

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STEPHANIE DE LA C-C.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL  
CENTER,

Service Agency.

OAH No. 2012020239

**DECISION**

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on August 7, 2012, in Alhambra, California.

Stephanie de la C-C. (Claimant) was represented by her father, Sergio de la C. A friend of father, Blanca L. accompanied him to the hearing.<sup>1</sup> Claimant did not attend the hearing. Interpreter services were provided Victor Ramos.

Judy Castaneda, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

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<sup>1</sup> Claimant, her father and father's friend are identified by first name and last initial to protect their privacy.

## ISSUE

Is Claimant eligible for regional center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code section 4500 et seq.)?<sup>2</sup>

## FACTUAL FINDINGS

### *Jurisdictional Facts*

1. Claimant is an eleven year, three month old girl who lives with her father, older brother and younger sister. Father requested Claimant be made eligible for Service Agency services. He believes Claimant has autism disorder and mental retardation.<sup>3</sup>

2. By letter dated December 19, 2011, the Service Agency gave notice of its proposed action (NPA) denying Claimant's request for eligibility for Service Agency services, having concluded that Claimant does not have mental retardation or any other disability that would qualify her for Service Agency services. Service Agency concluded that Claimant was functioning in the low average range of intelligence.

3. Claimant's father submitted a Fair Hearing Request on Claimant's behalf on January 21, 2012, which appealed the Service Agency's denial of eligibility. Father requested Claimant be re-evaluated because he did not consider the psychological assessment conducted by Pean Lai, Ph.D. to be valid.

4. In response to father's request for a re-evaluation, Service Agency arranged for Larry Gaines, Ph.D. to conduct a psychological evaluation of Claimant on March 18, 2012.

5. Upon review of the record and Dr. Gaines' report, Service Agency again concluded that Claimant is not eligible for Service Agency services.

6. On June 14, 2012, Service Agency staff notified Claimant that it continued to believe that Claimant is not eligible for Service Agency services. This appeal and hearing ensued.

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

<sup>3</sup> Claimant does not assert that she is eligible on the basis of cerebral palsy or a seizure disorder.

### *Claimant's Background*

7. Claimant was born full term with no pre-natal or post-natal complications. Although she had a history of one episode of febrile seizure, there is no history of major medical problems or head trauma. Her developmental milestones were delayed. She sat at one year, did not know how to crawl, walked at two years, and talked after two years. According to father, Claimant was a fussy, difficult baby, and very shy.

8. Claimant resided with her mother and father until about the age of three. Claimant was sexually molested by mother's boyfriend at the age of three. After her parent's separation, Claimant initially lived with her mother and at mother's request, then went to live with her father. Father subsequently remarried and has a four-year old daughter as well as an older son. In 2010 Claimant's mother again became involved in Claimant's life. Claimant moved back with her mother for about a year. In or about April 2011, as a result of an investigation by the Department of Children and Family Services, Claimant returned to live with her father, brother and sister.

### *Psychiatric and Psychological Evaluations Conducted Prior to Claimant's Request for Service Agency Eligibility*

Psychiatric Evaluation by Wagih Elsewafy, M.D., Eastern Los Angeles Youth and Family Services (ENKI)

9. Claimant was psychiatrically evaluated by Wagih Elsewafy, M.D. of ENKI on June 30, 2011 (Exhibit 6.) Claimant was referred by a Department of Children and Family Services social worker. Claimant began to receive services from ENKI about two months before Dr. Elsewafy saw her.

10. Father and Claimant provided Dr. Elsewafy with information about the reasons for the evaluation, and Claimant's developmental, family, educational, medical, and psychiatric history. Dr. Elsewafy conducted a mental status examination of Claimant, provided a "Dynamic Formulation" summarizing Claimant's psychological and behavioral functioning and a Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)<sup>4</sup> diagnosis. Dr. Elsewafy documented a hospitalization about one year earlier for five days for auditory hallucinations and suicidal ideation. The record indicates Claimant was discharged from the hospital with an unknown medication.

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<sup>4</sup> Official notice is taken that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV), published by the American Psychiatric Association, is a generally accepted tool for diagnosing mental and developmental disorders.

11. Dr. Elsewafy gave Claimant the following DSM-IV Axis I diagnosis: Mood Disorder NOS; Pervasive Developmental Disorder NOS; Victim of Sexual Abuse of a Child; Rule out Post Traumatic Stress Disorder; Rule Out Chronic Adjustment Disorder NOS; Rule Out Learning Disorder NOS; and Rule Out ADHD NOS.<sup>5</sup> Dr. Elsewafy indicated he deferred an Axis II disorder and recommended ruling out borderline intellectual functioning.

12. Dr. Elsewafy recommended continued therapy and consideration of a trial of a low dose antipsychotic medication with the possible addition of Wellbutrin, a psychotropic medication.

#### Psychological Evaluation by Harrell Reznick, Ph.D.

13. On October 10, 2011, Harrell Reznick, Ph.D., of Kay's Medical Group conducted a psychological evaluation of Claimant. Claimant was ten years, nine months old at the time. The evaluation was conducted at the request of the Department of Social Services, Disability and Adult Programs to determine whether she was eligible for social security disability insurance benefits.

14. Father provided Claimant's history. Dr. Reznick reviewed the psychiatric evaluation conducted by Dr. Elsewafy. Dr. Reznick also reviewed a teacher questionnaire completed by Claimant's fourth grade teacher, Martha Charre, who had Claimant in class during the last 41 days of school. Dr. Reznick summarized Claimant's teacher's report describing Claimant as being instructed at the first to second grade level, seen as easily distracted and experiencing memory problems, and seeming to have emotional issues, but that Claimant was not disruptive in school. According to Dr. Reznick's report, father reported that Claimant "had attended one school . . . and had never been in a special education program. . . ." (Exhibit 4 at p. 4.)

15. Father reported to Dr. Reznick that Claimant engages in repetitive motor movements, including arm-flapping, hand-moving and head-nodding gestures, often accompanied by grunting or actual speech production. Dr. Reznick did not report observing such movement during his evaluation. Father also reported that Claimant runs back and forth at home and appears distractible and hyperactive.

