

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2015090949

DECISION

This matter was heard by David B. Rosenman, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, on March 11 and June 2, 2016, in Culver City, California. Claimant was represented by her father who is her authorized representative.¹ Westside Regional Center (WRC or Service Agency) was represented by Lisa Basiri, Fair Hearing Specialist. Oral and documentary evidence was received, and argument was heard. The record remained open for Claimant's father to submit documents related to Claimant's Individualized Education Plan and for WRC to reply. On June 7, 2016, Claimant filed a Final Settlement Agreement, marked for identification and received in evidence as Exhibit D, and the Individualized Education Plan, marked for identification and received in evidence as Exhibit E. On June 9, 2016, WRC filed its letter in reply, marked for identification as Exhibit 16, including that there was no objection to the new documents. The record was closed, and the matter was submitted for decision on June 9, 2016.

Testimony of Mayra Mendez

On March 11, 2016, WRC called Mayra Mendez, Ph.D., as a witness and elicited her testimony on direct examination. Before her direct examination concluded, the parties and the ALJ determined that an added day of hearing was needed. On that added hearing day, June 2, 2016, Dr. Mendez was not available for further testimony. Claimant objected, as there was no opportunity to cross-examine Dr. Mendez, and requested that her testimony be stricken. Under Welfare and Institutions Code² section 4712, subdivision (i), fair hearings

¹ The names of Claimant and her family are omitted to protect their privacy.

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

“need not be conducted according to technical rules of evidence and those related to witnesses.” However, under section 4701, subdivision (f)(2), a claimant at a fair hearing has rights including the “opportunity to confront and cross-examine witnesses.” Claimant did not have the opportunity to cross-examine Dr. Mendez. Therefore, the testimony of Dr. Mendez is stricken from the record and will not be considered.

ISSUE

Claimant is diagnosed with Autism Spectrum Disorder (ASD). Is Claimant substantially handicapped or disabled by ASD and eligible for regional center services?

FACTUAL FINDINGS

1. Claimant is seven years old, born in July 2008. She seeks eligibility for regional center services based on a diagnosis of ASD.

2. On July 16, 2015, WRC sent a letter and a Notice of Proposed Action to Claimant’s parents, informing them that WRC had determined that Claimant is not eligible for regional center services because she was deemed not to be substantially handicapped by an eligible condition. Claimant requested a fair hearing. (Exhibit 2.)

3. As noted in more detail below, eligibility for services from a regional center requires the consumer to suffer from an eligible condition, and to be substantially disabled due to that condition. ASD is an eligible condition. WRC does not dispute that Claimant has been had previously diagnosed with ASD. However, WRC contends that Claimant is not disabled to the extent required to be eligible. Under regulations discussed in more detail below, and as related to a seven-year-old, an eligible condition is considered a substantial disability when there are significant functional limitations in three or more of the following areas of major life activity: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; and (6) capacity for independent living.

4. WRC contends that Claimant is substantially disabled in one area only--receptive and expressive language. Claimant contends she is also substantially disabled in areas of self-care, learning and self-direction. There were no contentions raised concerning mobility or capacity for independent living. Therefore, the emphasis in this Decision will be to examine the areas claimed to be a substantial disability to determine if there is sufficient evidence to support two of those areas (self-care, learning, or self-direction). Claimant has had numerous tests administered, and several reports and documents about her abilities were submitted in evidence.

5. The earliest document in evidence is a report of Claimant’s scores on the Woodcock-Johnson III Tests of Achievement administered by resource teacher Bernadette Duffy on March 9, 2016 (exhibit 11). In the summary, Duffy reports that, compared to

others at her grade level, Claimant's performance is superior in basic reading skills, mathematics and math calculation skills, high average in oral language skills and ability to apply academic skills, average in academic skills and written expression, and low average in written language.

6. On April 9, 2015, the Los Angeles School District (LAUSD) where Claimant receives special education services issued a Social Emotional Supplemental Report (exhibit 9) related to administration of the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), based on suspicion of "autistic-like behaviors."³ The ADOS-2 was administered by school psychologist Denise Perez, M.Ed., who concluded that Claimant met the criteria for both Autism and Autism Spectrum based on a total score of 14. Further, her comparison score of Level 8 or 9 (the report lists both level scores) indicated a high level of autism-spectrum related symptoms. This report supports Claimant's diagnosis of ASD. It also notes that the behaviors negatively impact her educational performance and progress, and recommends participation on friendship groups to ensure growth of social skills, and reinforcement of her initiation of social overtures.

