BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2017100536

DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on December 13, 2017.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, Inland Regional Center, represented Inland Regional Center (IRC).

Claimant's mother represented claimant, who was present during the hearing.[1]

The matter was submitted on December 13, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a diagnosis of Autism Spectrum Disorder, Intellectual Disability, or a condition closely related to an intellectual

[1] Claimant's mother speaks Spanish, and a Spanish language interpreter translated the hearing.

disability or that requires treatment similar to that required for individuals with an intellectual disability (the "fifth category")?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On September 18, 2017, IRC notified claimant that he was not eligible for regional center services.

2. On September 28, 2017, claimant's mother filed a fair hearing request, appealing IRC's decision. In the request, claimant's mother stated she disagreed with an evaluation conducted by IRC psychologist Veronica A. Ramirez, Psy.D., and requested that the following be taken into consideration: claimant's school psychologists' opinions, claimant's neurologist's opinion, claimant's mother's responses on an intake questionnaire, his mother's worries about her son, and that claimant had been a consumer of Harbor Regional Center.

DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER AND INTELLECTUAL DISABILITY

3. Official notice was taken of excerpts from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (*DSM-5*), which IRC's expert, Ruth Stacy, Psy.D., referenced during her testimony.[2] As Dr. Stacy explained, the *DSM-5* provides the diagnostic criteria used by psychologists to make diagnoses of Autism Spectrum Disorder and/or Intellectual Disability, which an individual must have to qualify for regional center services based on Autism and/or Intellectual Disability.

[2] Dr. Stacy's hearing testimony and opinions are discussed in more detail below.

4. Under the *DSM-5*, the criteria necessary to support a diagnosis of Autism Spectrum Disorder include: persistent deficits in social communication and social interaction across multiple contexts; restricted, repetitive patterns of behavior, interests, or activities; symptoms that are present in the early developmental period; symptoms that cause clinically significant impairment in social, occupational, or other important areas of function; and disturbances that are not better explained by intellectual disability or global developmental delay.

5. The *DSM-5* provides that three diagnostic criteria must be met to support a diagnosis of Intellectual Disability: deficits in intellectual functions (such as reasoning, problem solving, abstract learning and thinking, judgment, and learning from experience) "confirmed by both clinical assessment and individualized standardized intelligence testing"; deficits in adaptive functioning "that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility"; and the onset of these deficits during the developmental period. Intellectual functioning is typically measured using intelligence tests. According to Dr. Stacy, individuals with Intellectual Disability typically have Intelligence Quotient (IQ) scores below 70; the *DSM-5* states, "[i]ndividuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance."

BACKGROUND REGARDING CLAIMANT'S EARLY CHILDHOOD DEVELOPMENT

6. Claimant is a 12-year-old male who was born prematurely, at seven months, and then weighing only three to four pounds. He was immediately placed in an incubator and remained in the hospital's neonatal intensive care unit (NICU) for his first

two weeks. When he was three months old, he was hospitalized for pneumonia. His heart stopped while he was in the hospital necessitating resuscitation, and he remained in the hospital for three weeks. When he was released from the hospital, the pediatrician recommended that claimant be supervised all the time because of problems with his eyes, hearing, and speech. Claimant then received therapy to fix a problem with his eyes and to help him use his hands and feet.

7. When claimant was one year and ten months old, he was assessed by a physician at Miller Children's Hospital, Stramski Child Development Center, Behavioral and Neurodevelopmental Program in Long Beach, California.[3] The written Physician Evaluation, dated August 29, 2007, noted that based on "a childhood autism rating scale," claimant scored in the "mildly autistic range," and based on the mother's reports, he had "significant difficulty in social and emotional area [*sic*] suggestive of autism." The physician recommended seeking an evaluation through Harbor Regional Center (HRC) due to claimant's "significant speech and language delay and concern for autism spectrum disorder."

8. Claimant became an Early Start consumer of HRC in December 2007 due to speech delay. According to his mother, HRC assigned claimant to a "little school," and he received speech therapy as part of the Early Start program. In October 2008, HRC determined claimant was not eligible for regional center services after his third birthday because HRC's interdisciplinary team determined claimant was not substantially disabled due to a developmental disability based on a July 15, 2008, psychological evaluation performed by a licensed psychologist. Claimant did not receive further regional center services after age three.