16. According to Dr. Reznick, father also described what Dr. Reznick thought was sensory defensiveness suggestive of autism. This included sensitivity to loud noises, to which she responds by placing her hands over her ears. She repetitively eats certain foods (apples and onions) on a daily and overeats to the point where her father must tell her to stop. Dr. Reznick attached significance to the fact that Claimant refers to an imaginary friend with whom she speaks during meals.

17. Dr. Reznick also reports that father described autistic-like obsessive-compulsive behaviors. An example of this included her lining up dolls according to the color

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<sup>5</sup> Official notice is taken of the meaning of "Rule Out" from MedicineNet.com, an on-line medical dictionary: "A term much used in medicine, meaning to eliminate or exclude something from consideration." (www.medicinenet.com.)

of their clothes. If the dolls are out of order, Claimant becomes upset and frustrated. According to father, Claimant talks about dolls all the time, and stares at them for extended periods of time. She avoids eye contact with strangers, and prefers solitary pursuits. According to father, Claimant occasionally plays with other children.

18. Father also reported that Claimant has behavior problems at home and school, including temper tantrums that occur abruptly and cease just as abruptly. Father thought this might be the result of sexual abuse.

19. Claimant is able to care for her hygiene and toileting needs independently. She uses a fork and spoon but not a knife. She dresses herself and only needs help to tie her shoes. She does not perform or assist in any household chores. She occasionally accompanies family members shopping and to attend church. She prefers to watch TV, play with toys and draw.

20. Dr. Reznick described Claimant as appearing cognitively impaired, but giving a satisfactory effort during the evaluation. Dr. Reznick observed that Claimant was adequately dressed and groomed. On the Mental Status Examination, Reznick found Claimant oriented to person but not time or place. He described her as distractible but not hyperactive. Her mood and affect were described as constricted but there was no evidence of a thought disturbance. She spoke clearly, but had significant deficits in receptive and expressive language abilities for her age. Reznick found Claimant displayed adequate common sense judgment for her age. Her fund of information was poor for her age.

21. The only standardized test administered by Dr. Reznick was the Wechsler Intelligence Scale for Children-Fourth Edition, (WISC-IV). On the Verbal Comprehension Index Claimant obtained a score of 61; on the Perceptual Reasoning Index Claimant obtained a score of 63; on the Working Memory Index Claimant obtained a score of 65; and on the Processing Speed Index Claimant obtained a score of 85. Claimant received a Full Scale Intelligence Quotient of 60, placing Claimant in the mildly mentally retarded range of intellectual functioning.

22. Dr. Reznick offered the following DSM-IV diagnostic impressions: Axis I: Autistic Disorder; Axis II: Mild Mental Retardation. Dr. Reznick made the following recommendations: mental health interventions by practitioners familiar with autism; consultation with father to help him develop strategies to address Claimant's autistic presentation; a restrictive special education program; and as part of her school program, intensive speech and language and occupational therapy interventions.

## *Claimant's Educational History, Special Education Assessments and Services*

### Claimant's Educational History

23. Claimant became eligible for special education services on November 21, 2011 while a fifth grade student at Valencia Elementary School in the El Rancho Unified School District (District). Eligibility was on the basis of a specific learning disability.<sup>6</sup>

24. Claimant attended at least nine schools over a six-year period. (Exhibits 7 and 9.) These schools include Handy Elementary in the Orange Unified School District, for kindergarten and part of first grade; Northam Elementary at the Rowland Unified School District where she finished first grade; Sierra Vista Elementary in the Placentia Yorba Linda School District for the second grade; Prospect Elementary in Orange Unified School District and Creek View Elementary in the San Bernardino School District for part of the third grade and Indian Hills Elementary in the Riverside School District where she finished the third grade; the first trimester of fourth grade at Highgrove Elementary in the Riverside School District, part of the fourth grade at the Elwin Elementary in the Baldwin Park Unified School District and the last 41 days of fourth grade at Valencia Elementary in the El Rancho Unified School District (District). Claimant was enrolled in the fifth grade at Valencia Elementary School. She will start sixth grade in the fall of 2012.

25. On April 20, 2010, during the 2009-2010 school year (third grade), a "SST Summary Form" indicates a student study team meeting was held to address Claimant's academic, behavioral and attendance problems. (Exhibit 9.) The form does not identify the school district initiating the meeting, but the school is identified at "IH" which suggests it was completed by Indian Hills Elementary in the Riverside School District. Claimant's parent is listed as Leticia C., Claimant's mother. No parent attended the meeting, although mother had been contacted and agreed to reschedule to a new meeting time. Mother failed to appear for the rescheduled meeting. Claimant's strengths include her enjoyment of art and her creativity. Claimant's deficits include phonics, fluency, comprehension, and math facts as well as critical thinking and problems. The notes indicate "possible ED" suggesting concern with emotional disturbance, unspecified behavioral issues, attendance at numerous schools between kindergarten and third grade and "serious attendance issues." The notes

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<sup>6</sup> Ed. Code section 56337 provides: "(a) A specific learning disability, as defined in Section 1401(30) of Title 20 of the United States Code, means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term 'specific learning disability' includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. That term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage."

identify several strategies to address Claimant's academic and behavioral problems. The team notes also document a hospitalization between February 3 and February 8. The year of the hospitalization is not included but the context suggests this occurred in 2010. This information is consistent with the hospitalization reported by Dr. Elsewafy in his report.

26. On March 1, 2011, both parents attended a student study team meeting conducted by the Baldwin Park Unified School District to address Claimant's deficits in reading, mathematics, and writing. Claimant was in fourth grade. The notes indicate that Claimant does not want to make friends on the play ground and "puts up a wall." (Exhibit 9.) Various strategies were identified to address Claimant's educational deficits. The student study team stressed to the parents that it was very important to continue Claimant's counseling if Claimant moves again. Father indicated that if Claimant came to live with him, he planned to continue Claimant at Elwin through the end of the school year. In fact, Claimant did return to live with father and transferred from Elwin Elementary to Valencia Elementary 41 days before the end of her fourth grade year. She started the 2011-2012 school years as a fifth grade student at Valencia Elementary School.