7. LAUSD examiner Jeremy Kaplan, M.A., did a re-evaluation of Claimant and issued a Psycho-Educational Report dated April 14, 2015 (exhibit 8). The report indicates there were prior assessments in March 2012 and March 2013. Claimant was already receiving special education services under the eligibility category of Developmental Delay, and was being re-assessed to determine eligibility under other categories. Of note, Claimant was not assessed for a Specific Learning Disability; prior assessments established average cognition; and Claimant was performing at grade level at that time. It was confirmed, based on the ADOS-2 and other information, that Claimant exhibited behaviors associated with ASD. The assessment included observation in school settings and information from Claimant's teacher. Claimant did not engage with peers and showed some frustration when completing classwork. Expressive and receptive language was age-appropriate. Claimant's parents and teacher scored her for the Behavioral Assessment System for Children (BASC) second edition, with average scores, although the scoring varied substantially between parents and teacher. The BASC evaluates behavior, personality and self-perceptions of children. There was similar variance between parents and teacher scoring for the Connor's Test-Short Form used to assess presence of ADHD, and the Gilliam Autism Rating Scale-second edition (GARS-2) focusing on stereotyped behavior, communication and social interaction concerns related to ASD. The parents' scores indicated more behaviors, symptoms and elevated concerns than the teacher's. Noted were concerns with Claimant's pragmatic speech, failure to initiate and reciprocate with peers, and the impact on social skills and peer interactions, and behavioral rigidity. For example, Claimant had difficulties if she perceived that rules were not followed.

³ Eligibility for special education services, under the Education Code, is different than eligibility for services from regional centers under the Welfare and Institutions Code. "Autistic-like behaviors" is a consideration for special education services.

8. A speech and language pathologist performed an assessment in April 2015 and issued a report (exhibit 10). Various tests were administered. Various areas of strength were identified. The area of need was a difficulty with pragmatics, with a recommendation to target reciprocal conversation, problem solving, identifying different social scenarios, initiating and maintaining topics/conversations, problem solving, initiating interactions, increasing overall engagement in appropriate social skills, decreasing engagement in maladaptive social skills, and joining play.

9. An IEP meeting at LAUSD took place on April 17, 2015 and a written IEP was prepared (exhibit 12). Claimant's parents had requested no additional testing of cognition and processing. Results from prior testing and assessments are included in the IEP. In the area of social behavior, the IEP states that once given direction and maximum prompts, Claimant will play with peers, but will not otherwise. Continued eligibility for special education services was found under the category of Autism. Claimant was placed in a general education classroom with identified goals, and added speech and language services to address pragmatic language, and a resource specialist teacher to address pre-vocational and social skills.

10. A Psychosocial Assessment and report by WRC on May 3, 2015 (exhibit 6) largely relates to chronicling the parents' concerns, as well as some observations of Claimant's behaviors. Among parent concerns were issues of Claimant's frustration and the time needed to de-escalate, parallel play, and lack of interaction with peers, speech, and transitions. Claimant can be inconsistent in her presentation over times and settings. Parents scheduled a comprehensive evaluation at UCLA.

11. The comprehensive evaluation was over two days in May 2015 at the Semel Institute for Neuroscience and Human Behavior at the UCLA Neuropsychiatric Hospital, and resulted in a report dated July 2, 2015 (exhibit 7). Numerous tests were administered and records reviewed. Information was also gathered from Claimant's parents and teacher, as well as therapist Catherine Mogil, Psy.D., who provided the family with treatment including behavioral strategies when Claimant was between ages three and five. Based on the Autism Diagnostic Interview-Revised (ADI-R) with parents, it was concluded that Claimant met the classification of Autism due to qualitative impairments in reciprocal social interaction and communication, restricted interests and repetitive behaviors. Examples of supporting observations and information were provided. As to peer relationships, there are reported strengths but some significant areas of weakness. Similarly, on administration of the ADOS-2, Claimant again demonstrated some positive features in social and communication behaviors, as well as atypical qualities and inconsistencies, including some challenges engaging in reciprocal play. Cognitive assessment was by way of the Wechsler Preschool and Primary Scales of Intelligence-fourth edition, whereby Claimant's full scale intelligence quotient of 103, in the average range, was consistent with prior evaluations of her cognitive ability.

