BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, and INLAND REGIONAL CENTER, Service Agency.	OAH No. 2018100476

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 29 and 30, 2019.

Jennifer Cummings, Program Manager, represented Inland Regional Center (IRC).

Stephanie Veniez and Jens Sorensen, clients' rights advocates, appeared on behalf of claimant, who was present at the hearing.

The matter was submitted on May 30, 2019.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), specifically, under the category of intellectual disability or a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals?

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a five-year old male. Claimant's adoptive mother applied to IRC to obtain services under the Lanterman Act alleging claimant had an intellectual disability or a condition closely related to an intellectual disability that required treatment similar to that required for individuals with an intellectual disability. On September 5, 2018, IRC notified claimant of its determination that he was not eligible for regional center services because the information it reviewed did not establish that claimant had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment as needed by an individual with an intellectual disability.

2. On October 1, 2018, claimant's mother, on behalf of claimant, filed a Fair Hearing Request appealing IRC's determination. In the request, claimant asserted that he "disagree[s] with [IRC's] decision regarding … eligibility." Claimant further wrote that "[claimant should be] eligible under 5th category- dx – fetal alcoholism syndrome."

3. On October 17, 2018, IRC held an informal meeting with claimant's mother regarding the fair hearing request. During the informal meeting, claimant's mother provided information regarding why she believed claimant was eligible for regional center services under the categories of either intellectual disability or fifth category. On October 17, 2018, IRC wrote a letter informing claimant that IRC was adhering to its determination that claimant was not eligible for regional center services. This matter proceeded to hearing.

IRC'S EVIDENCE

Testimony of Borhaan Ahmad, M.D.

4. Borhaan Ahmad, M.D., is a board certified pediatrician at Loma Linda University, Department of Pediatrics. Dr. Ahmad received his medical degree in 1981 from Kabul University in Kabul, Afghanistan, and completed his pediatric residency in 1991 at Akron Children's Hospital and Medical Center in Akron, Ohio. Dr. Ahmad is board certified by the American Board of Pediatrics. In addition to working at Loma Linda University as a pediatrician, Dr. Ahmad has been a medical consultant for IRC since 2002. His responsibilities as a medical consultant include performing patient evaluations and reviewing records for determination of eligibility for services at IRC. Dr. Ahmad reviewed claimant's records, and worked with a team of evaluators at IRC to form an opinion as to whether claimant is eligible for IRC services. Dr. Ahmad testified at the hearing. Factual findings from his testimony are summarized below.

5. Dr. Ahmad testified that claimant is not eligible for IRC services on the basis of epilepsy and cerebral palsy because he does not meet the requirement of a diagnosis of epilepsy or cerebral palsy and did not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).) Dr. Ahmad reviewed the records of claimant but did not perform a medical evaluation of him. Dr. Ahmad did not evaluate claimant or review his records regarding any diagnosis of intellectual disability or eligibility determination on the basis of fifth category. However, he did meet with the other eligibility team members who did review claimant's records for that purpose. Dr. Ahmad understands that the team determination was that claimant was not eligible for services under those categories.

6. Dr. Ahmad explained that claimant suffers from the effects of fetal alcohol syndrome (FAS) as a result of his mother's use of alcohol when claimant was in utero. Dr. Ahmad stated that not every child exposed to alcohol in utero experiences the full

symptoms of FAS, but there is a spectrum of difficulties experienced by such children. Based on his review of claimant's records, Dr. Ahmad believes that claimant's difficulties, including behavioral problems, and a deficit in language and learning, are likely secondary to exposure to alcohol and drugs in utero. However, Dr. Ahmed further explained that FAS or any alcohol exposure in utero is not necessarily a qualifying condition for services at IRC.

Testimony of Holly A. Miller, Psy.D.

7. Holly A. Miller, Psy.D., is a staff psychologist at IRC and has had that position for the last three years. She received her Doctor of Psychology degree in 2009 from the University of La Verne. As part of her duties as a staff psychologist at IRC, Dr. Miller performs psychological evaluations, clinical consultations, and case review for determination of eligibility for services at IRC. Dr. Miller was a member of the eligibility team for claimant's application for services from IRC, reviewed claimant's records, and testified at the hearing regarding IRC's determination that claimant is not eligible for services. Factual findings from her testimony are summarized below.

8. Dr. Miller explained that claimant received early start services from IRC, which is a program that provides early intervention services for children from birth to age three based on the presence of developmental delays or risk conditions for developmental delays. In order to qualify for early start services, a child must have a 33 percent or greater delay in one or more areas of cognitive, physical (fine/gross motor), communication, social/emotional, or adaptive skills. Children eligible for early start services at IRC are not necessarily eligible for services under the Lanterman Act, and a separate eligibility determination under the Lanterman Act is made at the age of three. Some children eligible for early start services are ineligible for services under the Lanterman Act because of the different standards applied.

