

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2015050987

DECISION

This matter was heard on October 1, 2015, in Culver City, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. The Westside Regional Center (Service Agency or WRC) was represented by Lisa Basiri, Fair Hearing Specialist. Claimant was represented by her mother.¹

Evidence was received by documents and testimony. The record was closed and the matter was submitted for decision on October 1, 2015.

ISSUE

The parties agreed that the following issue is to be resolved: Is Claimant eligible to receive services from the Service Agency?

EVIDENCE RELIED UPON

WRC: Testimony from Thompson Kelly, Ph.D.; exhibits 1-8.

Claimant: Testimony from Claimant's mother, father and brother; neighbor Jessica K.; exhibits A-I.

¹ Titles and/or initials are used to maintain privacy for Claimant, her family, and a witness.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant was born in April 1998 and is a 17- year-old female. She has received special education services from her local school district under the eligibility category of a child with autism. Claimant’s mother requested that Claimant be assessed for eligibility for regional center services.
2. In a letter and Notice of Proposed Action dated April 9, 2015 (exhibit 2), the Service Agency notified Claimant that she was not eligible for services.
3. Claimant’s mother submitted a Fair Hearing Request dated May 6, 2015 (exhibit 2), resulting in this hearing.
4. Various statutes and regulations relating to eligibility apply to Claimant’s request for services. Although there are five developmental disabilities that would make someone eligible for services, autism is the only eligible condition at issue in this case. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), states: “‘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. . . . [T]his term shall include . . . autism, . . . but shall not include other handicapping conditions that are solely physical in nature.”
5. As relevant here, California Code of Regulations (CCR), title 17, section 54000, defines “developmental disability” as a disability attributable to autism that originates before age 18, is likely to continue indefinitely, and constitutes a substantial handicap. Excluded are handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or disabilities that are solely physical in nature.
6. In summary, Claimant’s mother contends that Claimant suffers from autism spectrum disorder and is eligible for services.² The Service Agency contends that Claimant may suffer other conditions, including Attention Deficit Disorder with an accompanying learning disorder, but does not have a diagnosis of autism spectrum disorder and is not eligible for services.
7. A base level understanding of autism and autism spectrum disorder will help place in context the evidence of Claimant’s behaviors, test scores, evaluations and diagnoses. Reference is made to the Diagnostic and Statistical Manual of Mental Disorders as a well respected and generally accepted manual listing the diagnostic criteria and discussing the

² As noted in more detail below, in 2013 a change was made in the psychiatric community from referring to a diagnosis of autism or autistic disorder, to a diagnosis of autism spectrum disorder.

identifying factors of most known mental disorders. The fourth edition, with text revisions, was issued in 2000 by the American Psychiatric Association, and is referred to as DSM-IV-TR. The DSM-IV-TR includes diagnostic criteria and discussion of the disability titled Autistic Disorder.³ In 2013, a new, fifth edition was issued, referred to as DSM-5. The DSM-5 includes new diagnostic criteria and a discussion of the disability now titled Autistic Spectrum Disorder.

8. Claimant has undergone various assessments and has been assigned various diagnoses over time. Several assessments and diagnoses relate to language in the DSM-IV-TR, while others relate to language in the DSM-5.

9. The earliest significant reference in the exhibits is from Shana Wallace, M.D., a pediatric neurologist, in a treatment note in September 2009, when Claimant was age 11 years, four months and the family lived in Charlotte, North Carolina. A teacher noted concerns about Asperger's syndrome (a disability related to Autistic Disorder from the DSM-IV-TR that is now considered within Autistic Spectrum Disorder under the DSM-5). Dr. Wallace noted that Claimant had qualitative impairment in social interaction and fixed pattern of interests "fitting diagnostic criteria for Asperger's." (Exhibit C.) Dr. Wallace also spoke to the family about the criteria for attention deficit hyperactivity disorder, and noted there were family concerns about specific learning disabilities. (Exhibit C.) She suggested a referral for neuropsychological testing.

