

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

Petitioner,

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Case No. 96-5814

DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES, f/k/a  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

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RECOMMENDED ORDER

April 6-7, 1998, in Gainesville, Florida, before Ella Jane P.

of Administrative Hearings.

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For Petitioner: Melissa G. Thorne, Certified Legal Intern

Paolo G. Annino, Esquire

Florida State University

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For Respondent: Lucy Goddard, Esquire

Department of Children and

1000 Northeast 6th Avenue

Gainesville, Florida 32601

STATEMENT OF THE ISSUE

Whether Petitioner satisfies the statutory definition of "autism," pursuant to Section 323.063(2), Florida Statutes, so as to qualify for developmental services administered by Respondent, Department of Children and Family Services a/k/a Department of Children and Families, f/k/a Department of Health and Rehabilitative Services (Department).

PRELIMINARY STATEMENT

Petitioner Susanne Damron applied to the Department alleging that she is eligible to receive Developmental Services pursuant to Chapter 393, Florida Statutes' statutory definition of "autism." On November 8, 1996, the Department determined Petitioner ineligible for such services. Petitioner timely filed for a formal hearing pursuant to Section 120.57(1), Florida Statutes.

By agreement of the parties, this cause was abated for some period of time.

The parties stipulated to certain facts in their Prehearing Stipulation filed on March 6, 1998, which was entered in evidence at formal hearing as ALJ Exhibit "A."

At formal hearing, Petitioner presented the oral testimony of Ralph Maurer, M.D., Director of the Center of Autism at the University of Florida; Elizabeth Chainy, O.T.; and Developmental Services Consultant, Janice Phillips. Petitioner had ten exhibits admitted in evidence.

Respondent Department presented the oral testimony of Michael Hemingway and Marci Whittenberger, Ph.D.; Dr. Alan J. Waldman, M.D., testified by deposition. Respondent had six exhibits admitted in evidence.

A transcript was filed on May 18, 1998. All timely-filed Proposed Recommended Orders have been considered.

#### FINDINGS OF FACT

1. The statutory definition at issue is found in Section 393.063(2), Florida Statutes, which provides:

"Autism" means a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and non verbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests. (Emphasis supplied)

2. In addition to the statutory definition of "autism" for Developmental Services eligibility, which is set out above, there are several other definitions of the words "autistic," "autism," and/or "autistic disorder," including one used in the rules of the Florida Administrative Code applicable to educational assessments for individual educational plans (IEPs); one used in the Diagnostic and Statistical Manual, Edition III (Revised); one used in the Diagnostic and Statistical Manual, Edition IV; another definition as used by the Autism Society of America; and

yet another definition as used by the "International Classification of Diseases."

3. Petitioner is a resident of Gainesville, Alachua County, Florida, and is 26 years old.

4. Petitioner graduated high school with a regular diploma in June 1989.

5. On December 23, 1996, Petitioner was involuntarily committed to the Department under Chapter 394, Florida Statutes, and placed at Northeast Florida State Hospital (NEFSH). She was discharged from NEFSH on September 4, 1997, and is currently residing and receiving services at EX-ARTS in Gainesville, Florida, a Level I Extended Adult Residential Treatment Facility operated by Meridian Behavioral Healthcare, Inc., under contract with the Department.

6. Petitioner has received no services from the State of Florida for any developmental disability, but is presently receiving mental health services from the State of Florida.

7. There is no dispute that Petitioner needs some undefined daily living skills guidance. The issue herein, however, is whether or not the Department is obligated to provide them under the statutory provisions which target autism.

8. On August 23, 1996, when Petitioner was 24 years old, Dr. G. Randall Williams, a psychiatrist, diagnosed Petitioner as follows:

Although Ms. Damron has had several diagnosis [sic] in the past including Severe Learning Disability, Attention Deficit Disorder, Seizure Disorder, and Schizophrenia, it is my opinion that Ms. Damron satisfies the criteria for Autistic Disorder as follows. [sic] According to the DSM-IV an individual must have a qualitative impairment in social interaction that is manifested by the failure to develop peer relationship [sic] appropriate to development [sic] level and a lack of social and emotional reciprocity. Further, the manual requires qualitative impairments in communication in that with adequate speech capacity there is a marked impairment in the ability to initiate and sustain a conversation with others. Further, I have noted by [sic] obsessive preoccupation with one or more stereo-typed [sic] and restricted patterns of interest of abnormal intensity as well as an apparently inflexible adherence to specific non-functional routines or rituals. Unfortunately, due to my having no prior access to this patient whom [sic] is now age 24, the requirement for onset prior to age 3 can only be derived from a review from [sic] her developmental history. This is portrayed by her mother as being characterized as her being a "difficult child" with few friends, developmental delay, including marked difficulty in achieving a fine motor skills [sic] various learning delays included [sic] dyslexia, dysgraphia, dyscalculia, and attention deficit disorder diagnosed at age 14. The above diagnosis [sic] are supported by complaints by the parental caregivers as well as my personal interactions. The differential diagnosis includes severe pervasive learning disability as well as schizophrenia. I do [sic] however feel that based on the DSM-IV criteria, she does indeed satisfy the criteria for Autistic Disorder. (emphasis supplied)