9. Dr. Miller explained that in order to be eligible for services under the

Lanterman Act, an individual must be diagnosed with at least one of five disabilities, originating before the age of 18, of: intellectual disability, cerebral palsy, epilepsy, autism spectrum disorder (ASD), or a disabling condition closely related to intellectual disability or that requires treatment similar to that required for individuals with intellectual disability (fifth category). The disability must continue or be expected to continue indefinitely and constitute a substantial disability for that individual. Dr. Miller reviewed records provided by claimant for a determination of claimant's eligibility under the categories of intellectual disability and fifth category.

10. Dr. Miller explained that in order to have a diagnosis of intellectual disability under the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (*DSM-5*), a person would need to have onset during the developmental period, before the age of 18, that includes both intellectual and adaptive functioning deficits meeting the following three criteria: (1) deficits in intellectual functions confirmed by clinical assessment and individualized, standardized intelligence testing; (2) deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility (such adaptive functioning deficits limit functioning in one or more activities such as communication, social participation, and independent living); and (3) onset of intellectual and adaptive deficits during the developmental period. Dr. Miller testified that claimant does not meet the criteria for a diagnosis of intellectual disability.

11. Dr. Miller also testified that claimant was not eligible for IRC services on the basis of what is referred to as the fifth category, a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals, because he did not have a substantial disability as defined in the Lanterman Act. (Welf. & Inst. Code § 4512, subd. (l); Cal. Code Regs., tit. 17, § 54001, subd. (a).) Dr. Miller explained that in order to meet eligibility requirements under the

fifth category, claimant must function in a manner that is similar to that of a person with intellectual disability or require treatment similar to that required by individuals with intellectual disabilities. Fifth category eligibility requires significant adaptive deficits with cognitive limitations and it is important to evaluate if the individual has had these cognitive and adaptive deficits over a period of time to rule out any sudden change or decrease in function. Dr. Miller stated that a lot of cognitive development takes place in early childhood, so the fact that a young child may score low on a cognitive assessment test does not mean that they will not score higher on that assessment test as they get older. Accordingly, it is important to establish a pattern of cognitive functioning in the low or borderline range over a long period of time to establish eligibility under the fifth category. Additionally, fifth category eligibility requires global deficits in adaptive and cognitive functioning, rather than focal, specific deficits such as a learning disability.

12. Dr. Miller stated that a disability is considered a "substantial disability" for eligibility when there are significant functional limitations in three or more of the following areas of major life activity, and as appropriate to the age of the person: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Given that claimant is five years of age, the life activities of independent living and economic self-sufficiency are not considered in his case because of his age.

13. Dr. Miller reviewed claimant's records, including claimant's previous eligibility determinations from IRC in 2016; early start services evaluation; Speech-Language Evaluation dated March 17, 2015; Speech-Language Evaluation dated June 16, 2016; evaluations and individual education program documents from claimant's school district; Occupational Therapy Evaluation dated April 15, 2018; a letter dated August 22, 2018, from Dr. Miguel Del Campo; test scores from San Diego State University from a research study; Neuropsychological Evaluation dated March 20, 2019, from Sarah N.

Mattson, Ph.D.; and the report of Dr. Kenneth Lyons Jones dated May 14, 2019. Based on Dr. Miller's review of all the records submitted, as well as the review conducted by the remainder of the eligibility team at IRC, Dr. Miller determined that claimant does not meet eligibility criteria for services under the Lanterman Act under the categories of intellectual disability or fifth category.

14. Dr. Miller testified about her review of claimant's Early Start eligibility evaluation dated March 10, 2016, when claimant was 30 months and 29 days old. Claimant's adoptive mother was concerned that claimant showed deficits in expressive communication and had sensory issues at that time. Claimant's Receptive-Expressive Emergent Language Test - Third Edition results showed claimant had scores in the poor range for expressive and receptive language skills. However, there was no evidence of global delays in adaptive living skills and claimant was at the age appropriate level in gross and fine motor, cognitive and socialization skills.

15. A Speech-Language Evaluation was conducted on March 17, 2015, at Rady Children's Hospital when claimant was 19 months old. The documentation from that evaluation showed various testing was conducted and a diagnosis was listed as: "[claimant] presents with severe receptive/expressive language and severe speech disorder secondary to in-utero drug exposure." The recommendation given for treatment for claimant was individual speech therapy two times per week. Dr. Miller noted that a speech disorder is not a symptom associated with intellectual disability and speech therapy is not a treatment given for intellectual disability.