[3] The records submitted did not indicate the name or specialization of the physician who examined claimant. Nor did the records specify the diagnostic tools used.

9. Records from Riverside Regional Pediatrics Neurology Department indicate claimant was diagnosed with Attention Deficit Disorder (ADD)[4] and Autism on July 15, 2013. The records provided during the instant hearing did not indicate who made the diagnoses, other than an illegible signature,[5] and did not explain how the diagnoses were reached. On July 15, 2013, claimant was prescribed Adderall, but he has not taken that medication since 2013 or 2014.[6]

CLAIMANT'S MOTHER'S CONCERNS

10. Claimant's mother described her son as "very undeveloped." Claimant's developmental milestones - crawling, walking, and speaking - were delayed, and he did not speak until he was three-years-old.[7] Claimant also suffered several colds with ear infections before he reached three years of age. He was in a special education preschool class in the San Bernardino City School District for one year. The Redlands School District then did an evaluation and determined he could be in a regular class.

[4] Official notice is taken that Attention Deficit Disorder (ADD) is now referred to as Attention Deficit Hyperactivity Disorder (ADHD) in the DSM-5.

[5] Claimant's mother testified claimant was seen and diagnosed by a neurologist.

[6] Dr. Stacy explained that Adderall is a medication commonly prescribed to treat ADHD symptoms, and it is not a medication used to treat Autism. Some documents indicated claimant stopped taking that medication in 2013 and other documents stated he stopped taking it during 2014.

[7] The assertion that he did not speak until his was three years old was inconsistent with information contained in a 2008 evaluation conducted before he turned three.

From first through fifth grade, all his teachers told his mother he was not consistent, did not understand, was easily distracted, and he had developmental delays. His mother also observed problems at home, including that he was more hyperactive, sensitive to noises, would hit his face, and would spit up. She saw a lot of delays in his development compared to children his age. She noted that "he is not like kids his age," and there were always "incidents." Claimant's mother described having to repeatedly remind claimant about unsafe things because he would forget. Although he is in eighth grade now, she stated that his learning is at the third-grade level. She wished he could be in a special class, because he does not learn in a regular class, and he needs supervision all the time.

THE PSYCHOLOGICAL EVALUATIONS AND PSYCHOEDUCATIONAL ASSESSMENTS

11. Claimant was evaluated by psychologists referred by HRC in 2008 and by IRC in 2017 and by school psychologists in 2008 and 2017.

July 15, 2008, Psychological Evaluation

12. HRC referred claimant for an evaluation with licensed psychologist Alejandra Muñoz, Ph.D., in 2008. Dr. Muñoz conducted her testing and evaluation on May 21, 2008, and July 8, 2008, when claimant was between two and one-half and three years old. Her report noted the following under the "REASON FOR REFERRAL" heading: "[Claimant] was referred for a psychological evaluation by Yesenia Marin, Intake Coordinator, to help in determining Regional Center eligibility. He was referred to the Regional Center by a psychotherapist from the Stramski Developmental Center where he has been seen four or five times every third month, with suspected Autism." According to the "BACKGROUND INFORMATION" in Dr. Muñoz's report:

> [Claimant] crawled at 8 to 9 months, walked at 16 months, and is not toilet trained yet. (The mother began to train him within the last week, and he is beginning to say "pi-pi.") He began to say his first words at 12 months, and he does not yet connect two words into a phrase. He has an expressive vocabulary of about ten words.

Dr. Muñoz administered the Bayley Scales of Infant Development, Third Edition (BSID-3), Autism Diagnostic Observation Schedule Module 1 (ADOS), Gilliam Autism Rating Scale-Second Edition (GARS-2), and Vineland Adaptive Behavior Scales, Second Edition (VABS-II). She also reviewed records and conducted a clinical interview. Claimant's BSID-3 scores placed him within the average range of cognitive development (with a standard score of 95), the mildly deficit range of language development (with a standard score of 62), and the low-average range of motor development (with a standard score of 82). His VABS-11 scores placed him in the borderline range of development of communication skills (standard score of 74), low-average range of development of daily living (standard score of 83) and socialization skills (standard score of 87), and borderline to low-average range of development of motor skills (standard score of 79). Based on his mother's responses to the GARS-2, claimant received a score in the "very likely probability of Autism" range.[8] His ADOS scores were "at the lower limit of the Autism cut-off in communication, below the Autism Spectrum cut-off in

[8] The report noted that claimant's mother's responses regarding the frequency with which claimant avoided eye contact conflicted with what she told Dr. Muñoz during the clinical interview.

reciprocal social interaction, and score of 2[9] (indicating some appropriate playing with toys, as well as some imagination in his play), and a score of 0 in stereotyped behaviors and restricted interests."