9. Dr. Ralph C. Maurer, also a licensed psychiatrist, conducted a joint report with Dr. Vardi at the University of Florida on September 25, 1996. Their joint 1996 report, issued

when Petitioner was 24 years old, and to which Dr. Maurer issued a later addendum, diagnosed Petitioner with "pervasive developmental disorder, not otherwise specified." (PDD-NOS) (Emphasis supplied)

10. Despite Dr. Williams's and Dr. Maurer's respective diagnoses of "autistic disorder" and "PDD-NOS," and despite the fact that the statute does not define or cover PDD-NOS, the Department stated in its November 8, 1998, letter denying Developmental Services, that its decision was:

based upon the requirement in the Florida Statutes that a specific diagnosis of autism or pervasive developmental disorder be made by a competent psychiatrist or licensed psychologist and that this condition manifests itself in infancy or early childhood.

11. Despite the parties' preoccupation with the appropriateness, vel non, of the Department's denial of benefits in November 1996, this proceeding is not designed as an "appeal" or "review" of agency action, but constitutes a de novo proceeding.

12. Petitioner asserted herein that because her lengthy medical and educational history demonstrated some symptoms of autism before age 24 and a diagnosis of autism after age 24, the Department was remiss in denying benefits. The Department's position was that all of Petitioner's symptomatology, taken as a whole, and her late diagnosis of "autism" do not meet the

statutory definition of "autism" or the Department's internal eligibility guidelines.

13. At formal hearing, Petitioner presented a number of evaluations, including the two foregoing psychiatric evaluations. The culled portions of the other reports that Petitioner principally relies upon may be summarized as follows:

- In January 1977, when Petitioner was 5 1/2 years old, she was evaluated by the University of Florida Health Center. This evaluation showed that on the Denver Developmental Screening Test Petitioner was at a 3 1/2 years old equivalence in the domain on "personal-social."
- In 1977, when Petitioner was 6 years old, Petitioner was diagnosed by the University of Florida Hospital and found to have a provisional diagnosis of "Socially Developmentally Delayed" and was found to have "Auditory Processing Problems."

- In January 1977, an educational evaluation recommended that Petitioner repeat kindergarten, and that she "should be encouraged to pursue fine and gross motor activities . . ."
- In 1978, when Petitioner was seven years old and in the second grade, the Alachua County School District identified her as an "emotionally handicapped" (EH) child and she was placed in a special education program.
- On December 1, 1978, the Alachua County School District wrote an "Individual Education Plan," (IEP) stating Petitioner ". . . shows non-attention, irrelevant activities, and low academic achievement . . ."
- In 1978, Petitioner's WISC-R intelligence test conducted by Alachua County School Board reflected a 23 point discrepancy between verbal and non verbal scores. Petitioner had a verbal IQ of 103, a performance IQ of 80, and a full scale IQ of 91.
- Based on her IEP, Petitioner was removed from the regular classroom and "placed in a resource program at Archer Community School" in the Alachua County School District.
- In 1978, an Alachua County School District psychological evaluation found that "Susanne spent most of her time engaged in non-productive off-task behavior" and "projective testing revealed a child who has not developed many of the social skills needed to effectively relate to both children and adults in non-academic situations." It concluded, "in terms of Special Assistance, Susanne's behavior is disrupting her performance in the classroom & thus an emotional handicap is present."