16. Dr. Miller also reviewed claimant's Speech-Language Evaluation dated June 16, 2016, from Temecula Valley Unified School District when he was two years and 10 months in age. The results of this evaluation showed that claimant's receptive language skills were adequate and his expressive language skills were in the high borderline range, suggesting some deficits. Claimant's evaluation noted that his sound

inventory was limited impacting his articulation, phonological development, and intelligibility. Claimant's social skills were observed and it was noted that he demonstrated adequate skills in social interaction. The document further noted that claimant's pragmatic language skills were adequate and he showed appropriate behavior. Dr. Miller noted that in individuals with intellectual disability, you would expect to see deficits in both social interaction and pragmatic language skills, but claimant was at an age appropriate level for both.

17. Dr. Miller explained that the Riverside County SELPA Individualized Education Program (IED) dated June 24, 2016, showed that claimant qualified for special education services under the category of speech and language impairment. Dr. Miller stated that while intellectual disability is a category that can qualify a student for special education services, claimant did not qualify for special education services under a category of intellectual disability. While attending pre-school claimant attended general education classes for 94 percent of his time and attended special education classes for six percent of his time. Dr. Miller also reviewed the Temecula Valley Unified School District SELPA IEP dated May 29, 2018, when claimant was four years old. That document also noted that claimant qualified for special education services under the category of speech or language impairment and not under the category of intellectual disability. The document also described claimant as social, happy, sweet, that he interacted well with others with no behavioral concerns, and was independent in a school setting.

18. Dr. Miller also testified about her review of the Exit IRSP - Closing Report from IRC when claimant ended his early start program dated July 11, 2016. Dr. Miller agreed with the determination made by IRC at that time that claimant did not qualify for services under the Lanterman Act because claimant was developmentally typical in most areas and only had a few delays in communication. Dr. Miller explained that at that time

claimant did not have any substantial adaptive deficits and there was no indication of intellectual disability or fifth category eligibility. She stated that there was sufficient information regarding claimant available that no further assessment was needed for an eligibility determination.

19. With regard to the Occupational Therapy Evaluation dated April 5, 2018, Dr. Miller noted that this assessment was conducted due to concerns related to claimant's fine motor skills. The assessment included various tests and clinical observations of claimant. The assessment summary noted that claimant demonstrated deficits in fine motor skills, visual motor skills, and hand strength. The document noted that claimant "requires minimal assistance with grooming, lower body dressing, and toileting activities (primarily due to decreased fine motor skills and thoroughness)." The recommendation for claimant was occupational therapy services two times per week. Dr. Miller explained that occupational therapy is not a treatment typically utilized for patients with intellectual disability. Dr. Miller noted that there was no information in this document suggesting substantial deficits in intellect or cognition for claimant.

20. Dr. Miller reviewed a letter dated August 22, 2018, from Miguel Del Campo, M.D., from the Fetal Alcohol Spectrum Disorder Clinic at Rady Children's Hospital. The letter summarized that claimant has been diagnosed with Alcohol-Related Neurodevelopmental Defects (ARND), which is a condition under the Fetal Alcohol Spectrum Disorder (FASD). The letter discussed the range of disabilities that may be experienced by a person with ARND, but did not specifically discuss those disabilities currently experienced by claimant.

21. Dr. Miller discussed her review of an undated letter from Sarah N. Mattson, Ph.D., with attached results from various tests, including the Wechsler Preschool and Primary Scale of Intelligence - Fourth Edition (WPPSI-IV) administered on August 14, 2018. The document noted that the tests were performed as part of a "research project

that involves neuropsychological testing of children with a variety of prenatal exposures …" The results of the WPPSI-IV test showed a full scale I.Q. score of 69. However, Dr. Miller noted that the WPPSI-IV test's full scale I.Q. score is a composite score from a variety of scores obtained from other tests. The verbal comprehension test is one of those tests and consists of six subtests, but in this case only two subtests were given to claimant to obtain the verbal comprehension score and the remaining four subtests were not administered. Dr. Miller explained that in order to get a full understanding of claimant's cognitive abilities, results from all six of the subtests would be necessary. Dr. Miller explained that issues related to cognition are complex and interpretation of how these scores were derived is critical in understanding the overall cognitive functioning of claimant. Dr. Miller noted that the scores provided on the WPPSI-IV verbal comprehension subtests showed that all of the scores he received were in the low average to borderline range other than one subtest for "information" that had a result of "profoundly impaired." She stated that typically individuals with intellectual disability do not have such variability in test score results, and do not have scores as high as those of claimant in the low average and borderline range. She explained that it was likely that the one "information" score "artificially lowered" the score on the full scale I.Q. Additionally, Dr. Miller explained that there are many factors that may lower a full-scale I.Q. score on these tests, including situational factors such as tiredness, low motivation, lack of attention, disruptive behavior, and not giving best efforts. She noted that no information was provided on these documents to explain or take into account any such factors, such as test environment and behavioral observations.