12. The Semel Institute report also addressed adaptive functioning, tested by the Vineland Adaptive Behavior Scales-second edition (VABS-2), which assesses

communication, daily living skills, and socialization. Communication was at the adequate level, with some developing skills in reciprocal conversations and issues with slow processing of verbal information, voice modulation, syntax and staying on topic. Daily living skills and community skills measured in the moderately low range overall. Personal skills (e.g., eating, hygiene, food preparation) were in the low range, age equivalent two years, six months (Claimant was age six years, seven months at the time), and domestic living and community skills both at age equivalent five years, six months. Socialization fell in the adequate range, although it was noted that the scores were not fully representative of her social challenges, which have grown more pronounced. Interpersonal relationships were age equivalent five years, eleven months; play and leisure was age equivalent six years, six months; and coping skills were age equivalent four years, eight months. Social behavior and emotion checklists were completed by Claimant's parents and teacher. Interestingly, on the Social Responsiveness Scale, the teacher noted several elevated items indicating clinically significant difficulties in behavioral items supporting the diagnosis of ASD, while the parents' responses did not reflect significant social impairments, although it was noted that the different demands in the different settings of school and home may explain this. On the Achenbach forms regarding emotional and behavioral functioning, again Claimant's teacher reported some elevations for specific behaviors, the parents form did not yield any elevated scores. On the Behavior Rating Inventory of Executive Functioning, measuring Claimant's overall executive functioning in real-world settings, the teacher noted significant difficulties in adaptation to changes, in modulating emotional responses, and ability to self-monitor and adjust performance. Again, the parents' concerns in these areas were milder. Overall, the results of the VABS-2 for Claimant are communication (standard score (SS) 100), daily living skills SS 77, socialization SS 92, and motor skills SS 94, for an adaptive behavioral composite score of 88.

13. The Semel Institute report included a diagnosis of ASD requiring "Support (Level I) for deficits in social communication and interaction and Requiring Support (Level I) for restricted interests and repetitive behaviors; Without Accompanying Intellectual Impairment, With Accompanying Language Impairment (fluent speech with challenges in verbal expression)" (exhibit 6, p. 13). The diagnosis was made by reference to the criteria in the Diagnostic and Statistical Manual, edition 5 (DSM-5), a well-recognized and accepted manual relating to diagnosis of various psychological and psychiatric conditions. The DSM-5 list of severity levels for ASD is found in exhibit 13, and explains the three severity levels. Level 1 severity is "requiring support"; Level 2 severity is "requiring substantial support"; and Level 3 severity is "requiring very substantial support." (*Id.*)

14. The Semel Institute report includes numerous recommendations. Behavioral intervention is needed to assist with, among other things and as relevant here, coping skills, self-regulation, and daily living skills. A social skills group treatment program can address social skills with peers and teach parents helpful strategies. With respect to education, "While [Claimant] has adequate cognitive and academic skills, she has difficulties in academic readiness due to her self-direction, rigidity, perfectionism, and inattention. Thus, [Claimant's] most pressing educational need is to target her academic readiness so she is amenable to learning and advances in her educational curriculum." (Exhibit 7, p. 16.)

Relevant accommodations to address distractibility and self-direction include frequent breaks, smaller bits of information to Claimant, and additional time for tasks, as well as positive reinforcement. Socialization recommendations include adult support to facilitate peer interactions and organized play. (*Id.* p. 17.)