- In the summer of 1979, at about age 8-9, "Susanne was evaluated . . . by an occupational therapist and found to have sensory integration dysfunction." She was found to have "deficits in processing vestibular stimulations, bilateral integration, and visual perception with associated motor problems."
- By second grade, the school educators recommended retention because she was reading at a late first grade level.
- In July 1980, Petitioner's exceptional education placement was change from an EH program to a "Specific Learning Disabilities" (SLD) program.
- In 1980, Petitioner's teachers said the following about her: "significant problems were noted as ability to concentrate on tasks and completing work on time."
- In 1980, in a private school, Petitioner "received swimming lessons by an Adapted Physical Education teacher and has received occupational therapy at the University of Florida . . ."
- In 1980, "fine and gross motor skills were rated as problems" for Petitioner and her teachers noted that "Susanne's eyes often . . . show a blank stare."
- The 1980 Alachua County School Board Report referred to Petitioner's social behavior as a "moderate problem, in spite of the fact that she was described as a highly motivated student."
- In 1980, the school psychological evaluation indicated that Petitioner had severe "visual processing deficits."
- Also in 1980, Petitioner's teachers believed they were "helping" Petitioner by putting Petitioner in a "refrigerator box to block out visual distractions . . ."

- In 1981, a psychological report stated that "it was felt that Susanne was now showing signs of an emotional disability."
- In 1982, when Petitioner was in the sixth grade, a school psychological evaluation stated that "'memory for letters' and 'disarranged pictures' were the tests and the visual cluster that were below the significant age score, and 'memory for words' were below the score in the auditory cluster." . . . "the teacher indicates that self-motivation and independent work habits were areas that caused the most concern in the classroom. Susanne's mother rated her as having 'significant' problems in the areas of ego strength, academics, and attention on the Burks' Behavior Rating Scale.
- As a teenager, Petitioner was tested continuously for learning disabilities because her academic performance continued to be significantly below average.
- At the age of 16, Petitioner was tested at the Mailman Center for Child Development. At this time, Petitioner's performance IQ was 70. She "displayed above average in verbal abstractions, but her particular weakness to hold and retrieve short-term verbal information [sic]." The Mailman evaluation also observed the Petitioner attempting to mimic a "sophisticated mode of communication, and that she severely lacks social development skills for her age." It concluded that Petitioner's arithmetic calculations and problem solving were categorized in the "severe deficit" category. Furthermore, the Mailman evaluations stated that beyond the specific learning disabilities, Petitioner showed definite signs of an "emotional disability."
- In November of 1990, Hartman & Associates conducted a learning evaluation. This report stated that Susanne has to be aware that it is not she who has failed the

system but the system that has failed to give her the academic skills that she needs to even have basic literacy levels," and it concluded that Petitioner has a severe learning disability.

14. In none of the foregoing reports, rendered by a variety of experts before Petitioner turned 18 years old, was Petitioner ever diagnosed as "autistic," by any definition of that word.

15. In fact, no evaluator from any professional discipline mentioned autism as a possible diagnosis until after the Petitioner had manifested a mental illness and attained at age 24.

16. Schizophrenia characteristics can develop in adolescence, early adulthood, or later life. Petitioner apparently manifested schizophrenia-like symptoms after high school graduation at age 18 and before age 21.

17. Dr. Ralph C. Maurer, M.D., testified at formal hearing. He is an Associate Professor at the University of Florida (UF). He also is Director of the Center for Autism at UF and is on the Board of Directors of the Advocacy Center for Persons with Disabilities. Dr. Maurer is board-certified in the field of psychiatry and is qualified by education, training, and experience to render an expert opinion in autism and schizophrenia. However, Dr. Maurer clearly stated that he does not consider himself an expert in "schizophrenia," and his evidence has been weighed accordingly.

18. Dr. Alan J. Waldman, M.D., testified by deposition. He is a Diplomate of the American Board of Psychiatry and Neurology (i.e. Board Certified) and is qualified by education, training, and experience to render an expert opinion in neuropsychiatry, psychiatry, and schizophrenia. However, Dr. Waldman does not consider himself an expert on "autism," and his evidence has been weighed accordingly.

19. Dr. Marci Z. Whittenberger, Ph.D., testified at formal hearing. She is a Florida licensed psychologist with additional training and experience in Developmental Services. She is currently employed as a senior psychologist for the Department of Children and Families. Dr. Whittenberger is qualified by education, training, and experience to render expert opinions in developmental disabilities and autism and is the most articulate and persuasive of the experts. She conducted a review of all evaluations and other reports submitted to the Department by the Petitioner.

20. Dr. Williams, (see Finding of Fact 8), did not testify at formal hearing.

21. Experts Waldman and Whittenberger testified that a neurological examination cannot differentiate between autism and schizophrenia.

22. Drs. Waldman and Maurer concurred that autism is not an illness that correlates with specific neuropsychological findings.

23. There is no "litmus test" for autism, by any definition. However, there are specific recognized diagnostic interview and rating skills that aid and assist in the diagnosis of autism.