The research project also tested claimant using the Wechsler Individual Achievement Test - Third Edition (WIAT-III), NEPSY-II, National Institutes of Health Toolbox (NIH Toolbox), Vineland Adaptive Behavior Scales - Third Edition (VABS-3), and the Child Behavior Checklist (CBCL). Dr. Miller explained that these tests were

administered by Gemma Bernes, who was supervised by a clinical psychologist named Sarah N. Mattson. Dr. Miller noted that no qualifications were provided for Gemma Bernes regarding her ability to administer or interpret the results of those tests.

Dr. Miller explained that the results of the NEPSY-II test show that claimant has borderline to low average cognitive abilities, which is much higher than what is expected in individuals with intellectual disability or fifth category eligibility. The results of the NIH Toolbox tests show some variability and results were in the borderline impairment to average range, which is far higher than that expected for a person with intellectual disability or fifth category eligibility. Dr. Miller noted that none of these scores for these two tests show a substantial deficit in cognitive ability for claimant.

With regard to the WIAT-III test, only one subtest for math problem solving was administered to claimant and the score for that subtest was 86, which is in the low average range of cognitive ability. Dr. Miller explained that for individuals with intellectual disability or fifth category eligibility, she would expect a score of 70, which is two standard deviations from the mean score, or lower for this test along with substantial deficits in cognition and learning. Claimant's results do not show a substantial deficit in cognition and learning. Dr. Miller explained that the VABS-3 test was based on information obtained from claimant's caregiver for a measure of claimant's adaptive behavior skills. The results of the VABS-3 showed that claimant had scores in the high borderline to low average range for adaptive skills. His overall composite score was 77, which does not suggest any adaptive functioning or behavioral deficits. With regard to the CGCL test, Dr. Miller explained that this was based on information obtained from a parent interview and is a method of measuring any behavioral or emotional issues in a child, but does not show intellectual functioning. The results of this test showed that claimant only had one elevated result for aggressive behavior, but no other results were clinically significant.

22. Dr. Miller also reviewed a report from Sarah N. Mattson, Ph.D., from her evaluation of claimant on March 20, 2019. Dr. Mattson included test data from the research project and testing on August 14, 2018, in this report plus additional testing of claimant administered by Dr. Mattson. Dr. Miller noted that of the tests administered to claimant for this report, the WPPSI-IV and the VABS-3 provide information on intellectual and adaptive functioning. Dr. Miller also noted that Dr. Mattson provided a narrative of her observations of claimant's behavior in this report. Dr. Miller stated that Dr. Mattson generally had no behavioral concerns for claimant and wrote that he provided full effort, focus and engagement and was well-mannered and polite. Dr. Mattson's report included WPPSI-IV test scores from a test administered to claimant on March 20, 2019, but only included testing for three subtests of the WPPSI-IV instead of all six subtests. Dr. Miller noted that no full-scale I.Q. was provided because the three subtests used by Dr. Mattson were not the correct or sufficient subtests to obtain a full-scale I.Q. score. Dr. Miller explained that the scaled scores for the three subtests of the WPPSI-IV administered by Dr. Mattson showed scores in the low average to average range overall. Dr. Miller stated that she would not expect to see such scores in an individual with a full-scale I.Q. score of 69 as indicated on the August 2018 research program WPSSI-IV test. She stated that would simply be inconsistent with claimant's abilities shown in the 2019 scores.

Additional tests administered by Dr. Mattson in March 2019 showed results that are inconsistent with a full-scale I.Q. score of 69 or an individual with intellectual disability or fifth category eligibility. Specifically, the Peabody Picture Vocabulary Test Fifth Edition (Peabody test) showed claimant scored in the average range for a child of his age, the Visual Motor Integration test score was in the average range, and the California Verbal Learning Test - Children's Version scores were in the average range.