10. A comprehensive psychological evaluation was performed by Robert Faucette, Ph.D., on two days in October 2009, as discussed in a report dated November 5, 2009 (exhibits 8 and D). Numerous tests were administered, only some of which are mentioned here. Data was compiled from Claimant, her mother and father, and her fifth and sixth grade teachers. On the Wechsler Intelligence Scale of Children, fourth edition, Claimant produced a full scale IQ score of 106, in the average range; however, her processing speed (83) was in the low end of the low average range. Slow processing speed was also noted in the results of the Woodcock-Johnson Test of Achievement-third edition. Test results in the subject of math justified a diagnosis of a learning disability in math. Dr. Faucette included the following in his clinical impression.

"The psychological assessment strongly supports a diagnosis of Attention-Deficit/Hyperactivity Disorder [ADHD], NOS [Not Otherwise Specified] and Pervasive Developmental Disorder [PDD], Not Otherwise Specified. ADHD, NOS is assigned given the PDD diagnosis, as her symptoms clearly overlap with this disorder. That being said she exhibits the inattentive-distractible symptoms associated with ADHD more so than the impulsive-hyperactive symptoms. As for the PDD, NOS diagnosis, based on the present assessment, she has the features of an Asperger's Disorder, but her adaptive functioning deficits do not appear to be restricted to social deficits, as she struggles with daily living skills and self-

³ The statute listing eligible conditions uses the word autism (see Factual Finding 4), while the DSM-IV-TR uses the phrase Autistic Disorder. For purposes of this Decision, the terms are interchangeable. Capital letters are used as they appear in the source documents.

help behaviors as well. What is clear is that [Claimant's] social/communication functioning is significantly impaired. And these symptoms certainly interact with behavioral, emotional, and academic problems that also impair functioning." (Exhibit 8, pp. 2-3.)

11. Dr. Faucette received input on the Social Responsive Scale (SRS) from Claimant's mother and sixth grade teacher to determine whether an Autistic Spectrum Disorder was present. Both indicated Claimant had specific impairments associated with social awareness and autistic mannerisms, and the teacher's response also indicated specific impairments associated with social communication and social motivation. Dr. Faucette noted that the SRS assessment showed Claimant's social-communication deficits negatively impacted her emotional-behavioral functioning, explaining the relationship among many of her symptoms. Dr. Faucette considered the criteria of a diagnosis of Asperger's Disorder but, rather, he determined that the test results supported the diagnoses of PDD-NOS, ADHD NOS, and Mathematics Disorder. Dr. Faucette made numerous recommendations, including seeking help from the local school district.

12. A later psycho-educational assessment by school psychologist Laurel Rixon (exhibit 7, dated May 6, 2015) indicated that, for sixth grade (presumably in California) in 2009, Claimant was found eligible for special education services based on the special education criteria for a child with autism. (As noted in more detail below, these criteria are different than the criteria of either the DSM-IV-TR for a diagnosis of Autistic Disorder or the DSM-5 criteria for a diagnosis of Autism Spectrum Disorder.) Apparently Claimant's family moved from California. Claimant had a physical examination in June 2011 where the doctor noted she was diagnosed with autism in 2009. (Exhibit E.) The source of this information is not cited, although it may have come from the educational records. It was also noted that Claimant's family would be moving to California. Claimant attended eighth grade at a school in the Los Angeles Unified School District (LAUSD) where her special education teacher noted in an email in October 2011 that Claimant's math processing speed was slow and she was confused or "spaced out" at times. (Exhibit G.) For eighth grade, Claimant was again found eligible for special education services based on the special education criteria for a child with autism.

13. The next evidence of professional input is a letter from Thompson Kelly, Ph.D., dated April 9, 2015 (exhibit 2). Dr. Kelly is the Manager of intake services at WRC and had reviewed documentation submitted by Claimant's mother seeking eligibility for regional center services. Dr. Kelly referred to the prior diagnosis of Pervasive Developmental Disorder. However, in the opinion of Dr. Kelly and the WRC clinical team, the records were more consistent with diagnoses of Attention Deficit Disorder and a learning disability.