24. One methodology of diagnosis which is generally accepted by psychiatrists and psychologists is contained in the current edition of the Diagnostic and Statistical Manual (DSM). The current edition at the date of formal hearing was the DSM-IV. The DSM-IV and its predecessor edition, the DSM-III-R, are texts which define, characterize, and rank various diseases, conditions, traumas, and injuries. Diagnosis is arrived at by rating specific-named criteria for each defined disease, condition, trauma, or injury.

25. Dr. Waldman and Dr. Whittenberger accepted the DSM-IV as authoritative for the diagnosis of "autism." Dr. Maurer did not accept either the DSM-III-R or the DSM-IV as definitive for purposes of diagnosing "autism."

26. The Department spokesman, Michael Hemingway, articulated Departmental statewide policy as being that in order to qualify for Developmental Services, an applicant must provide a clear diagnosis by either a "psychiatrist, a Florida licensed psychologist, or a psychologist employed by the Department who is qualified by training and experience to make the diagnosis of 'autism'" as defined by Section 393.063(2), Florida Statutes. According to Mr. Hemingway, although Department personnel often

expect to see a diagnosis which would include the numbering system and rating criteria of the current DSM, for the Department's purpose, the DSM is "almost incidental." (TR Vol. I pp. 212-213) The Department is not concerned with the steps one of the named professionals takes to come to a diagnosis, but is concerned that one of the named professionals follows the standards of practice for his/her discipline. Further, although the DSM may include a condition of PDD-NOS, the Department does not engraft that portion of the DSM upon the statutory definition, which statutory definition does not name PDD-NOS. This policy has not been promulgated as a rule of the Department, but this policy does not alter the statutory definition of "autism" in any way or require that a diagnosis be rendered in terms of the DSM (any edition). It merely requires that the diagnosis be rendered by one of the named professionals in terms of that professions standards of practice.

27. Despite three exhibits showing how Agency policy has evolved and changed over time, I find that the Department has "proven up" only the incipient policy as found in the immediately preceding Finding of Fact; that the policy has existed since the current statutory definition of "autism" was added to Chapter 393 in the late 1980's; and that the policy does not impact this case in any way because the only "diagnoses" Petitioner relies upon were rendered by psychiatrists, while the Department relies on a diagnosis by a Florida licensed psychologist, each of which are

one of the professional groups named in the policy as able to render diagnoses. Neither party suggested that a diagnosis by same other professional would be sufficient.

28. Dr. Maurer, Dr. Whittenberger, and Mr. Hemingway all testified that the definition of "autism" in Section 393.063(2), Florida Statutes, was taken from the DSM-III-R diagnostic criteria for "autistic disorder."

29. Dr. Maurer's current career thrust is directed to his work with the UF Center for Autism. He became involved with, and evaluated, Petitioner only after Petitioner's mother repeatedly contacted the UF Center for Autism, insisting that Petitioner was autistic and requesting help to obtain services from the Department. Dr. Maurer is also on the Board of Directors of the

Advocacy Center for Persons with Disabilities. The Petitioner was already 24 years of age when she was first evaluated by Dr. Maurer.

30. Pursuant to Dr. Maurer's expert testimony at formal hearing, Petitioner suffers from more than one problem. Petitioner demonstrates learning disabilities; schizophrenia-like symptoms or psychotic behavior which could arise from schizophrenia or from temporal lobe epilepsy; seizure disorder; and post traumatic stress or anxiety.

31. Dr. Maurer originally diagnosed Petitioner as PDD-NOS. (See Finding of Fact 9) because Petitioner did not fit the DSM-IIIR criteria for "autistic disorder." The DSM-IIIR definition of "autistic disorder" matches the criteria of the controlling statute. Dr. Maurer testified that the DSM-IIIR diagnostic criteria for PDD-NOS covered people who have some of the deficits, but who also do not meet some of the criteria, for "autistic disorder," which is a separate category.

32. Dr. Maurer testified that Petitioner also does not fit the DSM-IV criteria for "autistic disorder," which definition does not match the statutory definition.