#### Special Education Assessments

27. On August 29, 2011, father requested the District refer Claimant for special education services. From the record it appears that this is the first time that Claimant was evaluated to determine eligibility for special education services, although her problems in school had been the subject of two student study team meetings in 2010 and 2011.

28. Prior to conducting the Individualized Education Program (IEP) team meeting, District conducted a Psycho-Educational Assessment and a Speech and Language Assessment of Claimant. Claimant's general education classroom teacher and a special education teacher reviewed Claimant's functioning. (Exhibit 9.)

29. An IEP team meeting to determine eligibility for special education was held on October 21, 2011 by the Whittier Area Cooperative Special Education Program. In addition to father, the school psychologist, speech and language pathologist, classroom teacher and special education teacher, a school administrator and an intern school psychologist participated in the IEP meeting. A Spanish interpreter interpreted for father. The IEP team determined Claimant was eligible for special education services under the category of specific learning disability. No secondary eligibility category was noted.

#### Psycho-Educational Assessment of Claimant

30. Andy Smeritschnig, M.S., School Psychologist conducted the Psycho-Educational Assessment and reported the results in an October 21, 2011 report for the IEP team. Mr. Smeritschnig described Claimant as cooperative, reserved and attentive. She appeared to be interested in the evaluation and did not ask for a break. She put forth good effort, but would give up easily as tasks became more difficult. She would say that she was

sorry or “I give up.” Mr. Smeritschnig found that she established rapport and he opined that the test results were valid and a reliable reflection of her functioning at the time.

31. Mr. Smeritschnig obtained Claimant’s history from various sources including Claimant’s father and Claimant. This included family history, language and health information. Claimant told Mr. Smeritschnig that she wished she lived with her mother, and that it was difficult to talk to her father about “female” issues.

32. The following tests and assessments were administered by Mr. Smeritschnig: WISC-IV; the Test of Non-Verbal Intelligence, 3<sup>rd</sup> Edition (TONI-3); the Test of Auditory Processing Skills, 3<sup>rd</sup> Edition (TAPS-3); the Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI); the Wechsler Individual Achievement Test, 2<sup>nd</sup> Edition (WIAT-II); the Behavior Assessment System for Children, 2<sup>nd</sup> Edition (BASC-2); and the Scale for Assessing Emotional Disturbance, 2<sup>nd</sup> Edition (SAED-2). Claimant was also interviewed as part of the Psycho-Educational Assessment.

33. Claimant is classified as an English Language Learner, although English is described as her first language and she is equally comfortable in English and Spanish. All tests were administered in English. Claimant’s scores on the California Standards Test were in the far below basic range, indicating significant problems in academic achievement. Despite these scores, Mr. Smeritschnig did not conclude that Claimant was eligible for special education services as a child with an intellectual disability<sup>7</sup>.

34. Mr. Smeritschnig administered the WISC-IV. Scores on the WISC-IV show how well Claimant scores compared to a group of children the same age from across the United States. Scores within the 90 to 109 range fall within the average range.

35. On the WISC-IV Verbal Comprehension Index Claimant received a score of 81 (low average range); on the Perceptual Reasoning Index Claimant received a score of 84 (low average range); on the Working Memory Index Claimant received a score of 74 (borderline range); and on the Processing Speed Index, Claimant received a score of 75 (borderline range). Claimant had a Full Scale IQ of 73 +/-5, placing her in the borderline range of intellectual functioning. The Full Scale IQ score is considered the most representative estimate of intellectual functioning

36. Mr. Smeritschnig administered the TONI-3, a language free measure of abstract problem solving. Claimant achieved a nonverbal quotient of 84, placing her nonverbal problem solving within the below average range. Her score on the TONI-3 was consistent with her score of 84 on the Perceptual Reasoning Index on the WISC-IV (see

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<sup>7</sup> For purposed of special education eligibility, the terms mental retardation and intellectual disability are interchangeable. “Mental Retardation/Intellectual Disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period, that adversely affects a child’s educational performance (34 CFR Sec. 300.7(C)(6)).” (<http://www.cde.ca.gov/ds/sp/cl/documents/calpadsupdf48.doc>.)

Factual Finding 35.) Based on these test results, Mr. Smeritschnig concluded that Claimant's overall cognitive abilities are best described in terms of her visual reasoning skills which fall within the low average range on both the WISC-IV and the TONI-3.

37. Mr. Smeritschnig reviewed the results of the WIAT-II, administered by a special education teacher. The WIAT-II assesses academic abilities in Reading, Mathematics, and Written Language. Claimant's abilities were varied across as well as within academic domains, as follows: Reading Composite standard score of 77; Mathematics Composite standard score of 52; and Written Language Composite standard score of 63. Mr. Smeritschnig observed that Claimant is struggling significantly academically and her performance in mathematics and written expression is well below what would be expected of her given her nonverbal cognitive abilities.

38. Mr. Smeritschnig administered the Beery VMI, a test of visual motor integration. Claimant obtained a standard score of 93, placing her at the 32<sup>nd</sup> percentile. She is within the average range indicating no significant visual-motor integration impairments.

39. The TAPS-3, a test of psychological processes that are involved in learning, was also administered by Mr. Smeritschnig. Claimant obtained the following results: Basic Auditory Skills standard score of 90; Auditory Memory standard score of 76; and Auditory Cohesion standard score of 78. Her Auditory Perceptual Quotient was 81. Overall, Claimant has below average auditory-processing skills. Mr. Smeritschnig found the scores corroborated the results on the WISC-IV Working Memory Subtest (see Factual Finding 35.) A significant deficit in memory was observed. Mr. Smeritschnig believed this deficit was likely due to Claimant's difficulty with attention and focus.

40. Mr. Smeritschnig also administered the BASC-2 and the SAED-2. These instruments assist in determining a child's emotional and behavioral functioning.

