

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. 2016110503

DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California (OAH), heard this matter in San Bernardino, California, on January 23, 2017, and March 9, 2017.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented the Inland Regional Center (IRC).

Cecily E. Marrable, claimant advocate, represented claimant, who was not present.

The matter was submitted on March 9, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of a diagnosis of Autism Spectrum Disorder that constitutes a substantial disability?

## FACTUAL FINDINGS

### JURISDICTIONAL MATTERS

1. On October 18, 2016, IRC sent claimant a notice of proposed action, notifying claimant that she was not eligible for regional center services.

2. On November 2, 2016, claimant's parents filed a fair hearing request, appealing IRC's decision.

Claimant's parents stated in claimant's fair hearing request that the reasons for requesting a fair hearing were:

Our daughter [claimant] has been diagnosed with Autism by several doctors/psychologists. She has an IEP, a 1:1 Aide for the full duration of the school day, 40+ hours of ABA therapy per month provided by one of IRC [s/d] former vendors – Behavioral Autism Therapies. [H]ours were increased due to regression and multiple deficiencies: not eating at school[,] self injuries.

Claimant's parents also stated in the fair hearing request that the following was needed to resolve claimant's complaint:

We request to have the decision reversed and to have [claimant] accepted as a client of the Inland Regional Center so that she can receive the services she needs including but not limited to speech, OT, respite, IHSS-in-home-support/services, ABA, youth socialization classes.

## DIAGNOSTIC CRITERIA FOR AUTISM SPECTRUM DISORDER

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), identifies diagnostic criteria necessary to reach the diagnosis of Autism Spectrum Disorder (ASD). The diagnostic criteria 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. An individual must have a DSM-5 diagnosis of ASD to be eligible for regional center services based on autism.

## SUMMARY OF EVIDENCE PRESENTED

4. Claimant is a seven-year-old girl. She has been diagnosed with ASD, Obsessive Compulsive Disorder (OCD), and Attention Deficit Hyperactivity Disorder (ADHD). IRC agrees that claimant suffers from ASD. However, IRC decided claimant was not eligible for regional center services because it determined her condition has not resulted in a substantially disabling condition.

5. Claimant's treating counselor, Stacey M. Sanderson, M.S., L.M.F.T., L.P.C.C., and her treating psychologist, Erica F. Rosenfeld, Ph.D., diagnosed claimant with ASD in 2015. Her school's psychologist conducted a Psychoeducational Evaluation with respect to claimant's request for special education services and accommodations. Behavioral Autism Therapists, LLC (BAT) conducted a Functional Behavioral Assessment and wrote an ABA Assessment Report in November 2015 and a Psychological Assessment in January 2017. Claimant has been receiving Applied Behavior Analysis (ABA) therapy from BAT, paid for by her parents' health insurance provider, since 2015, and BAT provided written progress reports with respect to that therapy.

6. Documentation and reports were provided at the hearing regarding the multiple assessments and evaluations of claimant, including notes and a letter from claimant's therapist regarding her diagnoses and recommendations; claimant's psychologist's letter/report; the school psychologist's Psychoeducational Assessment Report; claimant's Individualized Education Program (IEP); BAT's ABA Assessment Report, Psychological Assessment Report, and ABA In-Home Progress Reports; and IRC's Psychological Assessment. Claimant's parents testified regarding claimant's behaviors and their concerns that she has been regressing, and claimant's treating psychologist and IRC's staff psychologist provided expert opinion testimony.

#### CLAIMANT'S TREATING THERAPIST'S AND PSYCHOLOGIST'S DIAGNOSES

2015 Evaluation By Stacey M. Sanderson, M.S., L.M.F.T., L.P.C.C.

7. Stacey M. Sanderson, M.S., L.M.F.T., L.P.C.C., is an individual, couples, and family therapist who works at Foothills Psychological Services. She obtained her Bachelor of Arts Degree in Behavioral Science from California State Polytechnic University, Pomona, in 1993, and her Master's Degree in Counseling: Marriage and Family Therapy from the University of LaVerne in 1998. Ms. Sanderson began treating claimant in May 2015, when claimant was five years old and in kindergarten. In her May 2015, psychological evaluation notes, she wrote that claimant presented with ADHD and ASD.

Ms. Sanderson wrote a letter, dated August 12, 2015, which stated:

I am the treating therapist for [claimant]. I have diagnosed her with both Autism spectrum disorder and Attention Deficit Disorder, combined type. It is my understanding that she will be receiving an IEP. I am recommending the following accommodations for her

Be reminded to drink water throughout the day, especially on hot days

Be reminded to put on her hat before she goes outside for recess

Be seated in a position in the classroom that minimizes distractions

Be allowed to sit on a 'wobble seat'

Be allowed to get up and walk around the classroom periodically to burn off energy

Be put on a behavior modification program if needed

There will obviously need to be more accommodations added as [claimant] continues in school and new issues arise, but at this time these would benefit [claimant's] academic progress.

2015 Diagnoses by Erica F. Rosenfeld, Ph.D.

8. Erica F. Rosenfeld, Ph.D., began treating claimant in June 2015. Dr. Rosenfeld diagnosed claimant with ASD and ADHD, combined type, and possibly OCD. Dr. Rosenfeld testified as an expert. Her written report and testimony are set forth in more detail below.

## BAT'S ABA ASSESSMENT, PROGRESS REPORTS, CLINICAL SUPERVISOR'S LETTER, AND PSYCHOLOGICAL ASSESSMENT

BAT's November 1, 2015, ABA Assessment Report

9. Claimant was referred to BAT for a Functional Behavioral Assessment due to maladaptive behaviors including "excessive tantrums, and delays in communication, lack of focus/attention, and deficits in social skills." Loc Le, Ph.D., B.A.C.A., who is a board-certified behavior analyst and BAT's clinical director, issued an ABA Assessment Report, dated November 1, 2015, based on parent interviews and on observations of claimant's behaviors at home and at school. At the time of Dr. Le's assessment, claimant was enrolled in first grade and was in a general education class without any supports.

Dr. Le's report noted that the following information was provided by claimant's mother:

- Claimant is "a very picky eater, where her foods cannot touch each other on the plate. She also has texture issues (nothing sticky) when it comes to food and does not eat red meat."
- Claimant "has difficulty carrying on a conversation with others. She will generally stray off topic or will be rigid and only talk about the things she wants to talk about, not taking into account the other person's interests."
- Claimant "bites her lips until they are raw. She also uses a pencil to dig out the dirt under her fingernails, which may cause bleeding."
- Claimant engages "in tantrum behaviors (crying and screaming) when she is asked to complete non-preferred tasks (getting up in the morning/brushing teeth, completing homework), or when she is denied access to tangibles. These tantrums . . . occur 5-10 times per day" and last "15-20 minutes in duration."
- Claimant is "independent in many of her self-help needs. She is able to dress herself, but her mother has to put out the clothes for her to wear, and she does not like to wear warm clothing. She has learned to wash her hands and

brush her teeth, but compliance is a major issue. . . . [Claimant] can feed herself with utensils, but there has been some regression and now she has started to use her hands to eat again.”