33. Dr. Maurer testified that Petitioner did not have "typical autism."

34. Dr. Maurer ultimately opined that the statutory definition of autism should be broad enough to include Petitioner



as a high-functioning autistic person, whom the mental health system does not support properly because of her underlying disabilities, saying:

She has disabilities of a severe nature which the mental health system does not know how to serve. . . . She does not have typical autism. . . . It fits within the statute. (TR Vol. I p. 153) . . . I'm not maintaining that Susanne is autistic. I'm maintain[ing] that that definition of autism in 393 is sufficiently broad to include her. (TR Vol. I p. 163)

35. Dr. Maurer reviewed the 1977 Communicative Disorder Consultation Report (age 5); an occupational evaluation dated 1/26/77 (age 5); the School Board of Alachua County Psychological Report dated 11/08/78 (age 6); the School Board of Alachua County Psychological Report dated 11/02/80 (age 8); the School Board of Alachua County Psychological Report dated 10/28/82 (age 10); a Report by William Beatty dated 2/9/88 (age 18) and the Mailman Center Reports from 1981 (age 9) and 1987 (age 15). From his testimony, it is clear that Dr. Maurer culled certain terms and phrases from these reports to emphasize, but that he had no clear idea of how terms in some reports are defined or used by the educational teams or evaluators who prepared their reports pursuant to Chapter 231, Florida Statutes, and Chapter 6A-6, Florida Administrative Code, applicable to IEPs.

36. Also, in forming his opinion that Petitioner meets the statutory definition of "autism," Dr. Maurer testified that he primarily relied on Dr. Kytja Voeller's report of neurological

and other tests of Petitioner's abilities in 1992 when Petitioner was already 21 years old. Dr. Voeller had not diagnosed Petitioner as "autistic."

37. By all accounts, Petitioner's level of functioning significantly deteriorated after she graduated high school in 1989 and before she was evaluated by Dr. Voeller in 1989 through January 1993 and further deteriorated before she was seen by Dr. Maurer in 1996.

38. Experts Maurer, Walden and Whittenberger all testified that a serious psychotic disorder such as schizophrenia can cause a deterioration in the person's ability to learn, verbal and non-verbal communication, behavior, and reciprocal social interaction and imaginative ability. Individuals with serious psychotic disorders also may show a restrictive repertoire of activities in interest.

39. At the time she was evaluated by Drs. Voeller and Maurer, Petitioner was taking haldol, a psychotropic medication used to treat schizophrenia, and cogentin.

40. Dr. Voeller's reports included no malingering tests to evaluate whether the Petitioner was presenting herself in a worse light so as to obtain services.

41. In their evaluations of the Petitioner, neither Dr. Voeller nor Dr. Maurer used any of the generally accepted specific diagnostic interview and rating scales that aid and assist in the diagnosis of autism, although Dr. Voeller used

generally accepted standardized tests to reach her conclusions of mixed learning disabilities and emotional problems.

42. Dr. Maurer's conclusion that there was an impairment in Petitioner's verbal and non verbal communication in infancy and early childhood was based on his inference that the 1992 disabilities reflected in Dr. Voeller's report went back into Petitioner's early childhood because in his opinion there was, "the lack of evidence for any medical illness or injury that could have caused those problems" and a "small amount of positive evidence here and that's not conclusive."

43. However, Dr. Maurer also conceded that someone with Petitioner's present disabilities in 1996 could not have graduated high school with a regular diploma, and he could not describe any severe behaviors or communication problems of the Petitioner that were present during her infancy or early childhood.

44. Dr. Maurer conceded that what is a learning disability, schizophrenia, or autism cannot be sorted out with regard to Petitioner at this late stage.

45. Although Dr. Maurer is clearly highly qualified to treat autism and related syndromes, his candor and demeanor while testifying, also clearly demonstrated that he was not comfortable as a witness in this proceeding and that he was reluctant to define Petitioner as "autistic," without reference to studies

predating and differing in part from the statutory definition. His ultimate opinion was not specifically rendered within reasonable medical probability or certainty.

46. Psychologists are extensively trained and required to look for and mention in psychological evaluation reports all behaviors that are outside the normal range.

47. Dr. Whittenberger testified that in her eligibility review she read every report submitted by the Petitioner and wrote down every behavior mentioned that would indicate or contra-indicate a diagnosis of autism.

48. As a licensed clinical psychologist capable of an independent diagnosis, Dr. Whittenberger's practice is to approve eligibility for Developmental Services if sufficient symptoms of autism are reported in childhood evaluations and other information submitted by the applicant, even if the "autism" label was not previously assigned to that behavior manifestation.

49. Dr. Whittenberger uses the current DSM for all her evaluations because she considers it to be professionally mandated by her discipline.

50. In evaluating the Petitioner, she used the DSM-IV, even though its definition of "autistic disorder" is not identical to the statutory definition.

51. Dr. Whittenberger also examined the submitted reports for descriptions by primary caretakers and others of behaviors in the child's history that indicated impairments in reciprocal

social interaction, verbal and non verbal communication and imaginative ability, and a restricted repertoire of activities and interests, elements of autism specifically named in the statute.