41. The BASC-2 is a parent/teacher rating scale. It rates a child's functioning in 21 areas, including Aggression, Hyperactivity, Anxiety, Depression, Social Skills, Adaptability and Somatization, among others. It is designed to help with determining a diagnosis and classification of various behavioral and emotional disorders of children and to assist in the design of treatment plans. Scores in the clinically significant range ordinarily warrant follow-up. Father identified clinically significant behavioral/emotional difficulties at home in 19 of 21 areas. Claimant's teacher did not rate any area in the clinically significant range. Claimant also rated herself. She identified four areas of concern: Attention Problem, Emotional Symptom Index (includes items related to a number of DSM-IV criteria for a diagnosis of Major Depressive Disorder), Relationship with Parents, and Self-Esteem. Mr. Smeritschnig thought that Claimant accurately described her self-emotional functioning.

42. The SAED-2 is composed of a parent and teacher questionnaire. Mr. Smeritschnig concluded that although Claimant struggles with some depressive symptoms, inattention, and lack of self-esteem, she is respectful and courteous at school, follows school rules and freely participates in both classroom and outside activities. She appears willing and ready to engage in social interactions. She tries to please others and had not gotten into any

trouble in the fifth grade. Based on the results of the questionnaires, Mr. Smeritschnig concluded that Claimant displays only mild symptoms of emotional disturbance at school and that those symptoms are consistent with her mental health history. Mr. Smeritschnig noted that Claimant displays extremely amplified symptoms of emotional disturbance at home.

43. Mr. Smeritschnig interviewed Claimant. Claimant is described as shy, courteous and reserved. She is cooperative and open to questions about her interests. She likes writing, drawing, and her teacher, but dislikes boys. She has three friends at schools. She displayed a low attention span. Claimant exhibited good social skills, discussed a variety of subjects, and displayed good eye contact. She was able to display introspection and correctly identify her emotions during different times of her life. She described herself as feeling sad and angry almost every day at home and that she has ways to cope with those feelings such as screaming into a pillow. Claimant's one wish was to be living with her mother. Claimant told examiner she liked talking to her ENKI therapist.

44. In addition to administering the above referenced tests and assessments, Mr. Smeritschnig briefly observed Claimant in the classroom. She was observed to pay attention despite not having her workbook, and completed assignments without assistance.

#### Speech and Language Assessment

45. As part of the IEP assessment, Janna Gray, M.A., SLP-CCC,<sup>8</sup> conducted a speech and language assessment of Claimant on October 21, 2011. Ms. Gray described Claimant as willingly coming to the speech room. She actively engaged with the Ms. Gray. Claimant was polite, smiled as she received praise, and put forth effort. She demonstrated appropriate attention and focus during the testing session. The assessment was considered a valid and reliable representation of Claimant's speech and language abilities.

46. Ms. Gray administered two standardized tests: the Comprehensive Assessment of Spoken Language (CASL) and the Test of Narrative Language (TNL). On the CASL, Claimant obtained a Core Composite Standard Score of 81, placing her in the 10<sup>th</sup> percentile, in the below average range. On the TNL, Claimant received a Standard Score of 88, placing her in the 21<sup>st</sup> percentile, in the below average range.

47. Ms. Gray concluded that Claimant demonstrated age-appropriate articulation, voice and fluency. She also has average syntactic abilities and average listening comprehension skills. Claimant is slightly below average in semantics and pragmatics. Ms. Gray concluded that Claimant's speech and language skills are within the average to below average range. Gray concluded that Claimant does not meet the special education eligibility criteria as a student with speech and language impairment<sup>9</sup>.

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<sup>8</sup> Speech and Language Pathologist, Certificate of Clinical Competency

<sup>9</sup> "A pupil shall be assessed as having a language or speech disorder which makes him or her eligible for special education and related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects

### Other Information Considered by the IEP Team

48. Father expressed disagreement with Dr. Elsewafy's ENKI evaluation (Factual Findings 9-12.) He believes that Claimant suffers from autism and mental retardation and desires that Claimant be placed in a special school that will properly address those problems. Claimant's general education teacher described Claimant as well-behaved in class, trying hard to keep up with the class work, and courteous and helpful yet shy at times. She is described as having good verbal skills and interacts freely and comfortably with her peers. The special education teacher reported Claimant's struggle with academics tasks and the results of the WIAT-II. (Factual Finding 37.)

### The November 21, 2011 IEP Team Meeting

49. District convened an IEP team meeting on November 21, 2011. In making recommendations to the IEP team, Mr. Smeritschnig considered the categories of specific learning disability, speech language impairment, emotional disturbance and intellectual disability. Mr. Smeritschnig concluded that Claimant meets the educational eligibility criteria as a child with a specific learning disability due to significant processing deficits in attention, which impacts her learning and short term memory, and significant discrepancy in her nonverbal cognitive abilities and her math computation and reasoning achievements.

50. Mr. Smeritschnig stated "that [Claimant] is not displaying any characteristics of a child with autism or an intellectual disability at school" and that District findings do not support a finding that Claimant has autism or an intellectual disability.(Exhibit 9.)

51. The IEP team determined that Claimant was eligible for special education services as a student with a specific learning disability. She has a significant processing disorder in attention, and her academic achievement in math calculations and computation are below her nonverbal abilities in this area. Claimant was continued in a general education classroom with a total of 360 minutes per week of Resource Specialist Program as her special education services.

52. Another IEP team meeting was held on February 9, 2012 to address father's concerns about Claimant's educational placement and eligibility criteria for special education. Father was concerned about Claimant not learning in school. District personnel attending the IEP meeting reported that Claimant was making progress, was anxious to do well in school, speaks up in class and gets along with her peers and adults. Mr. Smeritschnig reported that Claimant is easily distracted by peers. Claimant changed seats in her classroom and was no longer complaining about loud noises and distractions in class. The team determined that no change in service was warranted at the time.

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his or her educational performance and cannot be corrected without special education and related services."(Ed. Code, § 56333.)