The report described the evaluator’s observations of claimant in her home as follows:

Upon arrival at the family home, the evaluator was greeted by [claimant] with a big smile. She already knew the evaluator’s name because her mother had primed her of the evaluator’s visit. [Claimant] was able to answer basic questions such as her name, age, and sister’s name. However, she could not state her address or phone number. She was able to recall what she did at school when her mother asked. She was able to list the students and her friends at school. While she was able to answer these questions, [claimant] was off-topic and did not ask questions during our conversations.

When it was time to do her homework, [claimant] said, “I’m hungry” so her mother gave her a snack. [Claimant] then said, “I wish I could watch Netflix today.” However, her mother did not allow this request. As [claimant] was still eating, her mother brought out her homework papers and directed [claimant] to start writing. [Claimant] did not respond, so her mother put the snacks away and then gave her the instruction again. [Claimant] engaged in many escape-maintained behaviors during the homework process. She dropped her pencil several times, got out of her seat and

ran to get more snacks. She broke the lead on her pencil so that her mother would have to sharpen the pencil.

[Claimant] spent nearly 2 hours attempting to complete all the homework assignments for the day. She worked on spelling, reading fluency, rhyming words, and topic sentences. She displayed some screaming and crying but was able to calm herself down with her stuffed animal (horse).

The report provided the following description of the evaluator's observations of claimant at her school:

When the evaluator arrived, [claimant] and her classmates were walking outside to work on a class project. The students were learning about the different states of matter and had pieces of chocolate in plastic bags. They were to see what would happen to solids when it got hot. [Claimant] was able to walk with her classmates in single file and followed the teacher's instructions when she was outside. She jumped and skipped when it was her turn, and showed appropriate affect with facial expressions of enjoyment during this lesson.

Once outside, the students all sat down to watch a video on the three states of matter. [Claimant] was often not paying attention to the video and would sit back and lean in her chair. Her teacher told her that if she was having problems sitting in the chair that she could stand. [Claimant] chose to stand for a few minutes then sat back down. When it was time to share what they had found, [claimant] was again not

focused and did not pay attention to what the other students were saying. She was bouncing up and down in her chair and constantly got up and out of her chair. When the teacher asked [claimant] a question, she needed some prompting to answer.

The report noted two categories of challenging behaviors, engaging in “off-task behaviors ranging from 20-30 times per hour,” and “tantrum behaviors 5-10 times per day and lasting about 15-20 minutes in duration.” The report provided a Behavior Support Plan with strategies and goals to assist claimant and her family deal with claimant’s tantrums and off-task behaviors.

The report’s summary provided:

The results of this assessment show that [claimant] has deficits in social skills, communication skills, adaptive skills, as well as several maladaptive behaviors. These findings were based on observation, along with parental report.

Based on [claimant’s] needs for support in the areas of communication skills, social skills, and managing maladaptive behaviors, B.A.T. is recommending 35 hours per month of direct in-home ABA services, along with 7 hours supervision per month, starting November 1, 2015.

BAT’s ABA In-Home Progress Reports

10. BAT’s ABA In-Home Progress Reports for the time periods July 2015 to December 2015, March 2016 to August 2016, July 2016 to November 2016, and May 2016 to October 2016, which tracked claimant’s progress, were received in evidence. Those reports described the maladaptive behaviors that were being addressed as:

automatic/self-stimulating behavior, such as claimant picking at her clothes or any items in close proximity; and eloping, which included leaving an area without permission and crying, whining, or ignoring others. The reports also listed skill acquisition goals, including the ability to: sit and attend to non-preferred tasks; expressively answer social questions; share preferred items with others without displaying maladaptive behaviors; follow one step instructions; transition from a preferred activity to a non-preferred activity; engage in age appropriate activities; communicate her wants and needs; independently tie her shoes; wait for a preferred item; identify and count money; tell time; and make eye contact when her name is called.

The most recent progress report (for May 2016 through October 2016) noted the following ABAS<sup>1</sup> Adaptive Assessment Classifications:

<u>Categories</u>	<u>Percentile Rank Current</u>	<u>Classification Current</u>
GAC <sup>2</sup>	6	Below Average
Conceptual	10	Average
Social	18	High
Practical	4	Low
<u>ABAS-3 Skill Areas</u>	<u>Classification Baseline</u>	<u>Classification Current</u>
Communication	5	Low
Community Use	7	Below Average
Functional Pre-Academics	9	Average
Home Living	6	Below Average

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<sup>1</sup> "ABAS" is the Adaptive Behavior Assessment System. During IRC's expert Dr. Stacy's testimony, Dr. Stacy reviewed claimant's adaptive skill area scaled scores from the Adaptive Behavior Assessment System, Third Edition (ABAS-3) Manual.

<sup>2</sup> GAC refers to "General Adaptive Composite."

Health and Safety	5	Low
Leisure	8	Average
Self-Care	4	Low
Self-Direction	6	Below Average
Social	7	Below Average

The most recent progress report (for May 2016 through October 2016) summarized claimant's progress as follows:

[Claimant] continues to respond positively to B.A.T.'s program and goals that we have in place. Since starting with B.A.T., [claimant] has made a great amount of progress with our goals and programs. She has increased her ability to sit and attend for non-preferred activities. [Claimant] is currently working on being able to attend for up to six minutes for a non-preferred task. [Claimant] has also made progress with being able to wait for a preferred item or activity. She is currently working on being able to wait for up to a minute and twenty seconds. We also implemented new programs and goals due to [claimant's] progress that she has made during this report period. We recently implemented being able to expressly tell time and counting money up to one hundred dollars. She is currently working on telling time by the hour and is close to mastering that goal. [Claimant] is also progressing with counting a variety of bills up to one hundred dollars. However during this period, some of [claimant's] goals and programs decreased due to recent transitions in therapists and inconsistencies that have

transpired in the school setting. [Claimant's] Functional Communication and compliance has displayed some variability. . . . Her maladaptive behaviors have continued to decrease, but she has variability in her Eloping behavior.

BAT Clinical Supervisor's May 12, 2016, Letter

11. Khalilah Condon, M.S., BAT's clinical supervisor, wrote a letter dated May 12, 2016, in which she described the strategies used by claimant and her parents to diminish claimant's maladaptive behaviors of non-compliance; tantrums, including crying and whining; elopement; and certain off-task behaviors. In her letter, Ms. Condon noted that the strategies implemented had "been successful at decreasing an immense amount of maladaptive behaviors that have occurred in the past." Her letter noted advice she had given to claimant's teacher, which included additional strategies to assist with claimant's "constant picking at erasers and ripping holes in her clothes with scissors."