Dr. Muñoz's report described her behavioral observations of claimant as follows:

> [Claimant] was nicely dressed and well-groomed. He is a beautiful boy with regular facial features. His eye contact and affect were normal, and a good rapport was easily established and maintained throughout the session. While his mother was interviewed, [claimant] remained in the office playing with a developmental bead toy for a little while and then began moving about (though not in a particularly restless way). He tried to engage in turning the light switch on and off and did not obey his mother when she told him to stop. However, he readily obeyed the examiner when she told him "no." Though rebellious with his mother, he was also very affectionate with her. Also, he kissed the examiner goodbye and was cooperative with her during testing.
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> During the testing, [complainant] was cooperative and compliant.

[9] Dr. Muñoz's report did not clarify the category under which claimant received the "2" score, making her explanation of the results of the ADOS she administered a little confusing.

Dr. Muñoz's diagnostic impressions were that he suffered from Mixed-Receptive-Expressive Disorder and Oppositional Defiant Disorder. She did not diagnosis claimant with Autism Spectrum Disorder or Intellectual Disability. Dr. Muñoz's report explained:

> The data appear consistent with a language disorder in both the expressive and the receptive modalities, and an Oppositional Defiant Disorder (with losing his temper often, actively defying and refusing to comply with adult requests, often being angry, and being spiteful). [Claimant's] language problems appear consistent with his history of recurrent ear infections. Ear infections are always accompanied by some degree of variable or episodic conductive hearing loss, resulting in a longstanding form of fluctuating auditory deprivations. This in turn results in acuity deficits with delays in the development of speech and language, difficulty in the production of adequate speech, deficits in auditory processing and receptive language skills, and depressed IQ scores and academic skills.
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> October 20, 2008, Psychoeducational Assessment

13. HRC also referred claimant to the Long Beach Unified School District's Office of School Support/Division of Special Education, Infant/Preschool Center, for a psychoeducational assessment. The Assessment Team consisted of a school psychologist, school nurse, speech/language specialist, and bilingual technician. The evaluation was performed on October 20, 2008, when claimant was three years old and attending preschool. The report stated claimant was referred for assessment "due to speech and language delays and behavioral difficulties." The report noted claimant

passed the vision screening, his hearing was tested and found to be normal, and his "early milestones as reported by parent" were "developing within normal limits except language development."

The Psychoeducational Assessment referenced an August 27, 2008, Physician Report by Hyun S. Park, M.D., of the Stramski Child Development Center, Miller Children's Hospital,[10] and stated:

> Dr. Park has followed [claimant] since August 2007. She has seen him approximately four times since then. Her conclusions are that [claimant] has global developmental delay with worst scores in social, language and fine motor skills. Dr. Park disagreed with the psychological evaluation by Dr. Muñoz who gave [claimant] [*sic*] diagnosis of Mixed Receptive-Expressive Language Disorder and Oppositional Defiant Disorder. Dr. Park's conclusion is that [claimant] has autism spectrum disorder.

Under the heading "Autistic Spectrum Behavioral Features," the school's October 20, 2008, Psychoeducational Assessment stated (emphasis in original):

> The examiners of this evaluation noted that [claimant] displayed appropriate social skills during the evaluation. The *Childhood Autism Rating Scale (CARS)* was used because of the contradicting prior reports regarding the presence of

[10] Clamant provided an August 29, 2008, Physician Evaluation from Stramski Child Development Center, which did not mention Dr. Park. Neither party offered any document dated August 27, 2008, as evidence.

> autism spectrum disorder. The *CARS* is a 15-item behavioral rating scale developed to identify children with autism, and to distinguish them from developmentally handicapped children without the autism spectrum. This questionnaire was completed through interview with [claimant's] mother and observation for the purpose of describing [claimant's] current behaviors and determining [claimant's] level of need. At this time, [claimant's] behavior appears to be within the non-autistic range; his score is 24.
>
> [Claimant] was not observed to demonstrate atypical behaviors associated with autism spectrum disorders during the evaluation with the exception of delayed language development. . . .

