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. 2019030397

DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on April 23, 2019.

Keri Neal, Consumer Services Representative, Fair Hearings and Legal Affairs, Inland Regional Center, represented Inland Regional Center (IRC).

Claimant's mother represented claimant.[1,2]

The matter was submitted on April 23, 2019.

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[1] Claimant was in foster care under the supervision of the Los Angeles County Department of Child and Family Services when the Request for Fair Hearing was submitted. By the time of the hearing, claimant's foster parents had adopted her, and claimant's adoptive mother had taken over as claimant's representative.

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

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on a diagnosis of Intellectual Disability that is substantially disabling?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On February 7, 2019, IRC notified Los Angeles County Department of Child and Family Services (DCFS) that claimant was not eligible for regional center services. On March 28, 2019, claimant's DCFS social worker submitted a Fair Hearing Request, appealing IRC's decision and providing the following as the reason a hearing was sought:

> [Claimant] has been determined to not have an intellectual disability and mother does not agree with this determination. CSW has also observed that child does not meet her developmental milestones.

The Fair Hearing Request described what was needed to resolve the complaint as:

> Services for the child as [claimant] appears to have developmental delays and/or a possible intellectual disability. Also, CSW believes that child [*sic*] it is vital to have child test [*sic*] for intellectual disability in order to determine eligibility.

2. In a letter dated April 11, 2019, DCFS notified IRC that claimant was no longer under DCFS's supervision, DCFS was "no longer legally responsible for the child.

On 03/15/19, Court terminated jurisdiction of [claimant]," and the adoptive parents "were given full legal rights to the child." DCFS's letter stated that the adoptive mother wanted to proceed with the fair hearing and provided IRC the adoptive mother's contact information.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

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

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

[3] Dr. Diaz's psychological evaluation of claimant and hearing testimony are discussed in more detail below.

this involves a score of 65-75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance."

CLAIMANT'S BACKGROUND AND HER ADOPTIVE FAMILY'S CONCERNS ABOUT HER

5. Claimant is a bilingual (Spanish and English) seven-year-old girl who was placed in foster care after her biological mother abandoned her. Her biological mother may have abused drugs and it was believed that claimant suffered trauma while in her biological mother's care. Claimant's adoptive parents have cared for her since she was approximately two years old. Claimant began receiving special education services when she was in preschool due to Speech and Language Impairment (SLI). Since 2019, she has been receiving special education services based on Specific Learning Disability (SLD) as well as SLI.

6. Both claimant's adoptive mother and her adoptive mother's adult daughter testified regarding their concerns about deficits they have observed in claimant's functioning. They believed claimant had problems similar to other children they have known, including their family members, who suffered from Intellectual Disability and received regional center services. Claimant's adoptive mother stressed that she operates a day care business and therefore has experience caring for children of varying developmental levels.

Claimant's adoptive mother described claimant as forgetful, with "no retention," in need of repeated reminders to continue eating when she stops eating to do something else, and in need of reminders to use the bathroom because she has accidents about three times a week. According to claimant's adoptive mother, claimant cannot write her name or count to 10. There are good days when claimant "hugs and kisses," but she also has "really bad" days. On the bad days, claimant's adoptive mother has observed claimant not understand or appreciate danger, such that she may touch a hot stove or walk into traffic; "not know where to walk"; become lost at home and at

school, even though she knows her house "perfectly" and knows her way around her school; "she is completely gone"; "her mind is completely lost"; and she "doesn't even know her own name." Sometimes claimant has seemed to believe her biological mother was in the room, and there have been concerns that she may have experienced hallucinations. She is afraid of the dark and has become so frightened that her body has shaken. Claimant's adoptive mother also mentioned that claimant's biological mother suffered from schizophrenia, which medical professionals have told the adoptive mother would not usually present during childhood. Claimant's adoptive mother does not know what to do and fears that claimant will have serious problems in her life if she is not allowed to get the help she needs.