BAT's January 2017, Psychological Assessment Report<sup>3</sup>

12. Marcel Soriano, Ph.D., and Natalie Garcia, M.A., B.C.B.A., of BAT, issued a Psychological Assessment in January 2017, when claimant was seven years, six months old, to determine whether she qualified for a diagnosis of ASD.

The report noted that claimant's mother told the evaluators that:

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<sup>3</sup> This report is dated "January 12, 2016," but it states it was based on evaluations on January 6, 2016, January 9, 2016, and January 12, 2017, and claimant's representative identified it as dated "January 5, 2017," when it was offered as evidence. Based on claimant's age at the time of the evaluation, as noted in the report, it appears that this report was generated in 2017.

[Claimant] has regressed across several domains and exhibits several stereotypical behaviors. She has a history of aggressive behaviors, including hitting. When she is upset, [claimant] will tantrum up to 20 minutes. . . . She will scream, cry, hit her head, throw items, and run and hide. Parent also reported self-injurious behavior such as, cutting and picking at her nails with objects until she bleeds. [Claimant] was also reported to poke herself with utensils at school.

[¶] . . . [¶]

[Claimant] must be constantly supervised, even in the home, as she runs into walls and is not spatially aware of her environment. . . . While out, parent reported that [claimant] will run towards birds without any awareness of her surrounding [*sic*]. She needs to be preoccupied to be able to wait. Parent also reported that [claimant] often picks up food from the ground and will attempt to eat it.

[¶] . . . [¶]

Per teacher report, [claimant] lacks ability to stay focused and on task. She also has problems with socialization and does not adapt well to change. Parent reported that [claimant] often does not eat her lunch at school if she feels that the table or environment is "dirty."

[¶] . . . [¶]

Per parent, she has sleeping difficulties, as she had trouble both falling and staying asleep. Parent reported that [claimant] must sleep with her stuffed animals in a square around her, and often has night terrors. . . . [Claimant] is a picky eater. She is sensitive to soft textures. Per parent, she does not use utensils when she eats, as she tends to want to eat with her hands. Parent also reported that she is hypersensitive to everyday noises and will often cover her ears. In addition, she is hypersensitive to touch. [Claimant] cannot tolerate feeling dirty or wet, but does not like to have her face washed or her head touched to brush her hair. She is also sensitive to the clothes she wears. Per parent, she does not like zippers and only wears pants with an elastic waist.

Parent reported several issues with [claimant's] adaptive skills. She is toilet trained; however, parent reported she no longer wipes after using the restroom. She also seems to have regressed in her ability to independently wash her hands and brush her teeth. She requires prompts and help with dressing as well. . . . [W]hen [claimant] is upset she grunts and must be prompted to verbalize. Parent also reported regression in [claimant's] ability to verbally express herself, which dates back to the 1st grade.

The evaluators conducted a structured clinical interview, reviewed records, used the Childhood Autism Rating Scale (CARS)-Parent Report Form, and administered the

Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), Module 3, and the Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2).

The RIAS-2 was administered to assess claimant's cognitive functioning. All of her scores indicated that "her general intellectual ability is above average in comparison to peers her age."

Claimant's score on the CARS, which was based on her parent's rating of 15 behaviors on a scale of 1 to 4, fell within the mildly to moderately autistic range. The report noted that claimant's mother's ratings appeared consistent with the examiner's clinical observations.

The report stated that on the ADOS-2, claimant's overall score was consistent with autism and displayed a moderate to high level of symptoms.

#### CLAIMANT'S INDIVIDUALIZED EDUCATION PROGRAM

13. Claimant sought special education services from her school in 2015. The school agreed to provide certain accommodations based in part of a Psychoeducational Assessment by the school's psychologist.

##### School Psychologist's Psychoeducational Assessment

14. Tuan Tran, M.S., P.P.S.C., School Psychologist, conducted a Psychoeducational Evaluation in November 2015, when claimant was six years, two months old and attending first grade. Claimant was referred for assessment by the school's Student Study Team (SST) due to concerns regarding her "attention and social skills" in order to determine her levels of performance and eligibility for special education. The report noted claimant's previous ASD and ADHD diagnoses, and the resulting recommended accommodations from Ms. Sanderson, of Foothill Psychological Services.

The Psychoeducational Evaluation Report summarized claimant's educational history and noted that the SST records indicated:

[S]trengths such as helpful, caring, enjoys math, loves AR reading, loves to write, overall performance with school has been good, visual learner, artistic, and fast runner. Concerns such as the following were noted: takes 20 minutes at home with homework and has meltdowns (crying, frustrated, and stressed), doesn't want to follow steps in math, can't seem to handle things unorganized/messes, and socialization is a challenge. Concerns were also noted with compliance, attention, and listening.

Mr. Tran reviewed records of claimant's health and developmental history, conducted interviews and observations, and administered the following tests and surveys: Naglieri Nonverbal Ability Test (NNAT)-Form A; Berry-Buktenica Developmental Test of Visual-Motor Integration, 6th Edition (VMI); VMI Developmental Test of Visual Perception, 6th Edition; VMI Developmental Test of Motor Coordination, 6th Edition; Test of Auditory Processing Skills-3; Wide Range Achievement Test-4th Edition (WRAT-4); Woodcock-Johnson III Tests of Achievement; Connors-3 (Parent Short and Teacher Short); Achenbach Child Behavior Checklist; Achenbach Teacher's Report; Social Responsiveness Scale-2nd Edition (SRS-2); and Childhood Autism Rating Scale-2nd Edition. Mr. Tran did not administer any Intelligence Quotient (IQ) tests, although he used some of the other assessment tools to evaluate claimant's cognitive abilities.

The report provided the following behavioral observations:

[Claimant] was casually dressed and appropriately groomed. Superficial gross motor functioning appeared age appropriate. She presented with a euthymic mood and a congruent affect. Rapport was established and eye contact was fleeting at times. She was polite and cooperative. At

times, [claimant] was concerned about what was happening in the class while with the examiner. However, she appeared to be content with an explanation of how long the assessment would take and reminders about this. Reinforcers were used such as praise and playing games. Multiple breaks were taken. She spoke about her interests such as horses. She appeared to give good effort on all tasks.