In the "SUMMARY AND RECOMMENDATIONS" section, the assessment mentioned that claimant's mother had reported claimant exhibited some atypical behaviors "such as smelling sheets of paper, rocking and off to space." However, the assessment also stated that "[d]uring the evaluation, [claimant] did not demonstrate any autistic-like behaviors. His behavioral functioning during the examination was not indicative of oppositional-defiant behaviors either."

Regarding claimant's cognitive functioning, the assessment stated:

> The assessment of young children is difficult due to limited social awareness and differing rates of development during the first few years of life. Results, therefore, should be interpreted with caution.

> Based on information derived from interview, observation and testing, [claimant] appears to be functioning within the low average range of non-verbal ability and low-average range of combined verbal and non-verbal ability at this time.

The assessment concluded that claimant met state and federal criteria for special education as an individual with exceptional needs, based on a primary condition of "**Developmental Delay in the areas of speech and language development and fine motor development**." (Bold emphasis is original.)

Consistent with the Psychoeducational Assessment, the "Eligibility Statement" on claimant's Long Beach Unified School District, November 3, 2008, Individual Educational Program (IEP) provided: "[Claimant] exhibits significant developmental delays in the areas of language development & fine motor development that are not [*sic*] result of cultural or other environmental conditions."

January 17, 2017, Psycho-Educational Report

14. San Bernardino City Unified School District School Psychologist Sean D. Antos, M.A., conducted a psychoeducational assessment of claimant when he was 11 years, three months old and in sixth grade. At the time, claimant had been classified as suffering from a "Specific Learning Disability" and placed in "Specialized Academic Instruction (SAI) in mild/Moderate SDC for three periods/day."[11] Claimant had relative strengths in math and writing and was an early intermediate English learner. The report noted that claimant had been diagnosed with autism when he was four years old and had been prescribed Adderall for ADD.

The report included the following classroom observations:

[11] "SDC" appeared to be an abbreviation for "Special Day Class."

> [Claimant] was observed multiple times in his classroom and on the campus. He was observed in his SDC variously to attend to the teacher, speak to his seatmate and to sit with his head down at his desk. While navigating campus, he was observed to arrive to class late, walking in an area that is off-limits to students, and to inappropriately hug/hold onto his classmate. In the computer lab, [claimant] was observed to sit quietly, with his headphones one [sic]. However, on inspection by the observer, he was not following the instructions of the teacher. At a later point, he had difficulty in getting his computer to work, prompting frustration. This frustration took the form of calling out that his computer wasn't working (e.g. "the computer doesn't work!", "what's happening?", "what about the mouse/headphones?"), that he needed help, vocalizations (e.g. "Ahhh!"), and physical reactions (e.g. banging on the keyboard and keys), prompting redirection from the teacher.

Claimant's scores on the various intellectual functioning and cognitive tools administered were in the average and low average ranges. On the Kaufman Brief Intelligence Test-II (KBIT) (from an August 30, 2016, psychoeducational report),[12] his IQ composite standard score of 99 was in the average range. On the Woodcock-Johnson III Normative Update Tests of Cognitive Abilities (WJ-III COG) (from an August 30, 2016, psychoeducational report), his standard scores ranged between 82 and 109 and were in

[12] Although an August 30, 2016, psychoeducational report was referenced, that report was not presented as evidence.

the average and low average range. The report also noted the following under the heading "ADAPTIVE BEHAVIOR":

> [Claimant's] performance in the observations and previous testing sessions did not generate significant concerns in adaptive behavior. He appears to be able to care for his needs at an [sic] appropriate levels [sic] while on campus. He is able to follow classroom routines, and eat independently.