52. Petitioner's submittal provided much more information than is typical for most applicants for autism services.

53. Standard professional practice is that if some behavior or lack thereof is mentioned by the caretaker, it is recorded and investigated by the evaluator so as to confirm or rule out its presence. Likewise, if this behavior or lack thereof is observed by the evaluator, then the evaluator records it and either confirms or rules it out. If no severe behavior disorders were noted at all, it may be reasonably assumed by a reviewing professional that none were reported or observed in any of the foregoing evaluations.

54. Dr. Whittenberger opined that the behavior deficits observed in autistic individuals are not subtle, but are significant and severe. If present, these deficits would typically be mentioned in psychological reports. Examples of behaviors typically reported about autistic children are:

- Obsess or focus on one part of a toy, such as repeatedly spinning a toy truck's wheel instead of playing normally with the toy or all toys; sitting with a tricycle and spinning the wheels or staring at the seat handle.
- This child won't come out of the corner.

- This child won't leave the piece of string he has saved for the last two years and we can't get it away from him without horrible tantrums.
- Can't get him out from under the bed.
- He won't pay attention to anything except red objects.
- She just sits on the couch and rocks.
- She has a friend but they don't talk and they do their separate things, or she doesn't have any friends. Failure to make friends, failure to fit in, failure to get along.
- She won't talk to us. He's not talking yet.
- They don't play right or the same as my other children did. [sic] They never play with dolls, or dress up, or they just focus one part of one toy and it might not even be appropriate for that toy.
- A sentence structure was usual. [sic] Word order is mixed up, such as "no, please cookie I want." They use pronouns incorrectly.
- She said the same thing over and over. I asked her one question and she stuck to it for three or four times.
- They might talk in a monotone, or have inflections that are inappropriate or inaccurate for the content of the speech.
- It was difficult to get her to focus. It was difficult to get her to look at us.
- She doesn't seem to relate to us. We're not bonding.

55. Dr. Whittenberger found no such similar severe behavior disorders prior to age 18 reported by the Petitioner's mother, teachers, or evaluators in any of the evaluation reports. She concluded, on the basis of her professional education, training, and experience (see Findings of Fact 19 and 53) that this absence of anecdotal material denoting any severe behavior disorders meant that none were present.

56. Dr. Whittenberger stated that the critical elements required for a diagnosis of autism are missing from the evaluation reports. Although the reports discuss learning problems consistent with a severe learning disability, the Petitioner had no significant communication problems, no significant behavior problem and no indication of a severe lack in social reciprocity until, as an adult, she was diagnosed with a mental illness, schizophrenia.

57. According to Dr. Whittenberger, because Petitioner began suffering psychotic symptoms/schizophrenia as a young adult, the evaluations conducted after age 19 cannot be counted upon to provide reliable information about her childhood behaviors. This is due to the severe impairment in functioning caused by the mental illness itself.

58. Even so, the evaluations and reports submitted by the Petitioner indicate that from age five until the onset of a mental illness, at about age 20 in 1992, she was normal in many

ways, including behavior, but that she had severe processing and specifically catalogued learning problems.

59. The critical factors required for a diagnosis of autism are not present in the observations reported consistently over the Petitioner's childhood years by her mother, teachers and evaluators. The critical factors required for a diagnosis of autism were not present in the observations recorded consistently over Petitioner's childhood.

60. Dr. Whittenberger cited numerous references in the psychological and other reports done prior to age 19 which showed a pattern of normal behaviors and social skills which are inconsistent with autism. She relied primarily on these observations recorded by those early evaluations:

- At age 5 years 7 months, (1/26/77) the Petitioner's verbal ability was slightly above age level and her hearing was normal. She played with a shelf full of toys and was cooperative. The mother reported that she played with a variety of toys. She had no behavior problems during the testing and her IQ indicated that she was able to learn.
- At age 7 years 3 months (11/8/78) the referral question for the evaluation was related to academic performance and made no reference to impairments in social interaction. Petitioner was cooperative and demonstrated good conversation skills. Petitioner's verbal ability was higher than her non verbal/performance ability, and she met the criteria for "learning disability" in the school system.
- In an occupational therapy evaluation on 6/20/80, the Petitioner was extremely cooperative and displayed no attention



problems or tactual/tactical densiveness during the testing.