Claimant's adoptive mother's adult daughter described claimant in similar terms and stated that she did not believe Attention Deficit Hyperactivity Disorder (ADHD) was causing all claimant's problems. She noted that claimant had "good days" when she "can be calm," but then her "ADHD kicks in" and she "cannot pay attention."

REFERRAL TO IRC

7. Claimant was initially referred to IRC by DCFS on June 15, 2017, when claimant was five years old; at that time, DCFS's referral listed the area of concern as "Autism." On January 3, 2018, IRC's Eligibility Review Team determined that claimant was not eligible for regional center services under any category. On February 15, 2018, a Psychological Evaluation was conducted, and based on that evaluation, IRC continued to determine claimant was not eligible for regional center services.

Claimant was again referred to IRC and underwent another psychological evaluation with Dr. Diaz on January 28, 2019. Based on that assessment and Dr. Diaz's review of the records, IRC again determined claimant was not eligible for regional center services, this time focusing on DCFS's and claimant's adoptive mother's concern that claimant may have an Intellectual Disability.

CLAIMANT'S SCHOOL DISTRICT'S ASSESSMENTS AND INDIVIDUALIZED EDUCATION PLANS

June 25, 2015, Multidisciplinary Assessment Report

8. Claimant's school district issued a Multidisciplinary Assessment Report on June 25, 2015, when claimant was three years and five months old. The purpose of the report was to determine claimant's eligibility for placement in special education programs. A school psychologist, school nurse, speech/language pathologist, teacher, and claimant's adoptive (then foster) mother contributed to the report.

The report described observations of claimant's behavior during the assessment as follows:

> [Claimant] attended the assessment with her foster mother. She responded to her name being called and made appropriate eye contact. She is able to give 'high fives' when prompted. No stereotypical behaviors were observed. [Claimant] was able to complete some of the assessment tasks presented.

A variety of tests and assessment tools were administered. The Preschool Language Scale-5 (PLS-5) was used to assess claimant's speech and language skills. The results were in the "moderate delay" range. The Goldman Fristoe2 Test of Articulation was also used, to assess claimant's articulation and phonology in Standard American English. Based on the results of that test, combined with the PLS-5 results, the school district determined claimant was eligible for speech-language therapy. The Differential Ability Scale 2nd Edition (DAS-II) was used to assess claimant's ability to solve verbal and nonverbal tasks. Claimant's scores on the DAS-II were in the "low average" range. The Developmental Activities Screening Inventory II (DASI-II), an informal pre-academic

screening measure of a child's functioning between the ages of birth and 60 months, was also administered. Claimant's DASI-II scores were in the "average" range. The Developmental Profile-3 (DP3), a tool used to illicit feedback from a child's mother regarding development in the physical, adaptive behavior, social-emotional, cognitive, and communication areas, was also administered. Most of the DP3 scores were in the "low average" and "average" range, but claimant's "communication" score was in the "delayed" range.

The Multidisciplinary Assessment Report concluded claimant was eligible for speech and language therapy. It did not mention any concerns regarding Autism Spectrum Disorder or Intellectual Disability.

April 11, 2017, Individualized Education Plan (IEP)

9. Claimant's April 11, 2017, IEP, when claimant was five years old and in preschool, indicated claimant was eligible for special education services based on SLI. The IEP stated claimant presented "with a delay in articulation and language that affects her ability to communicate affectively [*sic*] in the academic setting" and noted claimant's parents' concern about claimant's retention of what she learned at school. Under the "Social Emotional/Behavioral" heading, claimant was described as "[f]riendly. She requires some encouragement for participation in activities and cues to remain on task. She becomes frustrated when a desired activity/object is denied." Under the "Adaptive/Daily Living Skills" heading, the following was noted: "Able to participate during therapy activities. Foster mother states [claimant] has limited abilities to dress self as well as other areas of self care being delayed."

April 9, 2018, IEP

10. According to claimant's April 9, 2018, IEP, when claimant was six years old and in kindergarten, claimant continued to be eligible for special education services based on SLI. Under the "Social Emotional/Behavioral" heading, the IEP stated:

> [Claimant] struggles with keeping her hands to herself. She finds it difficult to find friends to play with at recess. [Claimant] often portrays helplessness by stating she does not know how to open a door or participate in a group activity. This is also noted during Speech. Behaviorally, [claimant] is not able to focus for a minute on simple classroom tasks. She needs constant reminders. [Claimant] is yet to adapt to classroom routines.