Dr. Miller noted that Dr. Mattson's March 2019 report also included three tests

where the basis for all information obtained was from parental reports, rather than by directed examination of claimant. Specifically, the VABS-3 assessment of claimant from reports of his adoptive mother showed that claimant's adaptive functioning was in the borderline range. Dr. Miller noted that claimant's lowest score on the VABS-3 was in the area of socialization, which was previously his highest score on the VABS-3 administered in August 2018. Dr. Miller also opined that claimant's socialization scores could also be impacted by his speech issues, rather than due to cognitive functioning. Dr. Mattson also obtained information from claimant's parents for the Delis Rating of Executive Functioning test. The resulting scores showed that claimant's parents had concerns regarding claimant's behavioral and emotional functioning. Dr. Miller explained that a deficit in executive functioning is not indicative of intellectual disability and does not require the same treatment as intellectual disability. She explained that executive functioning is not fully developed in children or even adolescents and may be impaired for many reasons, including brain injury, drug exposure, and Attention Deficit Hyperactivity Disorder (ADHD). Dr. Mattson also obtained information from claimant's parents for the Behavioral Assessment System for Children test (BAS). The resulting scores from those parent reports showed claimant had low adaptive skills and problems with emotional regulation. Dr. Miller explained that the BAS does not provide a comprehensive measurement of adaptive behavior.

Dr. Mattson's report from March 20, 2019, concluded that claimant, in addition to his ARND, language disorder and ADHD diagnoses, had a diagnosis of mild intellectual disability. Dr. Mattson wrote in her report as follows:

> Individuals with mild intellectual disability are characterized by deficits in intellectual and adaptive skills that result in a "failure to meet developmental and sociocultural standards for personal independent and social responsibility" (DSM-5).

> [Claimant's] overall level of cognitive ability, as determined by the FSIQ [full-scale I.Q.], is in the mild range of intellectual disability and his level of adaptive function, as determined by multiple measures, is at the 1st to 6th percentile rank for his age, which is significantly impaired.

Dr. Miller disagreed with Dr. Mattson's diagnosis of mild intellectual disability. She explained that it appeared that Dr. Mattson cherry-picked specific scores to come to a diagnosis of intellectual disability for eligibility purposes while ignoring other scores obtained that showed claimant's strengths. All previous testing and even much of the testing ignored by Dr. Mattson show that claimant has borderline to average cognitive abilities with no significant deficits in adaptive functioning. The diagnosis of intellectual disability is not consistent with the data in all of the reports provided regarding claimant. Dr. Miller also noted that Dr. Mattson wrote in her March 20, 2019, report that IRC failed to do an in-person assessment of claimant for eligibility purposes, and she believed that "best-practices" dictated that IRC do so. Dr. Miller again disagreed with Dr. Mattson's statement that IRC is required to do an in-person assessment of claimant to determine eligibility for services. She testified that a review of all records provided for claimant show that claimant does not have intellectual disability or a condition closely related to intellectual disability requiring treatment similar to a person with intellectual disability, and no further assessment is warranted based on a review of those records.

23. Dr. Miller also reviewed a May 14, 2019, letter from Kenneth Lyons Jones, M.D., regarding a physical examination of claimant. The document provided that claimant had a diagnosis of ARND, which is a subcategory of FAS. Dr. Jones's letter explained that ARND is a spectrum disorder caused by prenatal alcohol exposure. The document also explained the services already in place for claimant, including behavioral therapy, but provided no specific information on exactly what and how that therapy was

provided. Dr. Miller noted that nothing in this letter provided evidence that claimant was diagnosed with intellectual disability or a condition closely related to intellectual disability requiring similar treatment. The treatments Dr. Jones listed in this letter were not specific to a diagnosis of intellectual disability.

24. Dr. Miller participated in the IRC team decision denying claimant's application for services in this matter. She explained that all of the above documents were reviewed and considered, and based on the totality of that evidence, denial of claimant's application for services is appropriate with no further need for an in-person evaluation. In conclusion, Dr. Miller stated that claimant does not meet the DSM-5 criteria for an intellectual disability or a condition closely related to intellectual disability that requires treatment similar to a person with intellectual disability. Accordingly, Dr. Miller concluded that the evidence did not support a finding that claimant was eligible for regional center services, and there was sufficient information provided so that no further evaluation of claimant for eligibility was appropriate at this time.

CLAIMANT'S EVIDENCE

Testimony of Kenneth Lyons Jones, M.D.

25. Kenneth Lyons Jones, M.D., is a pediatrician specializing in dysmorphology (abnormality of structure, such as birth defects) and teratology (the effect of drugs and chemical agents on the unborn child). Dr. Jones received his medical degree in 1966 from Hahnemann Medical School. He has been board certified in pediatrics since 1966. He completed his pediatrics internship at Philadelphia General Hospital in 1967, and his pediatrics residency at University of Washington in 1969. He was a pediatrician in the U.S. Army from 1969 to 1971. He completed a fellowship in Dysmorphology in 1974 at the University of Washington. He has been a professor of pediatrics at the University of California San Diego (UCSD) School of Medicine since 2011. He has had faculty

appointments at UCSD School of Medicine since 1974. Dr. Jones is a pioneer in the field of FAS. During his fellowship at University of Washington, he and another physician, Dr. Dave Smith, first identified the disorder of FAS in children born to alcoholic women.