- At age 9 (7/2/80) the referring question has nothing to do with social or behavior problems. At this time, the Petitioner was described as highly motivated, very social, very popular, and learned many things on her own at home. Her mother reported that she made a great deal of progress at the school and that the Petitioner has a friend. During the testing, the Petitioner was cooperative, initiated conversation and rapport was established easily. Her verbal IQ was normal (103) although her performance IQ was 77, indicating specific learning disabilities.
- On December 10, 1981, Petitioner's full scale IQ was still within the normal range. Petitioner's mother reported to the evaluator that Petitioner's interests were gymnastics, swimming, gym, music, her dog, tortoise, reading, basketball and tv.
- On October 28, 1982, Petitioner was referred for evaluation to determine appropriate classroom placement with no reference to unusual behaviors. Petitioner was still having problems in the classroom related to her learning disabilities, although her IQ was in the normal range with no significant difference between verbal IQ and performance IQ. She was cooperative and related well to the examiner indicating that the Petitioner did not have impairment and social reciprocity. In 1987, the Petitioner was referred to the Mailman's Center for Evaluation of Learning Disabilities. Petitioner was described as cooperative, friendly, interacting comfortably and with good verbal abilities. Petitioner asked astute questions, was above average on her judgment of social situations, was on task and not distractible.
- At age 18 years, 6 months, Petitioner

demonstrated normal speech syntax and word order and conversed about the trip to Chicago that she had won.

61. Evaluations of the Petitioner after age 19 report behaviors associated with mental illness and may be skewed by her use of psycho-therapeutic drugs.

62. The various evaluators consistently diagnosed the Petitioner as having learning disabilities, including problems with visual spatial, visual motor, reading disability and developmental dyslexia, disgraphia, and discalcula.

63. Dr. Whittenberger testified that the specific learning disabilities noted, and primarily relied on by Petitioner herein as evidence of autism (See Finding of Fact 13) are different from autism in that individuals with severe learning disabilities are normal in other areas such as communication, and social reciprocity and behavior, in contrast to an autistic individual's severe impairment in those areas.

64. Verbal memory loss, frontal lobe executive skill dysfunction, impairment in reciprocal social interaction, impairment in verbal and non verbal communication, and a restricted repertoire of activities and interests are all symptoms of schizophrenia, but the age of onset is usually beyond the developmental years.

65. Memory dysfunction is not a symptom that discriminates between autism and schizophrenia.

66. According to Dr. Waldman, Petitioner's behavior and

social functioning as reported in 1990 and as reported by Dr. Voeller in 1992-1993 indicate a significant change consistent, not with a developmental disorder, but with a psychotic episode occurring prior to Dr. Voeller's evaluation.

67. Petitioner met the school system's definition of "learning disability" because of her significant discrepancy between verbal and performance IQ scores, pursuant to Chapter 231, Florida Statutes, and Chapter 6A-6, Florida Administrative Code, or similar educational rules then in effect.

68. Although the school system at one time classified the Petitioner as "emotionally handicapped" under its statute and rules, the reported behaviors of lack of concentration, lack of sustained attention, and lack of completion of task, are not the type of severe behaviors that are usually indicative of autism.

69. Elizabeth Chainy, an occupational therapist presently working with the Petitioner, testified about her observations of Petitioner in February and March 1998, but she had no personal knowledge of the Petitioner in infancy or childhood.

70. Janice Phillips is an independent support coordinator for Developmental Services clients of the Department. According to Ms. Phillips, Petitioner has been able to articulate her goals for the future and has expressed to Ms. Phillips that she likes to ride bikes, swim, ride horses, play the piano, and go to the library.

71. All of Ms. Phillips' clients who receive Developmental Services under the "autism" category have a diagnosis of autism. The Department does not provide autism services to individuals with a diagnosis of "PDD-NOS."

72. Mr. Hemingway knows of no individuals receiving Developmental Services for autism who do not have a clear diagnosis of autism.

#### CONCLUSIONS OF LAW

73. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1), Florida Statutes.

74. In accordance with the provisions of Chapter 393, Florida Statutes, Respondent, through its Developmental Services Program offices throughout the state, offers services to persons with developmental disabilities.

75. The Petitioner applied for, and was denied, developmental services under the "autism" category. Herein, the Petitioner has the duty to go forward and prove by a preponderance of the evidence that she has "autism" as defined in Section 393.063(2), Florida Statutes.

76. To establish entitlement to developmental services, Petitioner must be domiciled in the State of Florida and have a "developmental disability," as defined in Section 393.063(11), Florida Statutes. See Section 393.065(1), Florida Statutes.

77. A "developmental disability" as defined in Section 393.063(11), Florida Statutes, as

A disorder or syndrome which is attributable to retardation, cerebral palsy, autism, or spina bifida and which constitutes a substantial handicap that can reasonably be expected to continue indefinitely. (Emphasis supplied.)