## *Service Agency Eligibility: Evaluations and Assessments*

### Background

53. As noted at Factual Findings 1 through 6, Father is requesting that Claimant be made eligible for Service Agency services. Father is concerned about Claimant's current and future functioning. According to father, Claimant's speech and walking were delayed. Claimant engages in repetitive movements, running in circles and waving her arms, lines her dolls up, and makes unintelligible sounds when listening to music. He describes her as sad, distractible, inattentive, and easily bothered by loud noises. Claimant is not social, very isolated with no friends, and in her own world. According to father, Claimant is careless about herself and her clothing, although she is able to attend to her dressing and hygiene needs, sometimes needing reminders. Father reports that Claimant wets herself frequently. Father also describes Claimant as becoming irritated, jealous and angry if she does not get what she wants. Father expressed frustration in trying to understand Claimant's problems. He expressed some relief when Harrell Reznick, Ph.D. who evaluated Claimant for Social Security Disability Insurance benefits, explained to him that Claimant suffers from autism and mild mental retardation. Father is not satisfied with the psychological counseling Claimant is receiving from Eastern Los Angeles Youth & Family Services (ENKI). Father's description of Claimant during the hearing is consistent with information he provided to the various professionals evaluating Claimant.

### Peai Lai, Ph.D., Psychological Evaluation

54. Peai Lai, Ph.D., conducted a Psychological Evaluation of Claimant at the request of ENKI to assist in determining Service Agency eligibility. Dr. Lai's report is dated September 13, 2011. Claimant was 10 years, 4 month old at the time. Father's girlfriend accompanied her to the evaluation and was interviewed by Dr. Lai. According to her report, Dr. Lai reviewed records obtained from Service Agency. At the time the report was prepared, Claimant was taking Abilify, a psychotropic medication. No specific reason is given for the administration of this medication. Father reported that Claimant is no longer taking this medication because father reported it increased Claimant's appetite.

55. Dr. Lai described Claimant as a friendly child who is above average height and weight and appeared significantly older than her age. She was casually dressed and well groomed. When greeted, Claimant made eye contact with Dr. Lai. She appeared calm and in a happy mood. Dr. Lai reported that Claimant used full sentences without difficulty. Claimant knew her address, date of birth and grade level. She was able to draw a person whom she said was her mother. Dr. Lai opined Claimant's drawing was of a quality typical for a child of Claimant's age.

56. During testing Claimant appeared to put forth her best effort. When given the first test item on the WISC-IV, Claimant recognized the material and named some of the subtests. Consequently, Dr. Lai did not administer the full WISC-IV because it had been

administered recently. Instead, she administered selected subtests not typically administered as part of the WISC-IV.

57. Based on the subtests, Dr. Lai estimated that Claimant was functioning in the borderline to low average range. Claimant's verbal abilities were slightly better than her non-verbal abilities.

58. Dr. Lai also administered the Vineland Adaptive Behavior Scales-II (Vineland-II). Claimant received a Communication Domain score of 79; a Daily Living Skills Domain score of 91; a Socialization Domain score of 83; and an Adaptive Behavior Composite score of 82. The Adaptive Behavior Composite score on the Vineland-II places Claimant in the moderately low range of adaptive functioning. She did best on the Daily Living Skills Domain, which falls within the adequate range of functioning.

59. Dr. Lai offered the following DSM-IV diagnostic impressions: Axis 1: Mood Disorder (per report); Axis II: no diagnosis. Dr. Lai concluded that Claimant is "not suspected of mental retardation diagnosis, given current reported adaptive skills and estimated intellectual functioning." (Exhibit 5 at p.4.)

Larry Gaines, Ph.D., Evaluation

60. When father expressed concern that Dr. Lai may not have obtained a complete picture of Claimant's functioning because his girlfriend accompanied Claimant to the evaluation, Service Agency referred Claimant to Larry E. Gaines, Ph.D. to determine Claimant's current level of cognitive and adaptive functioning, limited to the assessment of developmental disabilities, including mental retardation and autism. Dr. Gaines' report is dated March 8, 2012. Claimant was ten years, ten months old at the time.

61. Dr. Gaines reviewed prior testing, including Dr. Lai's September 13, 2011 and Dr. Reznick's October 10, 2011 psychological evaluations, Dr. Elsewafy's June 30, 2011 psychiatric report, Claimant's school IEP dated October 21, 2011, Mr. Smeritschnig's October 21, 2011 psycho-educational evaluation, and Ms. Gray's October 21, 2011 speech and language evaluation. In addition to a clinical interview and review of records, Dr. Gaines administered the following tests: WISC-IV, Berry MVI, the Autism Diagnostic Observation Scale-Module Three (ADOS-3), and the Vineland-II.

62. Background information about Claimant was provided by father. Dr. Gaines observed Claimant to be overweight with attire that did not fit well. She did not appear to show much care about herself or her appearance. She greeted Dr. Gaines and was able to make eye contact. Claimant's answers to questions were brief without a lot of detail. Her verbal utterances across all the testing was described as simplistic but not indicative of autistic language patterns. She spent time fiddling with the label on a juice jar. Dr. Gaines did not find the activity to be idiosyncratic, such as flicking or staring at a label might be.

63. Dr. Gaines described Claimant as somewhat cooperative on formal testing. Claimant demonstrated some attention to test activities, but could be impulsive and a bit distracted at times. She showed poor motivation on test activities, quickly saying "I didn't

know” to test tasks. Her efforts seemed to wane over time. Her behavior during testing was not idiosyncratic. Claimant gave such improbably incorrect answers that Dr. Gaines suspected the validity of overall test results, particularly of cognitive functioning. Comparing Claimant’s performance on previous tests, Dr. Gaines thought her performance was not indicative of her cognitive capabilities. He thought her functioning might be a reflection of “possible deterioration of her psychological functioning, or perhaps a complete lack of motivation and effort . . . ” (Exhibit 5 at p. 4.)