Regarding her adaptive/daily living skills, the IEP stated that claimant needed "maximum verbal cues to get daily needs met at school." According to the IEP, claimant's teacher noted claimant "was working on fundamental skills in the classroom," her "classroom skills were extremely inconsistent across time and task," she required "a maximum level of task direction," and her homework was "not consistently completed."

The following information was provided in the IEP regarding claimant's speech and language skills:

> Receptive vocabulary was noted to be in the low average range whereas expressive language was in the disordered range indicating that [claimant] may know more than she is able to verbally produce. Articulation was in the disordered range. It was noted that [claimant] often omits the ending sounds in words which severely affects her intelligibility. It is

> felt by both Speech and testers that [claimant] may have done better on all testing tasks however her distraction during all testing sessions may have affected her scores. [Claimant] required many prompts to stay on task. She was noted to use babyish-talk and often attempted to have the tester give her the answers for the task she was on.
>
> Present levels / goals / benchmarks discussion: … It was noted that [claimant's] skills have decreased and the amount of distraction during Speech sessions has increased from the beginning of the school year.

April 18, 2018, Psycho-Educational Assessment Report

11. In April 2018, school psychologist Laura Bullock-Lombardo, M.A., CCC-SLP, performed a psycho-educational assessment of claimant and issued a report, dated April 18, 2018.[4] The assessment was conducted to evaluate claimant's "cognitive functioning, processing abilities, academic achievement, and social-emotional functioning." Ms. Bullock-Lombardo observed claimant in her classroom and over the course of three test sessions. At the time, claimant was enrolled in a dual language immersion class, where 90 percent of the instruction was in Spanish and 10 percent was in English. According to the report, Ms. Bullock-Lombardo's general observations were:

[4] It appeared that this report had been significantly highlighted before it was copied, making it difficult to read the highlighted portions. IRC's representative stated during the hearing that the copy provided as an exhibit was in the same condition as the copy that had been provided to IRC.

> [Claimant] presents as content at school. Observations appear to indicated [*sic*] a preference for communicating in English at school. [Claimant] appears to demonstrate slow compliance when given instructions at school. [Claimant] is able to hold a conversation with adults. She will communicate with peers but appears to prefers [*sic*] to have personal space. No repetitive behaviors or obsessions with items was [*sic*] exhibited. [Claimant] at times appears to demonstrate higher levels of skill and confidence when interested in a given task. Other times she would be slow to comply and request assistance if she knew someone would do the work for her. In class she asked for help often. … [Claimant] appears to have some difficulties with self-confidence. [Claimant] is able to navigate the classroom and school yard independently. She appeared to demonstrate focus when presented with manipulatives and visuals.

Ms. Bullock-Lombardo administered tests and took into account teacher reports and her own observations to evaluate claimant. Ms. Bullock-Lombardo noted that "the California State Department of Education has banned the use of intelligence tests (Jacob & Hartshorne, 2003). This resulted from a lawsuit, Larry P. vs. Riles (1984)[5] in which the

[5] While it was unclear what "Jacob & Hartshorne, 2003" referred to in the report, the reference to "Larry P. vs. Riles (1984)" appeared to be to *Larry P. v. Riles* (9th Cir.1984) 793 F.2d 969. In that case, the Ninth Circuit Court of Appeals affirmed a district court ruling that enjoined the use of "non-validated IQ tests," and ordered the State of

court decided that the schools could not use IQ tests to assign African American[6] students to any special education program, with the exception of gifted programs. Therefore, a battery of approved tests was used in this assessment to gauge [claimant's] current cognitive functioning."