The report described claimant's mother's responses on the Connors Comprehensive Behavior Rating Scale (Connors CBRS) as follows:

> [Claimant's mother's] responses indicated very elevated scores in the areas of: Emotional Distress, Upsetting Thoughts, Worrying, Social Problems, Defiant/Aggressive Behaviors, Academic Difficulties, Language, Math, Hyperactivity/Impulsivity, Separation Fears, Perfectionist and Compulsive Behaviors, Violence Potential, and Physical Symptoms. On the DSM-IV-TR symptoms scales her responses indicated very elevated scores in the areas of: ADHD Predominantly Inattentive Type, ADHD Predominantly Hyperactive-Impulsive Type, Oppositional Defiant Disorder, Major Depressive Episode, Manic Episode, Generalized Anxiety Disorder, Separation Anxiety Disorder, Social Anxiety, Obsessive-Compulsive Disorder, and Autism Spectrum Disorder, Responses indicated average scores in the area of: Conduct Disorder.

> *The scoring indicated, however, that responses to similar items showed high levels of inconsistency.

The claimant's mother's responses to the Gilliam Autism Rating Scale-Second Edition/Spanish (GARS-2) indicated a '"very likely' probability of Autism in the area of Stereotyped Behaviors, Communication, and Social Interaction." Based on the Gilliam Rating Scale-3 (GARS-3) completed by claimant's physical education teacher, claimant was in the range of '"Probable' Probability of Autism Spectrum Disorder." Based on the GARS-3 completed by claimant's science teacher, claimant was in the range of '"Very Likely' Probability of Autism Spectrum Disorder."

The report's summary stated:

> Cognitive ability is estimated within the low to high average range. Academic skills estimated in the low to average range. Visual-motor integration is estimated in the low average range. In areas of social/emotional functioning, specific attention was paid to reported concerns of behaviors that can be characteristic of Autism Spectrum Disorders. Given the current responses and observations, combined with previous reports and information, it is felt that [claimant] does exhibit some behaviors characteristic of an Autism Spectrum Disorder at this time. Specifically, [claimant] is believed to exhibit delay in his communication abilities and resistance to environmental change or change in daily routine. Additionally, he [*sic*] believed to continue to qualify as a student with a Specific Learning Disability, as reported in

the psychoeducational assessment from the Redlands Unified School District, dated August 30, 2016.

Consistent with the 2017 psycho-educational report, claimant's San Bernardino City Unified School District January 18, 2017, IEP and his September 6, 2017, IEP both noted that he was eligible for special education services based primarily on "Specific Learning Disability (SLD)" and secondarily on "Autism (AUT)." Both IEPs noted: "[I]t is felt that [claimant] does exhibit some behaviors characteristic of an Autism Spectrum Disorder at this time. Specifically, [claimant] is believed to exhibit delay in his communication abilities and resistance to environmental change or change in daily routine."

Claimant and his mother moved out of the San Bernardino City School District, and at the time of the instant hearing, claimant was attending school in the Lamont Elementary School District. Documentation regarding a November 15, 2017, IEP meeting at his new school noted that he was deemed eligible for special education services based primarily on "Specific Learning Disability" and secondarily on "Autism."

August 14, 2017, Psychological Evaluation

15. IRC referred claimant to Veronica A. Ramirez, Psy.D., for a clinical diagnosis to help IRC determine claimant's eligibility for regional center services. Dr. Ramirez is a California licensed clinical psychologist. She has worked as a staff psychologist for IRC since January 2016, and she previously worked as a psychological assistant for IRC from January 2015 through December 2016. She obtained her Doctorate in Psychology in 2011, and she worked as a Social Worker and Psychology Intern before working for IRC. Although Dr. Ramirez did not testify at the hearing, her August 14, 2017, Psychological Evaluation was received as evidence.

When Dr. Ramirez conducted her evaluation, claimant was 11 years, 10 months old and in seventh grade. Dr. Ramirez interviewed claimant's mother in Spanish, and Dr. Ramirez's interactions with claimant, whom she described as bilingual, were primarily in English. Dr. Ramirez's report noted that claimant met the following developmental milestones: "rolled over at 8-9 months, sat alone at 8-9 months, crawled at 12 months, walked at 18 months, and was toilet-trained at 36 months. [Claimant] said his first word at 36 months, first phrase at 48 months, and understood commands at 36 months."