In the classroom, she sits near the end of the row and next to another student. She appeared to be following along. Teacher went around monitoring student progress. Table points were given and students worked quietly. She appeared to laugh appropriately at times with the other children when something the teacher said amused them. [Claimant] appeared to benefit from repetition of directions. She often times fidgeted with her pencil. She appeared to be on task at times. Instead of following along with the lesson on the board, [claimant] wrote her name at the top of several pages in her workbook. The classmates next to her told [claimant] what she was supposed to be doing. [Claimant] stopped and fidgeted with a piece of scrap piece of paper [sic] and then continued to write her name again. She was reminded by the teacher what she needed to be doing and was able to comply.

During lunch, [claimant] lined up appropriately to go to the cafeteria. She sat with the other students and ate her lunch. The student next to her appeared to make contact with

[claimant], but interactions appeared to be limited. She appeared to be very quiet in the cafeteria. However, she was seen briefly giggling and smiling with another student next to her. She often looked around the room as she ate. The cafeteria got noisy at times, but she did not appear to be affected by this. When done with her lunch, she went out to play. She walked around the field, but did not appear to interact with her peers. She later was seen playing on the jungle gym next to the other students.

According to the NNAT, claimant's nonverbal reasoning ability was in the average to superior range. Claimant's VMI scores indicated that her motor coordination and visual-motor skills were in the average range and her visual skills were in the high range. Claimant's overall auditory processing skills were in the average range, her basic phonetic skills were in the high average range, her auditory memory skills were within the high average range, and her ability to comprehend, use inferences, deductions, and abstractions to understand the meaning of auditory information given were in the low average range.

Mr. Tran noted the following with respect to claimant's academic functioning:

Per the Parent Questionnaire, [claimant's] strengths in school are an exceptional memory, loves learning new things, and excellent reading and math skills. [Claimant's] greatest problems in school are described as a lack of focus, staying on task, easily distracted, not following directions, and lacks social skills. [Claimant] is described by her teacher as creative and cheerful. The teacher indicated concerns with attention span, ability to follow directions, and social awareness.

Based on the results of the WRAT-4, claimant's reading ability, spelling, and math computation were all in the superior range. According to claimant's scores on the Woodcock-Johnson III, claimant was performing in the superior range in broad reading and broad math and in the very superior range in broad written language.

The report stated under the heading "Speech and Language Functioning":

[Claimant] was able to engage in some spontaneous conversation. However, she mostly communicated about her interests. Articulation appeared to be age-appropriate at the time. Pragmatics appears to be the area of concern, which may need to be addressed through a speech and language assessment.

Under the "Social and Emotional Functioning" heading of the report, Mr. Tran noted that from the teacher's responses on the Connor-3, claimant's scores were elevated for "defiance/aggression"; very elevated for "inattention," "hyperactivity/impulsivity," and "peer relations"; and high average for "learning problems/executive functioning." Based on the parent's responses, her scores were similarly very elevated for "inattention," "hyperactivity/impulsivity," and "peer relations"; average/very elevated for "learning problems/executive functioning"; and average for "defiance/aggression." On the Achenbach Teacher Report Form, claimant's scores on the Depressive Problems, Anxiety Problems, Somatic Problems, Oppositional Defiant Problems, and Conduct Problems scales were in the normal range. Her scores on the Attention Deficit/Hyperactivity Problems scale were in the borderline range. On the Attention Deficit/Hyperactivity subscales, her score for inattention was high enough to warrant concern and her score for Hyperactivity-Impulsivity was in the normal range.

On the Childhood Autism Rating Scale, Second Edition, Standard Version (CARS2-ST), the report noted that claimant has "mild to moderate symptoms of ASD."

Under the heading "Adaptive Functioning," the report stated:

Adaptive behaviors include real life skills such as grooming, dressing, safety, school rules, cleaning, and personal responsibility. [Claimant] is able to take care of her basic needs, including dressing, eating, and hygiene. Additionally, she is able to follow school and safety rules. [Claimant's mother] shared that [claimant's] responsibilities at home include clean her room, help mom with folding laundry, and hanging up clothes. Parent reported that these are responsibilities [claimant] does very well and [claimant] is described by parent as extremely organized. [Claimant] participates in running and private piano lessons. Based on observation and interview [claimant's] adaptive behavior appears to be age appropriate.

The report's summary stated:

[Claimant] is a 6 year-old student who is friendly and well-mannered. Her current general ability is estimated to be within the Average to Superior range. [Claimant's] processing skills in the areas of visual perception, overall auditory processing, and sensory motor functioning were commensurate with her estimated general ability. However, attention processing is revealed as an area of unique need according to assessment results. A deficit in attention processing was noted. Also, [claimant] demonstrated difficulty with auditory cohesion subtests involving

understanding spoken information and with higher-order linguistic processing, which is related to making inferences and implied meanings. Furthermore, parent and teacher ratings indicated concerns with [claimant's] ability to interpret social cues once they are picked up on; her expressive social communication; her motivation to engage in social-interpersonal behavior; and her stereotypical behaviors or highly restricted interests that are characteristic of autism.

Compared to her same age peers on standardized achievement measures, she is performing in the superior range in reading and math. She is performing in the very superior range in spelling and writing.

November 2015 IEP Team Assessment

15. Claimant's school district determined in November 2015 that claimant, who was then six years old, was eligible for special education services under the category of Autism. The school's IEP team concluded that "the least restrictive environment for [claimant] is general education with Specialized Academic Instruction provided in the Resource Specialist Program (RSP)." The school also decided that the following aides would be provided to claimant beginning November 20, 2015: preferential seating, visual schedules and reminders during class transitions, verbal or tangible incentives for task completion, modified homework and class work, if necessary, and special education teacher to share with general education teacher "IEP at a glance."

The IEP Team Meeting Notes summarized the general education teacher's report regarding how claimant was performing as follows:

She is a very sweet student. She is progressing well and likes to complete work. She does show focusing issues. She seems like she may not be tracking with the teacher but she is. Has some difficulty with transitions. She is very bright.

The IEP team also considered the special education teacher's report of her assessment of claimant's scores on the Woodcock-Johnson III tests. The IEP Team Meeting notes summarized the special education teacher's report as follows:

When compared to others at her age level, [claimant's] academic skills and her ability to apply those skills are both within the very superior range. Her fluency with academic tests is within the high average range.

When compared to others at her age level, [claimant's] standard scores are very superior in brief reading, broad written language, and brief writing. Her standard scores are superior (compared to age peers) in broad reading, broad mathematics, math calculation skills, brief mathematics, and written expression. When scores for a selected set of her achievement areas were compared, [claimant] demonstrated a significant strength in board written language.

16. In May 2016, the school agreed to add the following accommodations to claimant's IEP: She would be allowed to use a wiggle seat in class, use fidget items in class, including Velcro, and go over missed and incorrect test responses with her general education teacher for an opportunity to demonstrate her knowledge. Additionally, claimant would be provided additional assistance in language and speech, and extended school year assistance in speech and language and specialized academic instruction.