26. Dr. Jones has collaborated with Dr. Mattson since 1976 in the field of FAS. In 1998, both Dr. Jones and Dr. Mattson received grants from the National Institutes of Health for a collaborative initiative related to research of FAS. Dr. Jones is the head of dysmorphology for that collaborative and Dr. Mattson is the head of neurodevelopmental studies for that collaborative. Dr. Jones believes that Dr. Mattson is an expert on the neurobehavioral effects of alcohol on the developing fetus.

27. Dr. Jones explained that prenatal exposure to alcohol leads to a spectrum of defects and deficits. In 1996 it was determined that not all children exposed to alcohol in utero have physical deformities, but some have only neurobehavioral abnormalities with no growth or structural abnormalities. Children exposed to alcohol in utero with growth and structural abnormalities have Alcohol Related Birth Defects (ARBD). Those children exposed to alcohol in utero who do not have ARBD and only have neurodevelopmental problems have Alcohol Related Neurodevelopmental Spectrum Disorder (ARND). He explained that now the term FAS typically refers to those children with ARBD, which is at one end of the spectrum, and children with ARND are on the other end of the spectrum.

28. Dr. Jones testified extensively about the diagnostic requirements for ARND and explained that ARND can be associated with cognitive problems, but in some cases it only manifests in behavioral problems without cognitive problems. Dr. Jones stated that to get a diagnosis of ARND based on cognitive deficits, the individual typically has a full-scale I.Q. score that is one-and-a-half standard deviations from the mean, which translates to a full-scale I.Q. score of 78 or below. Dr. Jones noted that claimant had prenatal exposure to alcohol and has a diagnosis of ARND, but not ARBD.

29. Dr. Jones has extensive experience researching children with ARBD and ARND and testified extensively about the effects of ARND on cognition and neurodevelopment generally. Dr. Jones opined that claimant meets the cognitive component for ARND based upon Dr. Mattson's evaluation of him and claimant's full-scale I.Q. of 69 from the research project. He did not consider the fact that Dr. Mattson did not administer all subtests for the full-scale I.Q. of 69. Dr. Jones relied upon Dr. Mattson's report for his conclusion that claimant is cognitively impaired and relied exclusively on Dr. Mattson for her diagnosis of mild intellectual disability, but did no such evaluation himself.

Testimony of Sarah Mattson, Ph.D.

30. Sarah N. Mattson, Ph.D., is a neuropsychologist and professor at San Diego State University (SDSU). As a professor in the Department of Psychology at SDSU, Dr. Mattson teaches neuropsychology and abnormal psychology to students. She also directs the Center for Behavioral Teratology at SDSU, which is a clinic she started in 1989 to study the effects of prenatal alcohol exposure in children. The clinic specializes in FAS disorders and assesses children with a history of alcohol exposure in utero, as well as other conditions like ADHD, intellectual disability, and other behavioral conditions. Dr. Mattson received her Ph.D. in 1994 from SDSU in Clinical Psychology with Neuropsychology Specialty. Dr. Mattson explained that a psychologist with a Ph.D. has a heavier emphasis on research than a psychologist with a Psy.D. She stated that a psychologist with a Psy.D. degree typically has a heavier emphasis on clinical work with patients. Dr. Mattson explained that her research and expertise is in the area of neuropsychology and behavioral teratology, specifically for FAS. She focuses on how the brain directs behavior and cognition for psychological disorders.

31. Dr. Mattson has worked closely with Dr. Jones, and first knew his reputation because he was one of the first physicians to identify FAS. Dr. Jones was a

mentor to Dr. Mattson when she was a graduate student and she has worked with him on FAS research since that time. Dr. Jones focuses his research on the physical deformity aspect of FAS, known as dysmorphology. Dr. Mattson focuses on the neurobehavioral aspect of FAS for their joint research. Dr. Mattson's more recent research focuses on a "decision tree" for FAS, which was published in 2016, as a diagnostic tool for physicians to use to diagnose FAS.

32. Dr. Mattson testified at length regarding the possible cognitive and behavioral aspects of a diagnosis of ARND. She explained that the exposure to alcohol in utero results in a spectrum of defects and disorders ranging from physical abnormalities to cognitive and behavioral problems. She stated that ARND is a subset of an FAS diagnosis where cognitive and behavioral problems are manifested, but physical abnormalities are not. Dr. Mattson testified that ARND shares a lot of features with a diagnosis of intellectual disability, and that a diagnosis of ARND is similar to a diagnosis of intellectual disability. Dr. Mattson admitted that a diagnosis of ARND can be made if the full-scale I.Q. is at least one-and-a-half standard deviations below the mean, translating to a score of 77. A diagnosis of ARND can also be made based solely on behavioral impairment without cognitive impairment. Dr. Mattson stated that she believes claimant has a global cognitive impairment as demonstrated by his full-scale I.Q. score of 69 from the 2018 testing at the clinic.