14. As noted in Factual Finding 12, school psychologist Laurel Rixon prepared a comprehensive psycho-educational assessment for LAUSD (exhibits 7 and F, dated May 6, 2015). Suspected disabilities included autism and emotional disturbance. Numerous tests were administered, only some of which are noted here. Based on the overall test results, Ms. Rixon reported that Claimant did not meet the special education criteria of a student with an emotional disturbance. The Asperger Syndrome Diagnostic Scale was given to Claimant's mother as well

as her special education counselor, Ms. Gregorio. Of interest, the answers varied substantially between mother and teacher. Claimant's mother's input placed Claimant's probability of Asperger's Syndrome as "very unlikely," while Ms. Gregorio's input placed Claimant's probability of Asperger's Syndrome as "likely." Ms. Raxon reported that Claimant met the special education criteria of a student with autism, as required under California Code of Regulations, title 5, section 3030, subdivision (b)(1) (discussed in more detail below in Legal Conclusion 11) and that the following requirements were met:

"Verbal and nonverbal communication and social interaction are significantly affected. Within the Social scale, all raters reported that [Claimant] has difficulty relating to others that can't be explained by shyness, attention, or lack of experience. In the area of maladaptive skills, all raters reported that [Claimant] displays antisocial behavior. It was also reported that [Claimant] appears to be aware that she is different from others, and is oversensitive to criticism.

"The following behaviors may also be observed in addition to those above: Resistance to environmental change or change in daily routines. Teacher and parent exhibit a strong reaction to changes in her routine. . .

"Unusual responses to sensory experiences. In the area of sensorimotor skills, all raters indicated that [Claimant] frequently stiffens, flinches, or pulls away when hugged and prefers to wear clothes to be made of certain fabrics. [Claimant] is observed to wear a particular hat every day, even when it is hot outside." (Exhibit 7, p. 15.)

Ms. Raxon found that there were no reports of "Engagement in repetitive activities and stereotyped movements." (*Ibid.*)

15. As part of the intake process, an intake counselor at WRC performed an intake assessment of Claimant on June 9, 2015 (exhibit 6), including input from Claimant's mother regarding Claimant's developmental and educational history, as well as a list of behaviors in Claimant's past that were indications to her mother that Claimant may be autistic.

16. WRC referred Claimant to Rebecca Dubner, Psy.D., for a psychological assessment, which occurred on June 11 and 18, 2015, and is reported in exhibit 4. Numerous tests were administered, only some of which are mentioned here. Information was gathered from Claimant and her mother. Dr. Dubner also reviewed the reports by Dr. Faucette (November 5, 2009; exhibits 8 and D), the psycho-educational assessment by Laurel Raxon (May 6, 2015; exhibits 7 and F), and LAUSD's Individualized Education Plan for Claimant (May 6, 2015; exhibits 7 and F).

17. With reference to screening for Autistic Spectrum Disorder under the criteria of the DSM-5, Dr. Dubner administered the Child Autism Rating Scale-second edition (CARS-2), the Autism Diagnostic Observation Schedule-second edition (ADOS-2), and discussed with Claimant's parents the diagnostic criteria from the DSM-5. The results of the CARS-2, based

on information from Claimant's mother, did not support the presence of Autistic Spectrum Disorder. Dr. Dubner administered the ADOS-2 to Claimant, and wrote about some of Claimant's behaviors. (Exhibit 4, p. 8.) In Dr. Dubner's opinion Claimant's results on the ADOS-2 fell outside the range of autism spectrum disorder.

18. With respect to a diagnosis of Autistic Spectrum Disorder, Dr. Dubner listed several of the diagnostic criteria from the DSM-5 and found that none of them were met. Dr. Dubner gave specific information and examples, some of which are summarized below.

Diagnostic criterion A: "Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history."

A.1. "Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing or interests, emotions, or affect; to failure to initiate or respond to social interactions." (DSM-5, p. 50.)

Dr. Dubner noted this criterion was not met, citing examples of Claimant's interactions with others when she was younger, as well as her interactions with Dr. Dubner.