Since May 2016, claimant has received speech therapy in a group setting for 30 minutes four times per month.

17. In October 2016, the school agreed to provide a one on one aide and to provide claimant reminders in adaptive daily living skills, to include reminders to lock the door in the bathroom and to wash her hands, and reminders to eat her lunch and hydrate herself.

#### LUCID SPEECH AND LANGUAGE CLINIC, INC. EVALUATION

18. Claimant was evaluated by Megan McCann, M.A., CCC-SLP, of Lucid Speech and Language Clinic, Inc., in December 2016. According to the summary provided in Ms. McCann's written report:

Based on the current assessment, [claimant] presents with moderate-severe pragmatic deficits. Deficits are considered to be secondary to a diagnosis of autism. Receptive and expressive language, articulation, voice, and fluency are all at least within the expected range given [claimant's] current chronological age.

#### CLAIMANT'S PARENTS' TESTIMONY

19. Both of claimant's parents testified at the hearing regarding claimant's behaviors and their concerns. Their testimony was consistent with the parent reports noted in the psychological assessments and evaluations.

According to claimant's mother and father, they have seen areas of regression in claimant's behavior, particularly regarding her personal hygiene and eating habits. Although claimant is toilet trained, she has stopped wiping herself after using the bathroom. She needs to be reminded to wipe herself and wash her hands after using the toilet. The school principal has recommended that she use the restroom in the health

office at school, so the health clerk may give those reminders to claimant. There was also an incident in April 2016 when claimant exposed her bottom to her classmates in the bathroom because she thought it was funny. Claimant recently stopped using the school bathroom after she saw a spider in the bathroom. As a result, when her mother picks her up from school, she needs to immediately use the bathroom because she had been holding her bladder. She also needs to be reminded to drink water, as she will refrain from drinking water to avoid using the bathroom. Recent emails from claimant's teacher indicated that claimant has been willing go to use the bathroom at school during 2017 if accompanied by a friend.

Claimant does not bath herself. Her parents need to bath her. Although she can brush her teeth, she has regressed, and her parents need to brush her teeth and wash her face for her. Sometimes she blows her own nose, but she needs to be reminded. Because claimant bites her lips, she needs to apply "chap stick" on a regular basis. Her teacher reminds her, as she "would never" apply it "on her own."

Claimant needs assistance dressing herself. Her mother usually picks out her clothes for her, although claimant sometimes helps. Claimant's mother needs to help her get dressed before school and before she goes to bed. Claimant will put on her socks and shirt, and her mother helps her with buttons and zippers. Claimant has started taking her clothes off in the car on the way home from school. When it is raining, claimant does not put on her jacket or use her umbrella, unless someone reminds her. She does not like to wear a jacket when it is cold.

Claimant's parents constantly supervise her because they are concerned about her safety due to claimant's fears and her judgment when confronted with certain situations. Claimant is afraid of dogs, bees, and insects. If she sees insects or dogs, she darts into the street to get away. On one occasion, when she thought she saw a bug inside the car, she jumped into the front seat of the car and out of the car. (The car was parked at the time.) If she sees any bug, even if it is outside the car, she becomes

hysterical, and cannot breathe or talk. She will approach the hot stove, and her parents need to stop her from touching it. She has not burned herself because her parents have stopped her from touching the hot stove when she has reached her hands toward it. She has also opened the door without asking her parents for permission. She wanders off while in stores with her parents a couple of times a week, and she runs and chases birds without paying attention to her surroundings. She sometimes makes a waving motion, imitating a bird's wings flapping. Claimant's parents are also concerned because claimant likes shiny objects and will pick things up off the ground. She has picked up broken glass, and one time, she picked up a lighter.

Claimant has food allergies, and she has eaten food from others at school despite being told many times that she should not accept outside food. She needs to be reminded not to eat food offered to her by others. There have been incidents at school where she has eaten a cupcake, pretzels, and "Goldfish" and "Cheeze-it" crackers that were given to her by others, which resulted in rashes. She will also eat food she finds on the ground. Her parents remind claimant everyday not to eat outside food. Claimant does not eat her lunch at school. Her teachers have reported that she talks instead of eating, although claimant's parents testified that she will not eat in the school cafeteria if she thinks it is dirty or smells. For example, she does not like it if she smells broccoli or salmon. Although she knows how to use utensils, and she sometimes uses them, she prefers to use her hands to eat. She also does not like her food items to touch on her plate.

Claimant experiences night terrors, and they occurred two to three times a week during the past few months before the hearing. When that happens, she jumps into her parents' bed screaming, and she cannot use her words because she is so upset. She has to sleep with the light on, and she needs to have her stuffed animals arranged in a square pattern around her on her bed, or she cannot sleep.

Claimant engages in disruptive behavior. There are “too many outbursts to count.” On a good day, such behavior occurs only three to four times. She is scared of loud noises and will scream. When she becomes upset, she likes to sit with the couch pillows on top of her. Her tantrums are so loud that she can be heard from outside.

It takes claimant two to three hours to complete her homework because she needs a break every five minutes. She will become upset at unusual things. For example, she becomes upset if she cannot fit a sentence on one line of a page.

Claimant does not like messes, and she does not like anything to be dirty. Claimant’s father described an incident that occurred approximately one and one-half months before the hearing when claimant would not walk in a grocery store because she thought the floor was dirty. He had to carry her. They have not taken her to that store since that incident.

Claimant has problems focusing. She can sit and attend for between five and seven minutes. Her ability to sit and attend has improved with the help of the therapy from BAT.

Claimant has engaged in destructive behaviors, including breaking toys and lunch boxes. She has cut the classroom carpet and her clothes with scissors. She also cut her finger with a scissors one time because she thought her fingernail needed to be trimmed. On another occasion, claimant cut her finger on a zipper at school and her mother needed to take her to urgent care. The school told claimant’s parents that her finger was injured when she and another student were pulling on a zippered jacket in a tug of war fashion.

Sometimes claimant grunts, and her parents need to remind her to use her words. Her parents encourage her to interact with other children. However, she may focus on what someone has, rather than interacting.

Claimant remains in general education, with accommodations, and has been receiving 30 minutes of speech therapy once a week. She does well academically. She is

not taking any medication. Claimant's parents are concerned that she will have more struggles and need even more assistance as she progresses in school. Claimant's parents were also concerned that IRC's intake documentation contained incorrect information about claimant.

## THE EXPERT TESTIMONY AND REPORTS

20. Both parties presented expert testimony and expert reports. Claimant's treating psychologist, Erica F. Rosenfeld, Ph.D., testified about her diagnoses of claimant and her August 28, 2015, letter/report was received in evidence. IRC's staff psychologist, Ruth Stacy, Psy.D., testified about her psychological evaluation of claimant, and her report was received in evidence.