33. Dr. Mattson first met claimant when he came to her clinic for testing as part of a research project related to FAS in August 2018. Gemma Bernes performed the testing of claimant in August 2018, under Dr. Mattson's supervision. Gemma Bernes is a graduate student of psychology at SDSU and Dr. Mattson testified she is very capable and qualified to perform the tests administered to claimant.

34. Dr. Mattson testified that she diagnosed claimant with mild intellectual disability because of his full-scale I.Q. score of 69 from the 2018 testing at the clinic, as

well as from her review of other documents and information showing he has adaptive deficits. She also stated that claimant is diagnosed with ARND and he had indications of ADHD based on her assessment and review of information. Dr. Mattson admitted that the WPPIS-IV test administered to claimant in both 2018 and 2019 did not have all of the subtests included, but she stated that she had no reason to doubt the full-scale I.Q. score of 69 despite the fact that all of the subtests measured other than one showed results in the low average to borderline range, and the subtests for the WPPIS-IV administered in 2019 showed results in the average to low average range. Dr. Mattson also admitted that variability in subtest scores for the WPPIS-IV can make the full-scale I.Q. score invalid. However, she stated that she believes that claimant should still be eligible for services at IRC under the category of fifth category or mild intellectual disability. Dr. Mattson stated that not all of the subtests of the WPPIS-IV test were administered to claimant because her clinic was only interested in certain subtests for the research project.

35. Dr. Mattson stated that claimant's ARND is a diagnosis that never goes away, but the symptoms may change over time. Children with ARND can benefit from interventions and treatment. Dr. Mattson admitted that a child may meet the diagnostic criteria for an ARND diagnosis, but not meet the criteria for a diagnosis of intellectual disability, particularly because the cutoff for a full-scale I.Q. for a diagnosis if ARND is one-and-a-half standard deviations below the mean, instead of two standard deviations as required to meet the diagnostic criteria for intellectual disability. Dr. Mattson stated that claimant also has deficits in executive functioning, which is typical for ARND children. She stated that claimant has a learning impairment, but that is not his most significant impairment. Dr. Mattson also testified that her testing showed that claimant has a memory impairment, but with repeated exposure his memory improved. She stated that claimant had deficits in self-regulation related to mood and impulse control,

which are typical in children with ARND. Dr. Mattson opined that claimant has a "substantial disability" based on his diagnosis of ARND because he has significant limitations in self-care, self-direction, learning and language. Dr. Mattson opined that claimant will need treatments similar to a person with intellectual disability for each of these limitations, such as behavioral therapy. Dr. Mattson stated that claimant had impaired "capacity for independent living" because he was delayed in his adaptive skills at age three as shown in the progress reports from the early start program, and because children with ARND generally have impaired daily living skills. Dr. Mattson considers an impairment to mean testing results that are one-and-a-half standard deviations below the mean.

36. Dr. Mattson testified extensively regarding how ARND affects children generally with cognitive and adaptive deficits. She acknowledged that claimant is currently in a general education class for most of his classes, but she opined that "as he gets older that will likely not be the case."

37. On cross-examination Dr. Mattson stated that her understanding of the eligibility criteria for IRC services was that a person must have one of four diagnoses, of which intellectual disability is one, or what is called the fifth category, which allows for a broader view of eligibility for children who have disorders similar to intellectual disability or which require treatment similar to intellectual disability. Dr. Mattson was not aware of any other requirements for eligibility for services from IRC and has never participated in an eligibility determination on behalf of a regional center. She believed that IRC should be required to perform an in-person assessment of claimant for eligibility purposes, because it would not be possible to truly assess claimant otherwise.

Testimony of Claimant's Adoptive Mother

38. Claimant's mother adopted claimant when claimant was two days old, and testified regarding claimant's history and development. She explained that two months

before claimant's birth, claimant's mother adopted claimant's biological sister, who already had a diagnosis of FAS. Claimant's biological mother admitted to drinking alcohol, as well as using methamphetamine and marijuana during her pregnancy with claimant. Claimant's mother testified that claimant has struggled with his speech since he was very young and has received speech therapy two times per week since he was 18 months of age. His receptive language skills are significantly better than his expressive language skills. Claimant understands full sentences but has difficulty with multiple step directions. Claimant has a hard time controlling his emotions when he gets frustrated because he cannot communicate. Claimant's mother uses a picture book for claimant to show a picture of how he is feeling when he is unable to express himself, which she uses multiple times per day. Claimant has issues with articulation of his speech, and he is shy in a group of people. She stated he communicates much better in a one-on-one setting. Claimant uses two to three word sentences for communication most of the time.