A.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." (DSM-5, p. 50.)

Dr. Dubner noted this criterion was not met, and added that Claimant engaged in eye contact, used gestures spontaneously and had a full range of facial expressions. Claimant pointed, nodded her head for yes and shook her head for no. "During the interview, [Claimant] often noticed her mother's facial expressions and commented, 'Mom, why are you making that face?'" (Exhibit 4, p. 6.)

A.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." (DSM-5, p. 50.)

Dr. Dubner noted this criterion was not met, adding that Claimant developed appropriate friendships and that schoolmates liked to be with her. She did not always want to talk to her friends and sometimes wanted "downtime" at home rather than socialize. She could adjust her behavior but sometimes was at a loss for what to say to others.

Diagnostic criterion B: "Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history."

B.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.) (DSM-5, p. 50.)

Dr. Dubner noted that this criterion was not met. Although Claimant tapped her leg often and constantly shook her leg, these actions seemed to be mostly related to ADHD and/or anxiety.

B.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 the same route or eat same food every day).” (DSM-5, p. 50.)

Dr. Dubner noted that this criterion was not met. Although Claimant had difficulty coping with changes in her routine and might get annoyed with changes, she would begrudgingly adapt. “Claimant’s mother indicated [Claimant] is very particular about where her items are placed, yet [Claimant] indicated that she finds it annoying if she has a place for things and they are moved.” (Exhibit 4, p. 7.)

B.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).” (DSM-5, p. 50.)

Dr. Dubner noted that this criterion was not met. Claimant had no unusual interests. She enjoyed writing, drawing and reading. She used to do voice acting on You Tube and was trying to get into singing. “She used to really like animals and would only draw animals because she stated she wasn’t able to draw people. She used to collect stuffed animals.” (Exhibit 4, p. 7.)

B.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 sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement). (DSM-5, p. 50.)

Dr. Dubner noted that this criterion was not met. Claimant was not overly sensitive to sounds, lights or crowds, and her pain tolerance appeared to be normal. “She is not overly fascinated by lights or things that spin. She might get annoyed at loud noises and her eyes don’t adjust well [to] lights. She did not like Vegas at night because the lights were too bright. She stated she also didn’t enjoy Las Vegas because all she was able to do was go to an arcade.” (Exhibit 4, p. 8.)

19. Dr. Dubner concluded that Claimant did not meet the diagnostic criteria for Autistic Spectrum Disorder, but demonstrated poor processing speed and slow response time, which might account for her feelings of anxiety and/or depression. Claimant was not able to independently apply her cognitive skills to daily routines, which could be explained by

underlying mental health issues. The clinically significant impairments in her social and academic functioning were related to communication deficits; however, her symptoms did not meet diagnostic criteria for a communication or language disorder. Claimant's low grade depression, anxiety and low self-esteem could be addressed by mental health therapy. Dr. Dubner's diagnoses were Unspecified Communication Disorder and ADHD-Combined.

20. As part of the ongoing process to assess Claimant's eligibility for regional center services, a multidisciplinary observation of Claimant took place at WRC on September 8, 2015. The observers were Claimant's mother, Dr. Kelly, Ms. Basiri, Dr. Bazzano and Linda Hastings, Psy.D. Dr. Hastings wrote a report of the observation (exhibit 3). Dr. Kelly explained that they were familiar with the prior evaluations and reports, and that this was a less formal process to gather more information. Claimant responded to many questions and Dr. Hastings commented that Claimant did not demonstrate significant limitations in receptive or expressive language. Claimant responded and reacted in ways that did not indicate she was on the Autism Spectrum. Dr. Hastings noted atypical behaviors, such as circumscribed interests, heavy clothing despite the hot weather, few local friends but a few long distance friendships, and a choice of solitary activities and isolation from her family.