Dr. Erica F. Rosenfeld's Expert Testimony and August 28, 2015, Report

21. Erica F. Rosenfeld, Ph.D., obtained her Bachelor's Degree in History from Carleton College in 1964, her Master's Degree in Developmental Psychology from the University of Illinois, Chicago, in 1974, and her Doctorate Degree in Psychology from the University of Illinois, Chicago, in 1978. She has been practicing as a clinical psychologist in a private practice setting since 1991.

22. Dr. Rosenfeld wrote a letter/report dated August 28, 2015, when claimant was six years old, which stated claimant was referred to her for evaluation by her therapist, Stacey Sanderson, who had diagnosed claimant with ASD and Attention Deficit Disorder (ADD). Dr. Rosenfeld observed claimant on four occasions before writing her report. She based her evaluation on her observations of claimant, a behavioral history provided by claimant's mother, the Connors Parent Questionnaire (completed by claimant's mother), the Connors Teacher Questionnaire (completed by claimant's teachers), and "various questions from the Gilliam Asperger's Disorder Scale asked of the mother."

Her report described claimant's behavior as follows:

In my office, [claimant] was very active, could not sit still, hummed and talked to herself, oblivious of others around her and interrupted conversations. She was friendly, made eye contact, but was not interactive with me.

Dr. Rosenfeld's report included the following summary of the information claimant's mother provided:

[Claimant] has a history of not focusing on tasks which are not of her choosing, of not staying in her seat, rocking, rolling on the floor, yelling out loud inappropriately, humming and fidgeting. She is often the first in the classroom, but the last to start her work, although she finishes all her work once she starts. She has difficulty transitioning from one task to another. . . . [A]t home she moves constantly, runs around frequently, likes her room and toys to be in immaculate order, hates "messes", especially her baby sister's messy toys. Before going to another center in Kindergarten, she had to be sure that the crayons were all neatly in color order. She talked early, has a good memory for facts, reads above grade level, and particularly likes to play with hands-on toys such as Legos, cars, stuffed animals (but not dolls). She tends to stack toys or put them in a line. At home, she has tantrums if her toys are out of place or if stuffed animals fall off her bed. She is reported not to have tantrums at school, but often just doesn't do what she is asked to do. She is particularly attached to a stuffed horse. She doesn't play interactively with other children and when

taken to a park, she spends much time chasing birds and butterflies.

Dr. Rosenfeld's report concluded that diagnoses of ADHD, combined type; ASD; and possible OCD would be appropriate.

23. Rosenfeld's testimony was consistent with the information set forth in her report. She explained that she first saw claimant in June 2015, and the last time she saw her was on January 16, 2017. She went through her progress notes and pointed out that claimant believed her parents paid more attention to her sister; she whispered to herself; she had difficulties socially; there was an incident at school where she was accused of attempting to poison another child when she told him to sprinkle a silica packet she found on his food; it takes her three hours to complete her homework; she has tantrums at home triggered by unique events, such as if she cannot get a sentence to fit on the same line; she cannot stand anything being messy; at school she is fidgety and may scream out of nowhere and out of context; she does not read social situations well; and she is obsessed with having her stuffed animals lined up in a certain way.

Dr. Rosenfeld described claimant as having "characteristics of high functioning autistic kids" and stated that claimant was "academically smart." She believes that claimant should be granted regional center services and that an aide at school would be very helpful. Dr. Rosenfeld has worked with some children who received regional center services, although she was not familiar with the services offered once children start school.

Dr. Rosenfeld also testified that ADHD and autistic symptoms, such as an inability to focus and sit still, may overlap. She stated that some autistic behaviors may also be consistent with obsessive compulsive disorder.

Dr. Rosenfeld received Dr. Stacy's report, but she did not read it. She noted that she believed "someone should come up with a definitive diagnosis" of claimant's

condition. Dr. Rosenfeld said that she does not currently administer psychological testing, as she does not have the resources to conduct such testing. She stopped doing testing "probably 10 years ago."

Dr. Ruth Stacy's Testimony and October 17, 2016, Psychological Assessment

24. 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 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 to evaluate the eligibility of claimants seeking regional center services.

25. Dr. Stacy conducted a psychological assessment of claimant for IRC on October 17, 2016, when claimant was 7 years, 1 month, and 19 days old, to determine whether claimant was eligible for regional center services. Dr. Stacy reviewed claimant's records, including the assessments by Dr. Rosenfeld and Mr. Tran; observed and interviewed claimant; interviewed claimant's mother; and administered the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2), Module 3, and the Vineland Adaptive Behavior Scales, Second Edition, Survey Interview Form (Vineland II). Dr. Stacy did not conduct cognitive testing because there were no concerns expressed about

claimant's cognitive functioning, as she had been consistently performing in the average to above average range academically.<sup>4</sup>

Dr. Stacy's report noted her observations of claimant and the information claimant's mother provided about claimant's behaviors, including:

- Claimant could "speak in sentences of six or [sic] words. Her speech is understood by others." She "varied her intonation, tone, pitch, volume, and [sic] during the assessment. No echolalia, repetitive speech, odd, or scripted, or odd speech was heard. [Claimant] did not use stereotypical, odd, or idiosyncratic words or phrases. [Claimant] occasionally offered information about herself and about her own thoughts or feelings."
- Claimant "occasionally asked the examiner about the examiner's thoughts, feelings, or experiences."
- "Nonverbally, [claimant] used descriptive and emphatic gestures."
- Claimant "engaged in reciprocal social interactions with the examiner; however, there was a slightly unusual quality to some of the social overtures. [Claimant] made frequent attempts to get or to maintain the examiner's attention or to direct the examiner's attention to topics that were of interest to her. [Claimant] showed responsiveness to most social contexts; however, her responses were somewhat limited or socially awkward."
- "At times, [claimant] exhibited limited eye contact and a limited range of facial expressions. At other times, she exhibited good eye contact and various facial expressions. . . . [Claimant] showed some pleasure appropriate to the context

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<sup>4</sup> Dr. Stacy stated that she did not rely on the intake summary documents, which claimant's parents noted contained inaccurate information, when conducting her evaluation.