15. The Semel Institute report specifically addresses the issue of regional center eligibility and concludes Claimant presents with a substantial disability “which is gross and sustained, evident across multiple areas of functioning, cannot be attributed to other family/cultural issues,” and include: “Qualitative impairments in *receptive and expressive communication* are significant, as [Claimant] does not follow directions with multiple steps and requires adult facilitation to understand and complete simple, novel, and/or non-preferred tasks. [Claimant] has deficits in her expressive communication, such that she struggles with verbal expression, does not use her language for social purposes, or attempt to communicate through nonverbal means (e.g., gestures). These delays prevent appropriate play skills, social interaction, and adaptation to her environment. [Claimant] also evidences substantial disability in her *self-direction*. Without frequent intervention from others, she does not organize her own behaviors and becomes “stuck” on repetitive, non-functional, and ritualistic behaviors that take up a substantial amount of [Claimant’s] time and result in impairment. Further, *self-direction* is impacting [Claimant’s] ability to develop skills appropriate to age expectations and to *learn*. [Claimant] has not developed varied imaginative play and subsequent social skills, which is alarming because it is a precursor to a child’s abilities to *learn* to organize, problem-solve, form concepts, build on ideas, use critical thinking, and develop abstract reasoning. [Claimant’s] *learning* is impaired, as she has had impairments (e.g., academic readiness) in her learning and is in need of special education. Finally, [Claimant’s] *self-care* is impacted, as she does not show initiative and consistency for daily living activities. While expectations for children in her current age are minimal, she is at risk for being more delayed in her *self-care* as she grows older.” (*Id.* pp. 17-18.) Recommended services include parent training, behavior therapy in the home, social skills group, social recreational activities, and respite care.

16. WRC held a meeting of its eligibility team in July 2015 which concluded that Claimant was not eligible for services. The reasoning is discussed in the findings below on testimony from Thompson Kelly, Ph.D., WRC’s chief psychologist.

17. In July and August, 2015, Claimant was assessed by the Beverly Hills Speech & Language Center as part of a due process procedure involving LAUSD. Speech and language therapist Sara Reifman, M.A., prepared a report (exhibit B). Tests were administered, Claimant was observed at school and in the clinic, and other documents were reviewed. In summary, impacts were noted in areas of expressive language, as well as pragmatic deficits consistent with her diagnosis of ASD. Claimant struggled with reciprocity, perspective taking and topic maintenance, and needs a great deal of support from her communication partner. Expressive language deficits were noted. Diagnoses were Autism, Expressive Language Disorder, and Social Communication Disorder. Claimant’s ability to use language is significantly below that of peers, and its severity will impact her ability to function socially and academically.

18. Dr. Mendez observed Claimant at school on November 12, 2015 and wrote a report (exhibit 4). The exclusion of Dr. Mendez's testimony is immaterial, as the report was received in evidence. Dr. Mendez made reference to particular examples of Claimant's self-direction (including social, attention, self-regulation and self-care), motor skills, self-care (listed again as a separate item), and communication, and interviewed the resource specialist, Bernadette Duffy. Dr. Mendez concluded that Claimant presented as a well-adapted child, with functional skills in the areas of communication, motor, self-help and emotional regulation. She was high-functioning, engaged socially and demonstrated the ability to benefit from the curriculum, and to engage in cooperative behaviors and age appropriate cognitive processing.

19. The dispute over special education services between Claimant's parents and LAUSD, referred to above as the due process procedure, was resolved by a settlement agreement on December 22, 2015 (exhibit D). Among other things, LAUSD agreed to institute behavior intervention implementation services and behavior intervention development services, provided by a non-public agency, in lieu of the behavior intervention consultation services in Claimant's IEP dated October 21, 2015; reimburse parents for language and speech services for the prior six months; the IEP team would review language and speech progress and amend the IEP if necessary; and an IEP meeting was scheduled.

20. Sandra Greene, M.A., has provided a weekly social skills group for Claimant since August 2015. In a letter dated March 10, 2016 (exhibit A), Ms. Greene notes Claimant's inflexibility and bossiness, impulsiveness, need for modeling and coaching to respond socially to interactive situations, relative inability to pick up other's social clues, and garbled speech.

21. Claimant submitted a recent IEP from a meeting on April 15, 2016 (exhibit E). It appears to be the IEP called for in the settlement agreement with LAUSD. This IEP notes improvements under subjects of Social Behavior, Pre-Vocational Education, Social Functioning and Pragmatic Language. Several goals have been met, and others have not but are being worked on. In each area, Claimant continues to demonstrate certain difficulties. For example, Claimant engages in positive age and grade appropriate interaction with peers; uses appropriate language skills with peers and teachers; her tendency to tell peers what they should or should not do has diminished significantly; her social connections have deepened; she shares experiences with others, expresses how to be a friend and engages in social activities and chat. She needs to be less aware of and dependent on adult support, does not initiate tasks, lacks confidence, has difficulty focusing on her responsibilities and can be more flexible. Her pragmatic language skills continue to improve and Claimant actively engages in speech therapy. She still demonstrates some difficulties, though. Special education services and supports in these areas is to continue.