21. Dr. Kelly testified that, due to Claimant's history and mixed presentation, it was difficult to determine her diagnoses and possible treatments. There were components of mental health issues as well as developmental disability issues. Several of Claimant's symptoms were consistent with ADHD. Other behaviors were not expected in someone with Autistic Spectrum Disorder. To differentiate between the two was difficult. Because Autistic Spectrum Disorder is pervasive, chronic and disabling, the symptoms and behaviors are typically consistent across many settings. By contrast, with mental health issues there can be more of an up and down presentation. Claimant was clearly not as functional as others her age in several areas, including academic achievement and daily living skills. As to the other behaviors noted in the reports and during the observation, Dr. Kelly commented that they were not displayed consistently or at the level necessary to make a diagnosis of Autistic Spectrum Disorder.

22. Dr. Kelly is familiar with the legal requirements for a school district to find a student eligible for special education services as a child with autism. (In addition to his many years of experience in the fields of mental health and developmental disabilities, he was a special education teacher for 12 years.) The process of determining eligibility for special education services encompasses broader categories than the process related to regional center services, which require diagnoses under the DSM-5. School district resources address the conditions that make a student eligible for special education services. Dr. Kelly noted that, by virtue of their licensure, school psychologists do not make diagnoses using DSM-5 criteria. In his experience, he often sees applicants for regional center services who have been found eligible for special education services as a child with autism, however they do not meet the more exacting criteria for a diagnosis of Autistic Spectrum Disorder under the DSM-5.

23. Claimant's brother, older by eight and one-half years, testified to Claimant's perseverative interests over the years, including fixations on animals, Japanese anime, and computers. Some extreme behavior included creating an on-line personality, with another name, and Claimant's desire to be addressed by the fictional name. Her computer is an all-encompassing fixation. In his opinion, several of the behaviors and symptoms of which he is aware, and are mentioned in the various reports, are of a nature and level that meet the requirements for a diagnosis of Autistic Spectrum Disorder. Claimant's brother acknowledged that he had no formal training or education in the subject of psychology.

24. Neighbor Jessica K. has known Claimant and her mother for about four years. Jessica K. has a teenage daughter who is autistic, and she has noted many similarities in behavior with Claimant. Both were home schooled for a period, however neither was successful in that setting.

25. Claimant's father testified about Claimant's behaviors and challenges over the years. His concerns include Claimant's lack of progress in school and problems with grooming and hygiene. Claimant recently moved to a smaller, specialized education setting in LAUSD which will, hopefully, address her academic issues. In particular, he was curious about why Dr. Faucette's diagnosis of PDD, NOS would not be sufficient to establish Claimant's eligibility for regional center services. He cited an informational posting on the website of Autism Speaks, an organization that advocates and informs on the rights of, and services for, people with autism. (Exhibit I.) The website posting indicates that individuals with a current diagnosis on the autism spectrum, such as Asperger syndrome or PDD, NOS, will not lose their diagnosis of Autistic Spectrum Disorder and should continue to be entitled to appropriate interventions and services.

26. This concept is included in the DSM-5, which states:

“Note: Individuals with a well-established DSM-IV diagnosis of autistic disorder, Asperger's disorder, or pervasive developmental disorder not otherwise specified should be given the diagnosis of autism spectrum disorder. . . .” (DSM-5, p. 51.)

27. Claimant's mother testified about many of the behaviors, characteristics and challenges presented by Claimant. Claimant's early childhood behavior was troubling. Claimant's mother received input from different teachers who expressed concern. Claimant's mother is a teacher who received her Master's Degree in 2006. She has taken courses in childhood development and psychology. The family moved to North Carolina where Claimant entered the fifth grade. Claimant's mother worked in the same school. Another teacher, who had a son who was autistic, suggested that Claimant should be tested for it. Claimant was seen by Dr. Wallace and Dr. Faucette, as noted above. Claimant's mother gathered input relating to autism from the TEACH program in North Carolina. Currently, Claimant's mother is concerned with getting help for Claimant to finish school and get help with her daily living skills and in getting a job. Claimant's poor hygiene is a big problem. Claimant's mother does not believe Claimant can be successful or live independently without the types of services that

the Service Agency can provide.

28. The preponderance of the evidence supports the Service Agency's decision to deny eligibility for Claimant to receive services. Claimant has not established that she is eligible to receive services from the Service Agency.