- during interactions with the examiner but not to the extent that one might expect.”
- Claimant “communicated some understanding/labeling of emotions in other people/characters. . . . [Claimant] described things that made her happy, angry, mad, and afraid but she had difficulty describing how she felt when she was happy, mad, angry, or afraid.”
  - Claimant “had insight into typical social relationships but less insight into her role in the relationships.”
  - According to claimant’s mother, claimant “does not pick up on what her peers want to play and [claimant] gets upset when her peers don’t play what she wants to play,” and claimant “is timid about going over to talk to peers her age.”
  - Claimant has some food allergies and her parents have asked the school staff to monitor what she eats so that she does not eat food given to her by other children or food she picks up off the ground. Her mother noted that claimant “has recently started to eating [*sic*] food that she picks up off the ground.”
  - Claimant “has temper tantrums when she does not get her way. When she is upset, she may scream loudly, cry, put couch cushions on her, hide under the table, destroy things, throw things, go to her bed and put the cover over herself, and she may headbang against the couch or chair.” Claimant “has recently started to hit her mother. She has broken two lunchboxes at school.”
  - “No unusual sensory interests or seek [*sic*] sensory seeking behavior was observed. On one occasion, [claimant] made an odd hand/arm waving motion. No other unusual/repetitive hand and finger mannerisms, or complex body mannerisms were observed. No self-injurious behavior was observed.”

- Claimant “made occasional references to an unusual or highly specific topic or pattern of interest. . . . [Claimant] did not exhibit any obvious activities or verbal routines that had to be completed in full or according to a sequence.”
- According to claimant’s mother, claimant “headbangs against the chair or the couch when she is upset. [Claimant] also rolls on the floor, crawls on the floor like a cheetah, rolls her dress/blouse with her fingers, and spins. . . ,” and she “will jump, run, and fly into the couch.”
- Claimant was described as “very active.” She “sleeps through the night, off and on.” She “has had nightmares 2 to 3 times a month and it is the same nightmare.”
- Claimant “appears to have more fear than other children her age. She is very afraid of dogs, although she’s never had an incident with a dog. She is also very afraid of spiders and bugs.”
- Claimant “exhibited imagination and creativity during the assessment.”
- Claimant “follows instructions with two actions or an action and two objects. She follows instructions in the ‘if-then’ form.” She can “listen to a story for 5 or 7 minutes.” She says “at least 100 recognizable words,” can identify and name common colors, can tell the basic parts of a story, can put words in alphabetical order, and give simple and complex instructions. She can state her home address and phone number. “She reads and understands material of at least a fourth grade level.”
- Claimant “is toilet trained.” Her mother noted that her “daily living skills have regressed since the last half of last year. She will say, ‘You love [her two-year-old sister], more than me.’” Claimant “knows how to brush her teeth, how to dress herself; however, she sometimes requires prompting to do it. [Claimant] can button buttons correctly and she can also connect and zip zippers that

- are not fastened at the bottom. [Claimant] sometimes wears clothing appropriate to wet or cold weather.”
- Claimant “is sometimes careful around hot objects.” She “helps with simple household chores and she cleans up a play or work area at the end of an activity.” She “is very good at organizing. [Claimant] puts away her personal possessions. She helps prepare foods that require mixing and cooking. [Claimant] puts clean clothes away in their proper place. She uses the TV without help.”
  - Claimant “understands the function of money and she identifies a penny, nickel, dime, and quarter by name when asked. She also differentiates between bills of different denominations, . . . [Claimant] states the current day of the week when asked. She tells time using a digital or analog clock/watch. [Claimant] sometimes watches or listens to programs for information such as the news or the weather report. She demonstrates computer skills necessary to carry out tasks such as accessing the Internet. [Claimant] sometimes obeys time limits set for breaks.”
  - Claimant “makes and tries to make social contact with others. She shows a preference for certain people and objects over others. [Claimant] shows affection to familiar persons. She imitates simple movements and she also imitates relatively complex actions as they are being performed by another person. She shows a desire to please others.”
  - Claimant “sometimes shows an interest in children the same age and sometimes demonstrates friendship seeking behaviors with others the same age.”
  - Claimant “sometimes uses actions to show happiness or concerns for others. She sometimes answers when familiar adults make small talk. [Claimant] uses words to express her own emotions. She has a best friend or shows a

preference for certain friends over others. [Claimant] sometimes uses words to express happiness or concerns for others. [Claimant] acts when another person needs a helping hand. She sometimes recognizes the likes and dislikes of others.”

- Claimant “uses common household objects or other objects for make-believe activities and she did this during the assessment. [Claimant] plays simple make-believe activities with others. [Claimant] sometimes takes turns when asked when playing games or sports.” Claimant “plays informal, group outdoors games with others. She sometimes shares her toys or possessions without being asked. [Claimant] follows the rules in simple games, and she plays simple card or board games based only on chance. [Claimant] sometimes goes places with friends during the day with adult supervision. She sometimes plays one or more board, card, or electronic game requiring skill and decision-making.”
- Claimant “sometimes says thank you and please. She changes her behavior depending upon how well she knows a person. [Claimant] sometimes ends conversations appropriately.”
- With prompting, she “will clean and wipe her face and hands during and/or after meals.”
- Claimant “sometimes responds appropriately to reasonable changes in her routine. She has difficulty with transitions.”
- Claimant “likes to do things by herself but she sometimes accepts helpful suggestions or solutions from others. [Claimant] sometimes controls her anger or hurt feelings when plans change for reasons that cannot be helped.”

26. Dr. Stacy's diagnostic impression was that claimant met the diagnostic criteria for ASD, Social Communication: Severity Level 1<sup>5,6</sup>; Restricted, Repetitive Behaviors, Severity Level 1<sup>7</sup>; without accompanying language impairment; and without accompanying cognitive impairment.

Dr. Stacy administered the ADOS-2 to elicit social interaction and communication behaviors necessary for diagnosing ASD. Dr. Stacy's report explained that on the ADOS-2, a "score of 7 is suggestive of the Autism Spectrum and a score of 9 or above is

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<sup>5</sup> The DSM-5 lists and describes three severity levels for ASD: Level 1 "requiring support," Level 2 "requiring substantial support," and Level 3, "requiring very substantial support."

<sup>6</sup> The ASD severity level table in the DSM-5 (Table 2) describes social communication severity Level 1 as: "Without supports in place, deficits in social communication cause noticeable impairments. Difficulty initiating social interactions, and clear examples of atypical or unsuccessful responses to social overtures of others. May appear to have decreased interest in social interactions. For example, a person who is able to speak in full sentences and engages in communication but whose to-and-fro conversation with others fails, and whose attempts to make friends are odd and typically unsuccessful."

<sup>7</sup> Table 2 describes Restricted, Repetitive Behaviors in Level 1 as: "Inflexibility of behavior causes significant interference with functioning in one or more contexts. Difficulty switching between activities. Problems of organization and planning hamper independence."

suggestive of Autism.” Claimant’s Comparison Score was 6, in the moderate range of autism spectrum related symptoms, suggesting that she has ASD.

Dr. Stacy administered the Vineland II to estimate claimant’s developmental levels in various areas of adaptive functioning. Dr. Stacy’s report noted that based on claimant’s Vineland II scores, claimant’s communication skills were in the adequate range, her daily living skills and social skills were in the moderately low range, and her overall adaptive skills were in the moderately low range of adaptive functioning.