22. Between the first and last days of hearing, Claimant was observed at WRC at a multidisciplinary clinic on May 5, 2016, and Claimant's father was interviewed. Melissa Bailey, Psy.D., issued a report (exhibit 15). Respondent was also observed through a one-

way mirror by Dr. Kelly and Dr. Mendez. Dr. Bailey utilized portions of the VABS-2 and the social perception portion of the NEPSY-2 (which stands for “A Developmental **NEuroPSY**chological Assessment”). Claimant showed a range of affect and had age-appropriate conversation. In the interview, Claimant’s father’s concerns were consistent with those reported above, such as Claimant’s frustration and rigidity, difficulty in expressing ideas sometimes due to the time it takes for her to formulate and state information, problems with hygiene, problems with math at school, and inconsistency in her behavior and presentation. Dr. Bailey concluded that Claimant was able to offer information; the NEPSY-2 results showed Claimant functioning in the high average range on the two subtests given, affect recognition and theory of mind; and Claimant showed a wide range of affect, good eye contact, and used hand gestures.

23. The most recent document is a letter from Ms. Greene erroneously dated May 26, 2015 (exhibit C), but clearly created in 2016. Ms. Greene responds to comments from Claimant’s resource specialist teacher contained in the school observation report of Dr. Mendez (exhibit 4; November 2015). More specifically, Ms. Greene indicates that, in her experience, Claimant does **not**: always speak clearly and in complete sentences; initiate or maintain eye contact; reliably respond when asked a question; function like a typical first grader; or act in a socially age-appropriate manner.

24. In his testimony, Claimant’s father emphasized the portions of the Semel Institute report and Ms. Greene’s letters addressing areas of substantial disability. He noted that concerns in Claimant’s self-care relate to resisting showers and baths because she is fearful and reluctant, finding showers similar to thunder storms. Despite monitoring and reminders, Claimant does not adequately wipe herself after toileting, resulting in bouts of vaginitis. He described a communication issue as that Claimant often requires a “long wind up” before speaking, and can’t articulate quickly. While adults may be patient, peers tend not to be and may shut down with Claimant. Claimant requires a one-to-one aid at school, her math grades have fallen, and she sometimes gets frustrated and shuts down before finishing her homework. Claimant will question her own intelligence. With respect to self-direction, Claimant’s father referred to Ms. Greene’s comments on Claimant’s inflexibility and the impact of her behaviors on interpersonal relationships. He contends that the assessment of the Semel Institute is entitled to great weight, as there were several qualified team members doing the assessment and it was comprehensive and over two days. He notes that Claimant presents as a complex case, that there are times when Claimant is engaging and acts in a normal and age appropriate way, but that her daily life includes struggles in numerous areas.

25. Thompson Kelly, Ph.D., is WRC’s chief psychologist. He was involved in the WRC eligibility team’s initial decision to deny eligibility, stating that the team had trouble supporting the conclusions reached in the Semel Institute report and there were discrepancies in the report itself and between the report and other documents relating to Claimant’s behaviors and symptoms. Of note, some of Dr. Kelly’s testimony focused on whether Claimant was properly diagnosed with ASD and whether she demonstrated a substantial disability in the area of communication. As noted in findings 3 and 4 above, for purposes of

this fair hearing, WRC does not dispute the ASD diagnosis or that Claimant has a substantial disability in the area of communication.

26. Dr. Kelly addressed the requirements for eligibility for special education services and noted that the focus is on the student's ability to access and gain benefit from school. The requirements are less rigorous than the requirements for regional center eligibility. The testing therefore has a different focus, and the school psychologists that often administer the tests and write the reports are not authorized by their licenses to provide diagnoses.