CONCLUSIONS OF LAW AND DISCUSSION

Pursuant to the foregoing factual findings, the Administrative Law Judge makes the following conclusions of law and determination of the issue:

1. Throughout the applicable statutes and regulations⁴ the state level fair hearing is referred to as an appeal of the regional center's decision. Particularly in this instance, where Claimant seeks to establish her eligibility for services, the burden is on Claimant to demonstrate that she is entitled to the services and that the Service Agency's decision is incorrect.

2. To answer the question of Claimant's eligibility requires a review of the applicable statutes and regulations, and the relationship of the evidence to them.

3. Section 4512 lists specific categories for possible eligibility, including autism. The statute also requires that the condition must constitute a substantial disability to that individual.

4. Some of the evaluations and diagnoses of Claimant were made in the time period that the DSM-IV-TR was in effect, roughly 2000 to 2013. This is particularly true of Dr. Faucette's evaluations and diagnoses in 2009. The language used in the DSM-IV-TR section on autistic disorders required some of the factors listed to be "gross and sustained," meaning that it is obvious and noticeable over time. (DSM-IV-TR, p. 70.) The behavior must be of clinical importance. The DSM-IV-TR specifically stated that some behaviors must be a "qualitative impairment" or a "marked impairment." (DSM-IV-TR, pp. 70, 75.) Therefore, behaviors must be evaluated by those who, by their training and experience, are qualified to determine whether those behaviors are clinically significant and would or would not support the diagnosis. The task of the evaluator is to assess the patient globally—the entire presentation of the child—based upon the information presented and the observations made. If a significant behavior found by one evaluator is either not present or is not as pronounced when the patient is observed a second time, that behavior may be of less importance to the second evaluator.

⁴ Regional center services are covered in the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code sections 4700 - 4716, and CCR, title 17, sections 50900 - 50964. All further statutory references are to the Welfare and Institutions Code.

5. The DSM-IV-TR notes that it was developed for use in clinical, educational and research settings and is designed for use by those with appropriate training and experience, including a specialized body of knowledge and clinical skills. (DSM-IV-TR , Introduction, p. xxxii.) It should not be applied mechanically or “in a cookbook fashion,” and the diagnostic criteria “are meant to serve as guidelines to be informed by clinical judgment,” which might be used to justify a diagnosis even if all criteria are not met, as long as the symptoms are close, persistent and severe. It also stresses the importance of collecting data in a manner such that it is valid and sufficient to aid in making any diagnosis. (*Ibid.*)

6. The article on Autistic Disorder in the DSM-IV-TR notes (p. 74), in differentiating Autistic Disorder from ADHD, that although symptoms of overactivity and inattention are frequent in Autistic Disorder, a diagnosis of ADHD is not made if Autistic Disorder is present.

7. Dr. Faucette made a diagnosis of ADHD. Under the DSM-IV-TR, this is appropriate when the full symptomology of Autistic Disorder is not present. He also diagnosed PDD, NOS which, according to the DSM-IV-TR (p. 84) is used when there is a severe and pervasive impairment in the development of reciprocal social interaction, associated with impairment in communication skills or the presence of stereotyped interests or activities, but the criteria are not met for other diagnoses.

8. Under the criteria used to determine eligibility for regional center services at that time (2009), Dr. Faucette’s diagnoses did not constitute developmental disabilities that would make Claimant eligible for WRC services under the Lanterman Act. See Factual Findings 4, 5 and 10.

9. The criteria related to eligibility for special education services from a school district have also changed in the time periods relating to Claimant. One category used until July 1, 2014, was called “autistic-like behaviors,” and was described in CCR, title 5, section 3030, subdivision (g). Eligibility for special education services existed if a pupil exhibited “*any combination* of the following autistic-like behaviors.” (*Emphasis added.*)

“1. An inability to use oral language for appropriate communication.

“2. A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.

“3. An obsession to maintain sameness.

“4. Extreme preoccupation with objects or inappropriate use of objects or both.

“5. Extreme resistance to controls.