64. Dr. Gaines administered the WISC-IV. On the Verbal Comprehension Index Claimant obtained a score of 57; on the Perceptual Reasoning Index Claimant obtained a score of 51. No score was reported on the Working Memory Index and the Processing Speed Index. Claimant obtained a Full Scale IQ of 47. Dr. Gaines did not consider the results valid.

65. On the Beery-VMI, Claimant received a Standard Score of 83 and a Mental Age of 7years, 6 months. Claimant’s scores fell in the low average range of abilities. Because the Beery-VMI is highly related to non-verbal intellectual functioning, Gaines believed that Claimant has much higher learning and intellectual capabilities than the intelligence test would indicate. Dr. Gaines also noted that Claimant was able to do many tasks that an individual in the low to mildly mentally retarded range would not be able to do, suggesting that deficiencies she had on the intelligence test were due to something other than a lack of cognitive ability.

66. Dr. Gaines also administered the Vineland-II. Claimant obtained a Communications standard score of 64, a Daily Living Skills standard score of 71, a Socialization standard score of 69, and an Adaptive Behavior Composite score of 66. Claimant’s adaptive behavior skills were within the borderline range of performance on the Vineland-II, indicating her adaptive skills were not consistent with a diagnosis of mental retardation. The Adaptive Behavior Score Claimant received on the same test administer by Dr. Lai was 82, considerably higher.

67. Dr. Gaines concluded that his testing of Claimant’s intellectual functioning was not valid and not indicative of her cognitive capabilities. Significantly, Dr. Gaines noted that “[a]lthough normal individuals can perform poorly on intelligence tests, mentally retarded persons cannot fake good, and thus it is felt that [Claimant’s] current test score reflects poor test performance, rather than a lack of capability.” (Exhibit 5 at p. 7.) He noted that some of the errors Claimant made are not consistent with the type of errors mentally retarded individuals make. Dr. Gaines also noted that Claimant had been tested by District personnel with similar nonverbal measures and found to be functioning in the low average range.

67. Dr. Gaines administered the ADOS-3. This is a standardized instrument designed to evaluate autistic characteristics. He noted the elevated scores in Communication and Reciprocal Social Interaction. He further noted that “when other diagnostic concerns are present, the diagnosis of autism must be done very conservatively and utilize clinical judgment.” In Dr. Gaines’ judgment, the elevated scores were the result of “psychological disorders” and “not clearly due to autistic type behavior functions.” (Exhibit 5 at p. 6.)

68. Dr. Gaines considered the ADOS-3 results in light of Claimant's report that she was depressed and in a poor mood, and her history of sexual abuse. Given her mood and history, Dr. Gaines thought that her scores may be more reflective of reactive attachment disorder, mood disorder or poor social functioning, rather than autism. Dr. Gaines stated that a "[d]iagnosis of autism is highly questionable in relationship to these other psychiatric concerns." (Exhibit 5 at p. 7.)

69. Dr. Gaines discussed at length his rationale for not diagnosing Claimant as autistic. Specifically, Dr. Gaines addressed several concerns father had about Claimant's behavior that seemed to form the basis for father's belief that Claimant is autistic. He noted that father had reported several times that Claimant has toilet accidents on a nightly basis. Dr. Gaines opined that individuals who have been sexually abused may have toileting accidents or present themselves as disheveled or unkempt so as to appear unattractive. Toileting accidents alone are not necessarily indicative of a developmental delay. Father also reported that Claimant plays with younger children and with dolls. Claimant is also described as having a short attention span, being very distracted, acting without thinking of the consequences, and was observed to be fidgety. Dr. Gaines noted these behaviors may be consistent with Attention Deficit Hyperactivity Disorder. Claimant was able to engage in a basic conversation without the use of idiosyncratic or unusual language. Dr. Gaines also noted father's concern about Claimant having odd body movements and viewed a video provided by father to illustrate this. Dr. Gaines found that the movement "did not at all appear idiosyncratic in nature, but rather reflective of the activity at hand." (Exhibit 5 at p. 6.) Dr. Gaines thought that Claimant's tendency to bite on bottle caps and sensitivity to loud noises could be attributed to fidgety or restless behavior associated with attention deficit disorders, rather than autism.

70. Dr. Gaines also noted that father reports that Claimant lines up her dolls and organizes them by color or size and that she likes to fix their hair. Dr. Gaines did not observe any of this kind of behavior during the testing. Dr. Gaines observed that lining dolls up to play with them is not autistic and is not considered idiosyncratic in nature. Dr. Gaines did observe Claimant flicking her ring in her hand towards the end of the session, but he did not consider this to be autistic-type behavior.

71. Dr. Gaines gave Claimant the following DSM-IV Axis I diagnosis: Pervasive Developmental Disorder (Provisional)<sup>10</sup>; Reactive Adjustment Disorder (Rule Out); Mood Disorder, NOS (by report); Depressive Disorder NOS (Rule Out); Attention Deficit Hyperactivity Disorder NOS (Rule Out). With respect to Axis II, Dr. Gaines found that Claimant had no diagnosis or condition. According to Dr. Gaines, given father's concerns which indicate some autistic characteristics, Claimant may meet the criteria for a Pervasive Developmental Disorder, but the "[r]esults of this evaluation did not indicate symptoms with

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<sup>10</sup> Official notice is taken that according to the Indiana University-Purdue University-Indianapolis website, "[a] provisional diagnosis is one to which the clinician is not yet committed." ([www.iupui.edu/~flip/dsm.html](http://www.iupui.edu/~flip/dsm.html).)

sufficient frequency, breadth, or severity for diagnosis of full Autistic Disorder.” (Exhibit 5 at p.7.)

72. Dr. Gaines recommended continued special education services, mental health therapy and interventions, and school observation to confirm lack of autistic type behavior in the school setting. Dr. Gaines also made the following recommendation: “In light of extreme disparities in test findings, [Claimant] may continue to benefit from monitoring or re-evaluation of cognitive skills. Over time, to the extent that her current delay may reflect a deteriorating (sic) in real cognitive capabilities. [Claimant] may present over time as more similar to individuals with developmental delays.” (Exhibit 5 at p. 8.)