Dr. Ramirez administered the Childhood Autism Rating Scale, 2nd Edition, High Functioning (CARS-2HF); Autism Diagnostic Observation Schedule 2nd Edition, Module 3 (ADOS-2); and Vineland Adaptive Behavior Scales, 2nd Edition, Spanish Version (VABS II). She also conducted a parent interview, observed claimant, and reviewed records. Claimant's scores on the ADOS-2 showed "Minimal-to-No Evidence of Autism Spectrum-related symptoms"; his CARS-2HF scores showed "Minimal-to-No Symptoms pf ASD"; and his VABS II scales were in the low range of overall adaptive functioning. Dr. Ramirez did not conduct additional intelligence tests because "previous test results indicate intellectual skills in the high to low average range." Dr. Ramirez did not score claimant's mother responses to the Adaptive Behavior Assessment System, 3rd Edition (ABAS-3), because his mother "did not complete the form correctly."[13] Dr. Ramirez also noted:

[13] Following an informal conference between claimant's mother and IRC, Dr. Ramirez scored the ABAS-3, which scores were received as evidence and explained during Dr. Stacy's hearing testimony. However, Dr. Stacy did not place much weight on those scores in reaching her opinions because she believed other tools used by Dr. Ramirez were more reliable.

> The examiner noticed that mother gave [claimant] mostly zeros (indicating he was not capable). For example, she stated that [claimant] was not capable of labeling 20 familiar objects. The examiner went around the room and asked [claimant] what different objects were and he was easily able to label them. Mother may have answered the Communication question based on his use of the Spanish language. Due to mother's misunderstanding of the questions, the form was not scored and the examiner interviewed the mother to complete the Vineland Adaptive Behavior Scales (VABS-II).

Dr. Ramirez also believed that some of the VABS-II scores may have been lower due to the fact that claimant's mother speaks Spanish and claimant is bilingual, but seemed to prefer English. Dr. Ramirez explained:

> Due to the language barrier between mother and [claimant], some scores may be depressed as mother is not fully aware of his communication skills. For example, mother reported that [claimant] understands sarcasm in English but not in Spanish. She also felt that [claimant] could not order words in alphabetical order but when given that task he demonstrated he could. Again, these appear to be due to the language barrier between [claimant] and his mother.

Dr. Ramirez summarized her behavioral observations during her interactions with claimant as follows:

> During this evaluation, [claimant] demonstrated many behaviors that are not consistent with ASD. He was very silly and sought to make the examiner laugh. He was a sweet boy and appeared immature for his age. [Claimant] is easily distracted and seeks to distract others. He shared enjoyment with the examiner and inquired about the examiner's experiences and family. [Claimant] spontaneously engaged the examiner in a game. [Claimant] made use of a variety of different gestures (emphatic, descriptive, instrumental, and informational). Once [claimant] became comfortable around the examiner, he displayed good eye contact. He directed a variety of facial expressions towards the examiner. [Claimant] was very silly and this examiner could see how he can become a nuisance to his peers if he does not understand when to control his behavior.

Dr. Ramirez's diagnostic impressions were that claimant suffered from "Attention Deficit/Hyperactivity Disorder, Combine presentation," and she encouraged his mother to seek mental health assistance for his ADHD. She determined claimant's behavioral presentation was not consistent with Autism Spectrum Disorder and he did not meet the diagnostic criteria for Intellectual Disability.

DR. RUTH STACY'S EXPERT OPINION TESTIMONY

16. Ruth Stacy, Psy.D, received her Doctorate Degree in Psychology from Trinity College of Graduate Studies in 2008. She obtained her Bachelor of Arts Degree in Psychology and Sociology from California Baptist College in 1978; Master of Arts Degree in Sociology from California State University, Chico, in 1980; and Master of Arts Degree

in Counseling Psychology from Trinity College of Graduate Studies in 2004. Dr. Stacy has served as a staff psychologist at IRC since October 2015, having previously worked for IRC as a Senior Counselor/Intake from October 2000 until October 2015, Senior Consumer Services Coordinator from October 1991 until July 2000, and Customer Services Coordinator from July 1991 until September 1991. Dr. Stacy also has experience working as a marriage and family therapist and as a qualified mental retardation professional before working as an IRC staff psychologist. In Dr. Stacy's current position, she is responsible for performing and interpreting psychological assessments and reviewing records to evaluate the eligibility of claimants seeking regional center services.