27. Dr. Kelly stated the testing done at the Semel Institute was comprehensive, including many tests WRC would hope to see. However, he was critical of certain aspects of the Semel Institute report and noted other significant aspects of that report. He saw a fluctuating pattern in Claimant's social engagement, inconsistencies which he said was not the type expected in a pervasive developmental disorder such as ASD. Claimant's engagement in and completion of all of the testing was notable and not what he would expect if she had ASD and was substantially disabled by it. The ASD diagnosis used the DSM-5 descriptor of Level 1, the least level of impact. In many of the tests, Claimant's results were at or above age equivalency/ average. He agreed an argument could be made for a substantial impairment in the area of self-care. Dr. Kelly explained that in tests with standard scores, such as the VABS-2 in the Semel report, SS 100 is average, with one standard deviation (15 points lower, SS 85) considered as below average, and two standard deviations (30 points lower, SS 70) considered as significantly below average. By virtue of Claimant's scaled scores, she was not significantly below average in any category of the VABS-2, a test that focuses on communication, daily living skills and socialization, key indicators in the determination of whether there is a substantial disability.

28. After the Fair Hearing Request was filed, WRC concluded that based on the different presentations of Claimant in some of the existing reports, Dr. Mendez would observe Claimant at school and speak with her teacher, resulting in her report in November 2015 (exhibit 4). The teacher confirmed that what Dr. Mendez observed was typical for Claimant. Dr. Kelly noted that Dr. Mendez did not see substantial impairment in multiple areas. Claimant had good social engagement, not consistent with the Semel report.

29. After the first hearing day it was agreed that the multidisciplinary observation would occur, as depicted in Dr. Bailey's report in May 2016 (exhibit 15). Dr. Kelly observed for about 45 minutes, not the full length of the clinic. Dr. Bailey has much personal and professional experience with children with ASD. Portions of the NEPSY-2 were chosen because they give a sample of the ability to incorporate abstract thinking and insight, usually lacking in people with ASD, and the test had not previously been given to Claimant. Claimant's score above 75 percent was above average. Claimant's behavior was incongruous with the behaviors described in the Semel report. Claimant's lack of engagement was noted, but Dr. Kelly did not see it as pervasive, which he explained would indicate a lack of ability that is consistent with ASD. With Claimant, rather, engagement seemed sporadic. She was able to engage, but did not always do so.

30. Dr. Kelly noted that Sara Reifman, the speech and language pathologist who prepared the speech and language evaluation, may not have been qualified to provide diagnoses including Autism. Further, she diagnosed Social Communication Disorder, which is subsumed within a diagnosis of Autism and should not be listed separately and additionally.

31a. Dr. Kelly referred to guidelines prepared and published by the Alta California Regional Center for assessing substantial disability in children age three to twelve (ACRC guidelines; exhibit 14). As they relate to the areas of major life activity relevant to Claimant, the ACRC guidelines include the following.

31b. Regarding self-care, consider personal hygiene (e.g., toileting, washing and bathing, brushing teeth); grooming (e.g., dressing, undressing, hair and nail care), and feeding (e.g., chewing and swallowing, eating, drinking, use of utensils). Consider the child's appearance, the concerns reported by others, whether the child is expected to perform self-care tasks independently at home, and whether the tasks are not completed "because of the inability to understand or do them, or is it a compliance issue? (Note: requiring prompts to get started on self-care tasks is usually not sufficient in and of itself to be considered a substantial disability.)" (*Id.*, p. 1.) Examples of basic skills for a child age 6-12 includes "Correct use of utensils, neatness when eating, toilet trained, uses bath room independently, wipes/ blows nose, dresses self and selects own clothing, use of buttons and zippers, puts shoes on correctly, washes face, brushes teeth, regulates water for bathing." (*Id.*)

31c. In the area of learning, "the individual must be substantially impaired in the ability to acquire and apply knowledge or skills to new situations even with special intervention." (*Id.*, p. 3.) Consider whether the child receives special education services; estimate reading and math levels; can the child recall an event from the prior week or a birthday; can the child give an example of a recently learned task, and did it need to be broken down to simple steps to aid learning; does the child act appropriately to age in situations such as choosing clothing that is right for the weather, or if told to put things away at school will the child follow the same rule at home.