Heike Ballmaier, Ph.D., and Randi Bienstock, Ph.D., Records Review and Findings

73. Service Agency evaluated Claimant and found she was not eligible under the Lanterman Act on December 19, 2011. Thereafter, at father’s request, Service Agency obtained a psychological evaluation from Dr. Gaines. Claimant’s request for services was originally reviewed by Service Agency consulting psychologist, Heike Ballmaier, Ph.D., B.C.B.A.<sup>11</sup> Dr. Ballmaier reviewed Dr. Lai’s September 13, 2011 psychological evaluation and Dr. Reznick October 10, 2011 psychological evaluation reports and Dr. Elsewafy’s June 30, 2011 psychiatric report from ENKI and concluded that Claimant did not meet the Lanterman Act’s eligibility criteria. (Exhibit 1.)

74. On May 29, 2012, Randi Bienstock, Ph.D., a Service Agency consulting psychologist, reviewed Dr. Ballmaier’s notes and Dr. Gaines’ report. (Exhibits 8 and 10.) Dr. Bienstock reviewed Claimant’s school records. Dr. Bienstock concluded that Claimant does not have a diagnosis that makes her eligible under the Lanterman Act, and does not have a substantially handicapping condition that would qualify her for Service Agency services. Dr. Bienstock did not give much credibility to Dr. Reznick’s diagnosis of Claimant. She was concerned that Dr. Reznick did not confirm the diagnosis of autism with his clinical observations, did not administer any standardized tests for autism, and did not discuss the differences between his clinical observations and father’s observations of Claimant. Dr. Bienstock was also concerned because she did not believe Dr. Reznick’s diagnosis of mental retardation was consistent with Claimant’s adaptive functioning. Dr. Bienstock thought that Claimant’s District test results were most representative of her functioning. Dr. Bienstock noted that Claimant was cooperative and interested during the District evaluation, resulting in no evidence of mental retardation. Dr. Bienstock noted that psychological issues impact how motivated an individual is when taking a test, producing inconsistent test results. Dr. Bienstock concluded that most of Claimant’s problems are due to trauma, psychological problems, and learning problems and are not consistent with mental retardation and autism.

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<sup>11</sup> Board Certified Behavior Analyst

## LEGAL CONCLUSIONS

### *Jurisdiction and Burden of Proof*

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant properly requested a hearing and therefore jurisdiction for this appeal was established.

2. The burden of proof is on the Claimant to establish eligibility for government benefits or services. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. “[T]he Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals’ determination as to whether an individual is developmentally disabled.” (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant’s expert witnesses’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts that claimant was not eligible. (*Id.* at p. 1137.)

4. Based on the above and Factual Findings 1 through 6 and Legal Conclusions 1 through 3, Claimant in this case has the burden of proving by a preponderance of the evidence that her evidence regarding eligibility is more persuasive than the Service Agency’s evidence. Here, Claimant has not met that burden.

5. As defined in the Lanterman Act and its regulations, a developmental disability is a disability that originates before age eighteen, continues or is expected to continue indefinitely and constitutes a “substantial disability” for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, autism, and what is known as the “fifth category” – a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature. (§ 4512, subd. (a); Cal. Code Regs., tit.17, § 54000, subds. (a) and (b).) California Code of Regulations, title 17, section 54000, subdivision (a),<sup>12</sup> provides further that a developmental disability means “a disability that is attributable to mental retardation,

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<sup>12</sup> All further references to the California Code of Regulations, title 17, will be cited as CCR.

cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.”

6. “Substantial disability” means: “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 [t]he 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: 1) communication skills, 2) learning, 3) self-care, 4) mobility, 5) self-direction, 6) capacity for independent living and 7) economic self-sufficiency. (CCR, § 54001, subd. (b).)

7. Handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature are excluded from the definition of developmental disability. (CCR, § 54000, subd. (c).)

### *Mental Retardation*

8. The DSM-IV includes the following diagnostic criteria for mental retardation:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

9. The professionals who evaluated Claimant disagree about whether she suffers from mental retardation. Dr. Reznick was the only professional to diagnose Claimant with mental retardation. Dr. Reznick concluded that Claimant was mildly mentally retarded based on a WISC-IV full scale IQ of 60. Dr. Reznick did not discuss any factors, such as a psychiatric disorder, learning disability, attention or motivation problems, and Claimant's numerous school placements that may be a factor in Claimant's WISC-IV scores. Dr. Reznick did not administer any tests of adaptive functioning such as the Vineland-II and did not address the DSM-IV requirement of “[c]oncurrent deficits or impairments in present adaptive functioning . . .” when diagnosing mental retardation.

10. Dr. Lai did not diagnose Claimant with mental retardation. She estimated Claimant's cognitive abilities to be in the borderline to low average range with greater strengths in her verbal abilities. On the Vineland-II, administered by Dr. Lai, Claimant scored in the adequate range of adaptive functioning. Her adaptive functioning is not consistent with the DSM-IV criteria for diagnosing mental retardation.

11. Mr. Smeritschnig, the school psychologist, found that Claimant was in the borderline range of intellectual functioning on the WISC-IV. However, M. Smeritschnig thought that Claimant's overall cognitive abilities were more likely in the low average range given her visual reasoning skills. Mr. Smeritschnig did not administer the Vineland-II. However, nothing in his test result indicated that Claimant has deficits that would meet the criteria for deficits or impairment in adaptive functioning. During the IEP team meeting, Mr. Smeritschnig reported that the District was not seeing any characteristics of a child with an intellectual disability and did not consider Claimant to be intellectually disabled.

12. Ms. Gray, the Speech and Language Pathologist, found Claimant's speech and language skills to be within the average to below average range. Ms. Gray's findings do not support a finding that Claimant has a deficit or impairment in communication.

13. Dr. Gaines did not obtain what he considered a valid Full Scale IQ on the WISC-IV, but based on tests administered by the District and his observations of Claimant, Dr. Gaines did not diagnose Claimant with mental retardation. Dr. Gaines did explain that the results he obtained on the WISC-IV may be the result of a complete lack of motivation and effort during his testing session or possible deterioration in Claimant's psychological functioning. Dr. Gaines administered the Vineland-II and found Claimant adaptive functioning to be in the moderately low to borderline range, not in the mentally retarded range.