Dr. Stacy reviewed all the records IRC received and the exhibits claimant's mother presented during the hearing. Based on all the records, including the standard scores and scales measured by the diagnostic tools used, Dr. Stacy opined that claimant is not eligible for regional center services because he does not meet the diagnostic criteria for Autism Spectrum Disorder or Intellectual Disability, and he does not suffer from a condition similar to, or that requires treatment similar to, Intellectual Disability (the "fifth category"). Dr. Stacy noted that the records she reviewed supported a finding that claimant had delays in speech and language, but those delays did not support eligibility for regional center services. Dr. Stacy believed ADHD was the appropriate diagnosis.

While Dr. Stacy considered that a neurologist had previously diagnosed claimant with Autism and ADD and a school psychologist had found some characteristics of Autism during a 2017 psychoeducational assessment, she did not consider those findings to be sufficient for a *DSM-5* diagnosis, which would be necessary for regional center eligibility based on Autism. Dr. Stacy explained that Autism diagnoses are typically made by psychologists after conducting the types of tests administered by Dr. Muñoz and Dr. Ramirez. Neurologists normally do not administer such tests, and school psychologists have a master's level education and are not licensed to make formal *DSM-*

5 diagnoses. Additionally, in the school setting, a student may be eligible for special education services if the student has at least three characteristics of Autism, even if the student does not meet the *DSM-5* criteria for diagnosis of Autism Spectrum Disorder.

With respect to diagnosing Intellectual Disability, Dr. Stacy explained that she would expect to see standardized scores on intelligence tests of 70 or below, accompanied with adaptive deficits. For a fifth category diagnosis, Dr. Stacy would expect to see scores in the low borderline range, also with adaptive deficits. Claimant's overall IQ scores were in the average range, such that he would not be diagnosed with Intellectual Disability or fall within the fifth category.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

2. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid.*) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

STATUTORY AUTHORITY

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

4. Welfare and Institutions Code section 4501 states:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors, and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.
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> [¶] . . . [¶]
>
> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities. . . .

5. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

"Developmental disability" means a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

6. California Code of Regulations, title 17, section 54000,[14] provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, 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.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

[14] The regulation still uses the former term "mental retardation" instead of "intellectual disability."

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a

need for treatment similar to that required for mental retardation.

7. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.

8. A regional center is required to perform initial intake and assessment services for "any person believed to have a developmental disability." (Welf. & Inst. Code, § 4642.) "Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs . . . ." (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, "the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

9. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. However, the criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act and California Code of Regulations, title 17. The fact that a school may be providing services to a student based on the school's determination of an autism disability is not sufficient to establish eligibility for regional center services.

APPLICABLE CASE LAW

10. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127, the Fourth District Court of Appeal discussed the language in the Lanterman Act regarding the fifth category and determined the language was not impermissibly vague. The appellate court explained that finding as follows (*Ibid.* at pp. 1128-1130.):

> In the instant case, the terms "closely related to" and "similar treatment" are general, somewhat imprecise terms. However, section 4512(a) does not exist, and we do not apply it, in isolation. "[W]here the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies." [Footnote omitted.] Here, the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS and RC professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman

> Act and regulations to assist such RC professionals in making this difficult, complex determination. Some degree of generality and, hence, vagueness is thus tolerable.
>
> The language defining the fifth category does not allow such subjectivity and unbridled discretion as to render section 4512 impermissibly vague. 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.
>
> While there is some subjectivity involved in determining whether the condition is substantially similar to mental retardation and requires similar treatment, it is not enough to render the statute unconstitutionally vague, particularly when developmentally [*sic*] disabilities are widely differing and difficult to define with precision. Section 4512 and the implementing regulations prescribe an adequate standard or policy directive for the guidance of the RCs in their determinations of eligibility for services.

EVALUATION

11. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. There is no question that claimant suffers from development delays for which he receives special education services. His mother justifiably wants to make sure her son receives any and all services

for which he is eligible. However, the evidence introduced in this hearing was not sufficient to prove by a preponderance of the evidence that claimant suffers from Autism Spectrum Disorder, Intellectual Disability, or meets the criteria for eligibility under the fifth category. Accordingly, claimant is not eligible to receive regional center services at this time. Thus, his appeal from IRC's determination that he is ineligible to receive regional center services must be denied.

ORDER

Claimant's appeal from Inland Regional Center's determination that he is not eligible for regional center services and supports is denied.

DATED: December 26, 2017

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THERESA M. BREHL

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.