The report listed the following Vineland II scores:

<u>Domain</u>	<u>Standard Score</u>	<u>Adaptive Level</u>
Communication:	100	Adequate
Receptive	10	Moderately Low
Expressive	15	Adequate
Written	20	Moderately High
Daily Living Skills:	75	Moderately Low
Personal	10	Moderately Low
Domestic	13	Adequate
Community	13	Adequate
Socialization:	75	Moderately Low
Interpersonal Relations	10	Moderately Low
Play/Leisure Time	11	Moderately Low
Coping Skills	10	Moderately Low
Adaptive Behavior		
Composite:	83	Moderately Low

Based on those scores, Dr. Stacy concluded claimant did not have a substantial deficit in adaptive functioning. Accordingly, although Dr. Stacy agreed that claimant met the diagnostic criteria for ASD, Dr. Stacy concluded that claimant’s ASD has not impacted claimant to the extent it constituted a substantial handicapping condition

because, as stated in Dr. Stacy's report, claimant's "adaptive skills range from the Adequate to the Moderately Low range. Overall, her adaptive skills are in the Moderately Low range of adaptive functioning." Dr. Stacy provided further explanation regarding her conclusions during her testimony.

27. Dr. Stacy was present during the entire hearing, including the testimony of claimant's witnesses, Dr. Rosenfeld and claimant's parents. Her testimony was consistent with her report, and her opinions did not change based on the information provided by claimant's witnesses during the hearing. Dr. Stacy testified that Dr. Rosenfeld's report gave a good background and provided useful information, but it did not address the criteria needed to determine eligibility.

Dr. Stacy explained that even though she agreed that claimant fit the diagnostic criteria for ASD, claimant's adaptive functioning was not at a level where she was suffering a substantial disability that would trigger eligibility for regional center services under the Welfare and Institutions Code and Title 17 of the California Code of Regulations. According to Dr. Stacy, to be considered a "substantial handicapping" condition, she would expect to see scores on the ADOS-2 below 70, in the mild deficit or lower range. None of claimant's ADOS-2 scores were below 70. Instead, claimant's composite score on the ADOS-2 was 83 (moderately low), with a socialization score of 75 (moderately low), daily living score of 81 (moderately low), and communication score of 100 (adequate).

Dr. Stacy also reviewed the scores on the BAT progress reports and BAT's recent Psychological Assessment Report. She noted that those scores did not translate into the low scores that would be expected of someone who is suffering a substantial handicapping condition because those scores were not in the "extremely low" range. Additionally, Dr. Stacy explained that, under the Welfare and Institutions Code and Title 17, there must be significant functional limitations in three or more of the following seven major life activities: receptive and expressive language, learning, self-care,

mobility, self-direction, capacity for independent living, and/or economic self-sufficiency. She noted that a person's age must also be considered when evaluating whether there are limitations in the seven major life activities. Dr. Stacy pointed out that the areas of "capacity for independent living" and "economic self-sufficiency" would typically not be considered until the person reaches 15, 16, or 17 years of age, such that it was not yet appropriate to evaluate those areas for claimant, as she is only seven years old. The major life activity of "mobility" would also not be an issue in claimant's case because she is fully ambulatory.

In claimant's case, Dr. Stacy did not believe there were significant functional limitations in the areas of receptive and expressive language, learning, self-care, or self-direction. She ruled out "learning" due to how well claimant had been doing academically and due to her average and above average levels of cognitive functioning as demonstrated by the recent cognitive testing performed by BAT in 2017. Dr. Stacy acknowledged that claimant struggles in the areas of self-care and self-direction, including that claimant has unusual fears and has regressed in attending to her personal hygiene. However, because there are other things that claimant can do for herself, in the areas of self-care and self-direction, Dr. Stacy concluded that claimant's limitations were not at a level that would amount to a substantial handicapping condition, based on claimant's test scores.

## 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.] . . . 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." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "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.

[¶] . . . [¶]

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. Welfare and Institutions Code section 4512, subdivision (l)(1), defines “substantial disability” as:

“Substantial disability” means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (A) Self-care.
- (B) Receptive and expressive language.
- (C) Learning.
- (D) Mobility.
- (E) Self-direction
- (F) Capacity for independent living.
- (G) Economic self-sufficiency.

7. California Code of Regulations, title 17, section 54000,<sup>8</sup> 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;
  - (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.

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<sup>8</sup> The regulation still uses the former term "mental retardation" instead of "intellectual disability."

(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.

8. 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.

9. Welfare and Institutions Code section 4642, subdivision (a), requires a regional center to perform initial intake and assessment services for "any person believed to have a developmental disability." Welfare and Institutions Code section 4643, subdivisions (a) and (b), provide the following regarding assessment services:

- (a) If assessment is needed, the assessment shall be performed within 120 days following initial intake. Assessment shall be performed as soon as possible and in no event more than 60 days following initial intake where any delay would expose the client to unnecessary risk to his or her health and safety or to significant further delay in mental or physical development, or the client would be at imminent risk of placement in a more restrictive environment. 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 and is conditional upon receipt of the release of information specified in subdivision (b).
- (b) In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may

consider evaluations and tests, including, but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources.

10. 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).)

11. California Code of Regulations, title 5, section 3030, provides the eligibility criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act. The fact that a school may be providing services to a student under an autism disability is not sufficient to establish eligibility for regional center services, as regional centers are governed by California Code of Regulations, Title 17. Title 17 eligibility requirements for services are different than those of Title 5.

## EVALUATION

12. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. The evidence introduced in this hearing demonstrated that claimant has Autism Spectrum Disorder. However, the evidence failed to demonstrate that claimant suffers from a substantial disability as a

result of her ASD diagnosis because the evidence did not support a finding that claimant currently has significant functional limitations in three or more of the seven areas of major life activity, as appropriate to claimant's person's age.

Despite Dr. Stacy's opinion that claimant did not suffer from significant functional limitations in any of the seven major life activities listed in the Welfare and Institutions Code or Title 17, the evidence presented supports a finding that she has regressed to such an extent that she suffers significant functional deficits in the areas of self-care and self-direction. But that amounts to only two of the seven major life activities required to demonstrate a "substantial disability," and the applicable codes and regulations require significant functional limitations in "three or more" of the listed major life activities.

Therefore, because the evidence failed to demonstrate that claimant currently suffers from a "substantial disability" as defined by the Welfare and Institutions Code and Title 17 of the California Code of Regulations, claimant is not currently eligible to receive regional center services. Thus, her appeal from IRC's determination that she is ineligible to receive regional center services must be denied.

## ORDER

1. Claimant is ineligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act.
2. Claimant's appeal from Inland Regional Center's determination that she is not eligible for regional center services and supports is denied.

DATED: March 22, 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.**