31d. In the area of self-direction, does the child have "significant impairment in the ability to make and apply personal and social judgments and decisions." (*Id.*, p. 4.) Consider "emotional development (e.g., routinely has significant difficulty coping with fears, anxieties or frustrations; severe maladaptive behaviors, such as self-injurious behavior); interpersonal relations (e.g., has significant difficulties establishing and maintaining relationships with family or peers; social immaturity; marked difficulty protecting self from exploitation); personal independence (e.g., significant difficulty maintaining daily schedules, responding appropriately in an emergency, taking medications as directed). (*Id.*)

“Is the child reasonably flexible? Can he/she adapt to changes without great distress? Does the child have any self-injurious behaviors? Can the child problem-solve or troubleshoot difficult situations? Can [the child] form friendships independently? How does the child react to being teased? Can the child self-initiate tasks, such as requesting a snack or choosing play activities, on own with minimal prompts? (*Id.*, pp. 4 and 5.)

32. Given the foregoing, Claimant has not established that she is substantially disabled by her condition of ASD as to meet the requirement of being eligible for regional center services.

LEGAL CONCLUSIONS

1. Claimant established that she suffers from a developmental disability (Autism Spectrum Disorder) which would entitle him to regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act).⁴ (Factual Findings 1 through 32.)

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. Where a claimant seeks to establish her eligibility for services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency’s decision is incorrect. 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. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines “developmental disability” as “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 [includes] autism.”

4. To prove the existence of a developmental disability within the meaning of section 4512, a claimant must show that he has a “substantial disability.” Pursuant to section 4512, subdivision (l):

“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.

⁴ Welfare and Institutions Code section 4500 et seq.

- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

5. Additionally, California Code of Regulations, title 17 (Regulation), 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.

6. For a child seven years old, the major life activity of economic self-sufficiency is not considered.

7. Though WRC is not disputing Claimant's diagnosis of ASD, Dr. Kelly raised concerns about it. To provide a reference point, 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.)

8. As noted above, the statute and regulation at issue here require that Claimant's ASD be a substantial disability, meaning the existence of significant functional limitations in at least three of the listed areas (section 4512, subd. (l) and Regulation 54001), and that the condition "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" (Regulation 54001). Therefore it is necessary to examine the evidence of the extent to which Claimant's ASD disables her. From the start, the diagnosis provided in the Semel report indicates Claimant's ASD is at severity Level 1, requiring the lowest range of interventions of the three levels explained in the DSM-5 (exhibit 13).

9. The evidence revealed some remarkable inconsistencies, in Claimant's behaviors, in the manner in which those behaviors were viewed by her parents and her teachers, and in the documents in support of, and opposed to, her eligibility for regional center services. For example, Dr. Kelly was correct in noting that many of Claimant's behaviors noted in the Semel report were not present, either at all or in the same degree, when Dr. Mendez observed Claimant (twice) and when Dr. Bailey and Dr. Kelly observed her. Statements that a behavior had a negative impact on Claimant's educational performance, such as found in several LAUSD-related reports (see, e.g., the April 9, 2015 supplemental report, exhibit 9), do not provide a level or degree to assist in determining if Claimant's functional limitations are significant. In other words, problems are often reported that are not of the level of severity to support the conclusion of a significant limitation or substantial disability. Similarly, test scores that are slightly below average, average or above average do not support a conclusion of significant functional limitations. Interestingly, in the LAUSD supplemental report, exhibit 9, Claimant's parents gave information supporting more functional limitations, while the teacher's answers were less supportive. (See finding 7.) Yet in testing for the Semel report, the teacher reported more elevated concerns than did the parents. (See finding 12). In finding 15, aspects of the Semel report are summarized that are specific to the requirements of substantial disability. The conclusion that Claimant

evidences substantial disability in her self-direction is supported by a reference -- she gets “stuck” on repetitive, non-functional and ritualistic behaviors that take up a substantial amount of her time -- however, nowhere in the Semel report are any examples of this cited. Another inconsistency is Ms. Greene’s position that Claimant requires constant modeling and coaching as to how to respond socially to interactive situations (exhibit A), and the April 15, 2016 IEP which indicates Claimant needs to be less aware of and dependent on adult support (exhibit E).

10. The ACRC guidelines (exhibit 14) are instructive in providing a framework of considerations against which to place the observations and reports of Claimant’s disability. Some, but relatively few, of the listed specific situations and behaviors are covered in the evidence. However, Claimant’s overall scenario and presentation is not such as to meet the legal requirements to establish that her ASD is substantially disabling based on the evidence available at this time.

ORDER

The Service Agency’s determination that Claimant is not eligible for regional center services is sustained, and Claimant’s appeal of that determination is dismissed.

DATED: June 23, 2016

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.