14. In light of Factual Findings 7 through 74 and Legal Conclusions 1 through 13, despite Claimant's cognitive and adaptive functioning challenges, she has not sustained her burden of showing that she is mentally retarded.

#### *Autism Disorder*

15. The DSM IV identifies the criteria necessary for the diagnosis of Autistic Disorder. Autistic Disorder is one of several Pervasive Developmental Disorders. As noted in the DSM-IV text, "Pervasive Developmental Disorders are characterized by severe and pervasive impairment in several areas of development reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests and activities." The group of disorders identified as Pervasive Developmental Disorders are Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified. The DSM-IV notes, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of

activities and interests.” An individual must have a DSM-IV diagnosis of “Autistic Disorder” to qualify for regional center services.

16. The DSM-IV diagnostic criteria for “Autistic Disorder” are:
  - A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)
    1. qualitative impairment in social interaction, as manifested by at least two of the following:
      - a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction
      - b. failure to develop peer relationships appropriate to developmental level
      - c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest)
      - d. lack of social or emotional reciprocity
    2. qualitative impairments in communication as manifested by at least one of the following:
      - a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
      - b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
      - c. stereotyped and repetitive use of language or idiosyncratic language;
      - d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.
    3. restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:
      - a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
      - b. apparently inflexible adherence to specific, nonfunctional routines or rituals
      - c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

d. persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

17. To qualify for eligibility for Service Agency under the category of autism, Claimant must show that she suffers from autism. The presence of autistic-like characteristics or a diagnosis of a Pervasive Developmental Disorder without a DSM-IV diagnosis of autism is insufficient. The professionals who evaluated Claimant disagree about whether she has autism. Dr. Reznick was the only professional to diagnose Claimant with autism. Dr. Reznick's diagnosis is given little weight. His diagnosis was based on father's report. Dr. Reznick did not administer any standardized test to independently evaluate whether Claimant suffers from autism. He did not describe what behaviors he observed during the evaluation that supported his diagnosis of autism. And, Dr. Reznick did not address other psychological and psychiatric factors that might be affecting Claimant's behavior.

18. None of the other evaluators who examined Claimant diagnosed her with autism. Specifically, Dr. Lai did not diagnose Claimant with autism or another Pervasive Developmental Disorder. Dr. Elsewafy did not diagnose Claimant with autism, but did indicate the presence of a Pervasive Developmental Disorder NOS by history. Dr. Gaines administered the ADOS-3 and found that some elevated scores could indicate possible autistic-type behaviors. However, Dr. Gaines felt those behaviors may be attributable to psychological and psychiatric connotations rather than autism. Dr. Gaines did indicate a provisional diagnosis of Pervasive Developmental Disorder. When father told the District IEP team he believed Claimant has autism, Mr. Smeritschnig reported that Claimant is not displaying any of the characteristic of a child with autism at school and that District findings do not support a finding that Claimant has autism.

19. In light of Factual Findings 7 through 74 and Legal Conclusions 1 through 6 and 15 through 18, despite Claimant's cognitive and adaptive functioning challenges, she has not sustained her burden of showing that she has Autistic Disorder.

#### *Fifth Category*

20. In this case, Claimant is seeking eligibility as an individual with autism or mental retardation. Claimant did not seek eligibility under the fifth category on the basis of a "disabling condition found to be closely related to mental retardation" or "requires treatment similar to that required for individuals with mental retardation." (§ 4512, subd. (a).) However, Dr. Bienstock testified that Service Agency considered the fifth category when

evaluating Claimant. Consequently, this Decision also addresses eligibility under the fifth category.

21. Dr. Bienstock testified that Service Agency considered the fifth category when determining Claimant's eligibility for services. Dr. Bienstock described the difficulty in determining Claimant's eligibility under this category. She acknowledged Dr. Reznick's diagnosis of mild mental retardation and other tests that placed Claimant in the borderline range of intellectual functioning. However, Dr. Bienstock gave great weight to Dr. Gaines' review of all of the available information, and his consideration of factors that may impact Claimant's cognitive functioning. Both Dr. Bienstock and Dr. Gaines believed that Claimant was actually capable of functioning better than she performed on some standardized tests. This conclusion is consistent with the findings of Mr. Smeritschnig and District personnel that Claimant suffers from a specific learning disability that is depressing her academic achievement. Given the totality of the evidence, Claimant has not sustained her burden of proving that she has a condition "closely related to mental retardation" or that "requires treatment similar to that required for individuals with mental retardation." (§ 4512, subd. (a).) In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, the appellate court held that "the fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (*Id.* at p. 1129.)

22. In light of Factual Findings 7 through 7 and Legal Conclusions 1 through 18 and 20 through 21, despite Claimant's cognitive and adaptive functioning challenges, she has not sustained her burden of showing that she has a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (§ 4512, subd. (a); Cal. Code Regs., tit.17, § 54000, subds. (a) and (b).) Nonetheless, Claimant's father is rightly concerned about Claimant's future. Claimant has complex psychiatric, psychological, and learning difficulties. Father is reasonably concerned about what course of treatment is best advised and how to obtain that treatment. Dr. Bienstock indicated her availability to meet with father to review the available information about Claimant. Dr. Bienstock's suggestion is well taken and Service Agency is urged to insure that Dr. Bienstock is available to meet with father with the aid of a Spanish language interpreter. Dr. Gaines also acknowledges that Claimant's condition may change over time, and recommended continuing monitoring or re-evaluation of Claimant's cognitive, to determine whether Claimant may present as more similar to individuals with developmental disabilities. Nothing in this decision precludes Claimant from seeking Service Agency eligibility in the future.

ORDER

Claimant's appeal is denied. Claimant is not eligible for services under the Lanterman Act.

Dated: August 21, 2012

/s/

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DEBORAH M. GMEINER  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a 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.