“6. Displays peculiar motoric mannerisms and motility patterns.

“7. Self-stimulating, ritualistic behavior.”

10. This regulation contained substantially fewer requirements to be satisfied (i.e., any two or more of the seven listed) for someone to receive special education services for exhibiting autistic-like behaviors as compared to the number of requirements under the DSM-IV-TR to be diagnosed as autistic (i.e., six of the 12 listed) and receive services from the Service Agency. When Claimant was first found eligible for special education services, it was under the criteria noted in Legal Conclusion 9.

11. Changes were made in an amendment effective on July 1, 2014. The criteria related to eligibility for special education services now includes the disability of autism, described in CCR, title 5, section 3030, subdivision (b)(1):

“Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

“(A) Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in subdivision (b)(4) of this section.

“(B) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in subdivision (b)(1) of this section are satisfied.”

12. This regulation contains substantially fewer requirements to be satisfied for someone to receive special education services for autism as compared to the number of requirements under the DSM-5 to receive services from the Service Agency.

13. Ms. Rixon’s report was dated May 6, 2015, and refers to the new criteria for special education services. Ms. Rixon, as a school psychologist, made a recommendation for those services under the regulations defining autism that is specific to special education services. However, Ms. Rixon did not refer to the criteria of Autistic Spectrum Disorder under the DSM-5, and did not diagnosis Claimant with Autistic Spectrum Disorder under the DSM-5.

14. A key question here is, under all of the circumstances, whether Dr. Faucette’s diagnosis of PDD, NOS is the type of diagnosis that, under the DSM-5, is a well-established diagnosis such that Claimant should now be given the diagnosis of autism spectrum disorder. Reliance on Dr. Faucette’s 2009 opinion would be appropriate in the absence of other, later, assessments and diagnoses.

15. Dr. Dubner performed her assessment in June 2015, using the types of tests and

observations designed, in part, to determine if there was a current diagnosis that was appropriate to Claimant's behaviors. She administered two specific tests designed to elicit information about Autistic Spectrum Disorder, the CARS-2 and the ADOS-2, and discussed the DSM-5 criteria with Claimant's parents. She was aware of the assessments by Dr. Faucette and Ms. Rexon. The tests and observations did not reveal evidence of enough significance to support a diagnosis of Autistic Spectrum Disorder.

16. The multidisciplinary team observation in September 2015 confirmed that Claimant's behaviors did not support a diagnosis of Autistic Spectrum Disorder.

17. Under these circumstances, and particularly in light of the subsequent assessments of Claimant, Dr. Faucette's diagnoses are still considered, but are not sufficient to qualify Claimant as having a developmental disability that makes her eligible for regional center services. Comments by Dr. Wallace are preliminary at best, with no scientific basis cited, and she referred Claimant for further assessment. Nor does the educational assessment provide sufficient evidence to establish an eligible developmental disability. The Service Agency presented substantial, credible, and persuasive evidence establishing that Claimant does not meet the diagnostic criteria for Autistic Spectrum Disorder.

18. Claimant's family and neighbor made numerous observations and comments about Claimant's behaviors, and suggested that the clinicians did not properly evaluate those behaviors. However, as noted above, the language used in the DSM-IV-TR section on autistic disorders requires some of the factors listed to be "gross and sustained," meaning that it is obvious and noticeable over time. The behavior must be of clinical importance. Therefore, it is most likely that a behavior, which is noticeable to Claimant's mother or others, may not be viewed as clinically significant by those who, by their training and experience, are qualified to make the diagnosis. This may explain why Claimant's family views some of Claimant's behaviors as indicative of autism while several professionals do not.

19. The preponderance of the evidence supports the Service Agency's decision to deny eligibility for Claimant to receive services. The Service Agency's interpretation of the laws and regulations regarding eligibility, and application of them to Claimant, was not proven to be unreasonable or arbitrary.

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ORDER

Claimant has not established that she is eligible for services. Claimant's appeal of the Service Agency's determination that she is not eligible for services from the Service Agency is denied.

DATED: October 15, 2015

DAVID B. ROSENMAN
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.