provisional diagnosis of an ASD is not sufficient to carry the day even if no evidence was offered to refute it.

33. In contrast to Dr. Prilutsky's “evaluation” is a note from a District psycho-educational report issued in March 2012. According to that document,

Based on the IEP [Claimant] continued to qualify for special education services as a student with an emotional disturbance. [Claimant] was also assessed at UCLA to rule out concerns of Autistic-like characteristics and the findings were that the Autism Clinic stated that [Claimant's] difficulties could not be attributed to Autistic Disorder. The recommended special education eligibility under the category of

Emotionally disturbed. The report listed the following DSM-IV Diagnoses: Axis I: Anxiety Disorder Not Otherwise Specified, Parent-child Relational Problems, Depression NOS, currently in remission. Axis II: No diagnosis. Axis III: Asthma. Axis IV: Stressor-adaptive functioning stressors resulting from anxiety and parent/child conflict. Axis V: Current global assessment of functioning = 50.

(Ex. 18, p. 4. Capitalizations as in original.)

Given UCLA's decades of research and study of ASD's and their treatment, and that institution's reputation, such findings must be given significant weight in the determination of Claimant's condition.

Other Findings Relevant to the Case

34. Mother testified that Claimant has serious problems that handicap her in everyday living. The young woman lives at home, and sleeps in her mother's bed. Although Claimant tells people who interview her that she can accomplish various tasks, like handle money or cook, Mother testified that such is not true, a view supported by a family friend who appeared at the hearing.

35. It is plain that Mother's reports have to be carefully considered. As noted previously, her reports cannot be supported by the reports of others. When she appeared for the 2012 social assessment at the Service Agency, she withheld the reasons why Claimant was exited from the system. (Ex. 20, p. 1.)⁶

36. It is also plain that a number of variables are at work in this case, including a less than perfect home life, Mother's own struggles with Bi-Polar Disorder and Obsessive Compulsive Disorder (ex. 20, p. 5), and mental health problems that the rest of the family have grappled with. (*Id.*) These matters and Claimant's mental health problems explain whatever behavioral issues she has rather than a diagnosis of ASD.

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.

⁶ A psycho-educational assessment prepared by the District in March 2012 lists comments from Claimant's teachers, from kindergarten to ninth grade. They do not describe a child with maladaptive behaviors, and certainly not of the intensity described by Mother. (Ex. 18, pp. 2-3.)

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, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, 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).⁷ 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 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

⁷ All references to the CCR are to title 17.

impairment that results in a need for treatment similar to that required for mental retardation.

4. Section 4512, subdivision (1), 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.

Legal Conclusions Pertaining to Credibility

5. (A) It is settled that the trier of fact may “accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted.” (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also “reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material.” (*Id.*, at pp. 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of “one credible witness may constitute substantial evidence”, including a single expert witness. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. That is, disbelief does not create affirmative evidence to the contrary of that which is discarded. That the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (*Hutchinson v. Contractors’ State License Bd.* (1956) 143 Cal.App.2d 628, 632-633, quoting *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

(C) An expert’s credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert’s opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The trier of fact may reject the testimony of a witness, including an expert witness, even if it is uncontradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) The expert’s opinion is no better than the facts on which it is based and, “where the facts underlying the expert’s opinion are proved to be false or nonexistent, not only is the expert’s opinion destroyed but the falsity permeates his entire testimony; it tends to prove his untruthfulness as a witness.” (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923-924.)

(E) “[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. For example, an expert’s opinion based on assumptions of fact without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence. Similarly, when an expert’s opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an “expert opinion is worth no more than the reasons upon which it rests.” (Citations omitted.) (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116.)

Legal Conclusions Specific to Resolution of the Case

6. (A) To establish eligibility, Claimant must prove, by a preponderance of the evidence, that she suffers from an eligible condition, i.e., autism, mental retardation, intellectual disability, or that she falls into the fifth category. This Conclusion is based on section 4512, subdivision (a).

(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.

(C) A similar analysis applies to finding eligibility for “mental retardation,” a statutory term that has been superseded by the DSM-5. To be sure, the change in the diagnostic criteria does not appear to be as significant as that which took place in regards to autism.

7. Claimant has not established she is eligible for services by having Intellectual Disability, based on Factual Findings 9 through 25, and Legal Conclusions 1 through 6.

8. Claimant has not established she is eligible for services by having an Autism Spectrum Disorder, based on Factual Findings 9 through 36, and Legal Conclusions 1 through 6.

9. Claimant has not established that she is eligible for services based on a condition similar to mental retardation or which can be treated in a manner similar to mental retardation, based on Factual Findings 9 through 36, and Legal Conclusions 1 through 6.

10. Claimant suffers solely from a psychiatric disorder or disorders, based on Factual Findings 5, 10(C), 11(C), 12 (A) through (H), 39, and 36.

ORDER

Claimant's appeal is denied, and she shall not be eligible for services under the Lanterman Act.

June ____, 2014

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.