39. Claimant's mother reviewed Dr. Mattson's test scores from March 20, 2019, testing of claimant. She was surprised that claimant's scores for the vocabulary subtest of the WPPSI-IV were in the average range. She believes this is because the testing must have been done on a one-on-one setting and not a group setting because claimant does not focus in a group setting. Claimant's mother described claimant's self-care and stated that he waits for her to pick out his clothes. He can put on his own shirt, but he cannot zip up a zipper. He cannot fasten pants or shirts, but can put on pull-up pants or pull-over shirts. Claimant can use the bathroom independently, but sometimes needs assistance wiping. He still wears a diaper at night when he sleeps. Claimant will not brush his teeth and his mother will brush them for him. Claimant can feed himself, but cannot use a knife because he does not have sufficient hand/eye coordination. Claimant sleeps with his parents and does not yet sleep in his own room.

40. With regard to claimant's behavior, he has consistent "meltdowns" at least

four to five times per week, and some are explosive in nature. Claimant will kick, hit, bite and throw things. Claimant likes to run away, which happens fairly often, and he has no sense of the danger associated with that behavior. Claimant can direct his own activities and has a hard time understanding what he is allowed and not allowed to do. Claimant's mother utilizes behavioral interventions when she senses a behavioral outburst approaching.

41. Claimant's mother believes that claimant will benefit from services from IRC, and stated that he benefited greatly from his early start services. She believes that the gap in services from when his early start program ended has caused his behaviors to be more explosive. She stated that claimant was not able to keep up with his class at school and as a result they are sending him to a smaller school with a teacher/parent helper to student ratio of one to six. They decided to send him to the smaller school because claimant functions better in a smaller group setting.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

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THE LANTERMAN ACT

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, also defines "developmental disability" and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

> (a) Developmental Disability means a disability that is attributable to [an intellectual disability], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to [an intellectual disability] or to require treatment similar to that required for individuals with [an intellectual disability].

(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.

(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 [intellectual disability], 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 [intellectual disability].

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

EVALUATION

7. Claimant's mother and Dr. Mattson believe claimant is eligible for regional center services because of an intellectual disability or what has been labeled fifth category, a condition closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability. The Lanterman Act and applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. Dr. Miller provided a thorough and detailed explanation of claimant's records, and explained why claimant did not qualify for regional center services. Dr. Miller concluded that claimant's cognitive skills and intellectual abilities are in the borderline to average range, and he had no significant deficits in adaptive functioning as demonstrated by all records reviewed. Additionally, Dr. Miller further explained that the testing results from 2018 and 2019 from Dr. Mattson's clinic did not include all necessary tests to obtain a valid full-scale I.Q. score, and Dr. Mattson minimized claimant's strengths as shown on test scores in the average range, and focused on outlier scores, only one of which was in the substantial deficit range, to justify a diagnosis for eligibility purposes. Dr. Mattson's testimony that claimant had significant cognitive and adaptive deficits constituting a diagnosis of mild

intellectual disability was not supported by the test results and information in his records. Dr. Mattson's testimony also frequently focused on claimant's ARND diagnosis and the symptoms claimant "will likely experience as he ages" based on that diagnosis as opposed to claimant's current condition and strengths. Given claimant's current age and abilities, it is premature to speculate on his future development. The weight of the evidence does not support a finding that claimant has intellectual disability or a condition similar to intellectual disability or a condition requiring treatment similar to that required for intellectually disabled individuals. There was insufficient evidence to conclude that claimant had a qualifying developmental disability at this time.

8. Claimant's mother was sincere and her testimony heartfelt. She is clearly motivated by her desire to help her son to obtain services she believes are necessary to allow claimant to thrive, and undoubtedly has her son's best interest at heart. However, claimant has the burden of proving that he is eligible for regional center services. That is, he must prove it is more likely than not that he has a qualifying developmental disability. The weight of the evidence presented at hearing did not establish that claimant is substantially disabled because of an intellectual disability, or a condition closely related to an intellectual disability, or a condition that requires treatment similar to that required for individuals with an intellectual disability. As such, claimant failed to satisfy his burden of demonstrating eligibility for regional center services under the Lanterman Act.

ORDER

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

DATED: June 13, 2019

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DEBRA D. NYE-PERKINS

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.