78. "Autism" is defined in Section 393.063(2), Florida Statutes, as

A pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and non verbal communication and imaginative ability, and a markedly restrictive repertoire of activities and interests. (Emphasis supplied)

79. Respondent Agency's instructions to reviewing personnel which require a clear diagnosis of autism and not of any other disorder (specifically not one of PDD-NOS, which is nowhere named

in the statute) does not enlarge or contravene the statute, and does not rise to the level of a non-rule policy. This is a case of first impression, and the Department was entitled to attempt to prove-up and did prove-up its non-rule policy of requiring that the clear diagnosis be made by one of three named professionals. However, whether this policy is an unpromulgated "rule" or not is not determinative of this case, since all the diagnostic evidence presented has been through experts acceptable to the Department.

80. Petitioner has not proven that she meets the definition of "autism" contained in Section 393.063(2), Florida Statutes, by a preponderance of the evidence. There is no clear evidence that Petitioner is, or ever was, autistic, because all the statutory criteria proven are overlapped or obscured by Petitioner's schizophrenia which manifested after age 18. Furthermore, there is no persuasive evidence of the onset of autistic symptoms during Petitioner's infancy or childhood, as required by the statute. Indeed, at least until she graduated from High School, Petitioner seems to have functioned well, despite learning disabilities and emotional problems related to the learning disabilities.

81. The legislative history is silent on any type of relation between the Department of Education rules defining "specific learning disability," "emotional handicap," "severely emotionally handicapped" or "autistic," for IEP purposes and

Chapter 323, Florida Statutes, governing Developmental Services entitlement.

82. Although Petitioner proved she has a severe learning disorder, she did not prove that she also has a severe communication and behavior disorder with age of onset during infancy or childhood as required by Section 393.063(2), Florida Statutes. Nor did she prove that prior to adulthood and the onset of her schizophrenia that she exhibited impairment in reciprocal social interaction, impairment in verbal and non verbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests, as required by the statute.

83. The negative behaviors described in the evaluation reports prior to age 19 were not severe and are not generally accepted as diagnostic of autism. Rather, they are diagnostic of specifically defined conditions related to education.

84. Dr. Maurer testified that the Petitioner is not autistic as that term is recognized by generally accepted standard medical reference works, but in his opinion, she still meets the statutory definition, basically because she needs the services and should be covered by the statute. This constitutes honest and conscientious testimony, but is not persuasive of Petitioner's entitlement under the statutory definition of "autism." Dr. Maurer's testimony in support of Petitioner's entitlement is not based on reasonable medical certainty or

generally accepted standards of his profession. Dr. Maurer's opinion was based primarily on his interpretation of Dr. Voeller's neurological examination of the Petitioner when she was 21 years old and after the onset of Petitioner's serious mental illness. Dr. Maurer was unable to support his opinion with specific references to any childhood behaviors by the Petitioner, and his culling of some early reports and evaluations to reach a different conclusion does not persuade.

85. Petitioner's evaluations through age 18 consistently and significantly do not report signs of serious childhood communication and social problems. Descriptions of non-autistic behavior were repeated frequently throughout the evaluations during the Petitioner's childhood.

86. Psychologists are extensively trained and required to look for and note in psychological evaluation reports all behaviors that are outside the normal range. The numerous psychological reports submitted by the Petitioner to the Department consistently reported mostly normal behaviors and communication skills prior to age 18 and contained no reports of severe behavior or communication problems. Indeed, Petitioner was switched from an emotionally handicapped category to a specific learning disability category by trained education teams which by law would require expert psychological input. Therefore, it can be inferred that the Petitioner did not exhibit severe behavior or communication problems during childhood.



87. It is undisputed that Petitioner's level of functioning significantly deteriorated after she graduated high school with a regular diploma and that she had previously been hospitalized with symptoms of schizophrenia and was receiving treatment for same when she was evaluated by Drs. Voeller and Maurer.

88. It is undisputed that individuals with schizophrenia also exhibit severe impairment in memory, learning, communication, and reciprocal social interaction, and that these behaviors are attributable to their schizophrenia, not autism.

89. Because the Petitioner failed to present evidence that the onset of the symptoms of her present disability were present in infancy or childhood, as required by Section 393.063(2), Florida Statutes, she cannot prevail.

#### RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Children and Family Services issue a Final Order finding that Petitioner does not meet the statutory criteria for "autism" and is not eligible for Developmental Services under that category, pursuant to Chapter 393, Florida Statutes.

DONE AND ENTERED this 9th day of July, 1998, in Tallahassee,  
Leon County, Florida.

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ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of July, 1998.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.