The "Southern California Ordinal Scales of Development (SCOSD) Developmental Scale of Cognition" was used to measure claimant's "level of cognitive functioning" and the quality of her "sensory information processing at that level." Based on this assessment, Ms. Bullock-Lombardo determined that claimant's cognitive skills were in the "appropriate range." Claimant's academic achievement was assessed using the Woodcock-Johnson Tests of Achievement-Third Edition (WJTA-III), which measures achievement in reading, mathematics, and written language. The resulting scores indicated a deficiency in the "Understanding Directions" and "Oral Comprehension" areas and a "significant discrepancy between ability and achievement in Listening Comprehension."

The Test of Auditory Processing Skills (TAPS-3) was administered to assess claimant's "auditory skills necessary for the development, use, and understanding of language commonly utilized in academic and everyday activities." Claimant's overall score in the "Phonological Index," which measures "a person's ability to decode sounds with words," was in the "Deficient" range. Her overall score in the "Memory Index," which measures "basic auditory processes," was in the "Borderline" range. Her overall score in the "Cohesion Index," which measures the "ability to use inferences, deductions, and abstractions to understand the meaning of a message (in other words a person's level of

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California to develop plans to eliminate the disproportionate enrollment of black children in "educable mentally retarded (EMR)" classes.

[6] Claimant was described as African American in some of the exhibits.

auditory reasoning)," was in the "Borderline" range. According to Ms. Bullock-Lombardo's report, claimant's overall scores on the TAPS-3 "suggest that auditory processing is an area of concern." The report explained:

> Auditory Processing is the ability to analyze or make sense of information taken in through the ears. It is the perception and use of auditory information including auditory discrimination, memory, sequencing, and integration.
>
> Students with auditory processing deficits have difficulties processing what they hear in the same way other kids do because their ears and brain don't fully coordinate. Something interferes with the way the brain recognizes and interprets sounds, especially speech.

The Development Test of Visual-Motor Integration (VMI-5) was used to assess the extent to which claimant was able to integrate her visual and motor capabilities. Claimant scored in the average range.

The Connors 3rd Edition (Connors 3), a tool to "obtain observations about a youth's behavior from multiple perspectives" which was designed to assess ADHD and common co-morbid problems in children aged 6 to 18, was administered based on parent and teacher reports. The report explained that scores on the Connors 3 may range from a "Low Score," which meant "[f]ewer concerns than are typically reported," to a "Very Elevated Score," which meant "[m]any more concerns than are typically reported." The report described claimant's Connors 3 scores as follows:

> Overall Connors 3 scores were consistent between raters, with [claimant] in the very elevated range in all shared scales.

> Inattention, impulsivity, defiance/aggression, and peer relations are all major areas of concern. Findings correlate with observations and interviews which suggest that [claimant] demonstrates difficulties with focus/attention and peer relations. Incidents of aggression and defiance were not observed during observations at school. Periods of slow compliance was [*sic*] observed.

The Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) was administered to measure claimant's adaptive functioning in her everyday life. Unfortunately, the descriptions of claimant's Vineland-3 scores were heavily highlighted/lined out on the copy of the report received as evidence, such that it was difficult to read most of this part of the report. In the report, Ms. Bullock-Lombardo summarized the Vineland-3 results as follows:

> Both parent and teacher reports indicate low level daily functioning skills. Based on this assessment, [claimant] demonstrates a higher level of skill at school. These scores do not correspond with observations, academic test scores, and ability level as measured by the ordinal scales. [Claimant] appeared to demonstrate higher levels of skill when motivated and was inconsistent. It is important to note the impact of auditory and attention difficulties when evaluating [claimant's] daily living skills. Adaptive rating scales appear to suggest the presence of skills but a lack of consistency in demonstrating skills.

The report's summary stated that "[claimant] reliably demonstrated cognitive skills consolidated by age four with some skills emerging at the four to seven-year-old level. Based on assessment, [claimant's] cognitive skills are appropriate for her age group." Ms. Bullock-Lombardo noted in the report that although Intellectual Disability was considered, it was not determined to be an appropriate basis for special education eligibility at the time of the assessment.[7]

April 8, 2019, IEP

12. Claimant's April 8, 2019, IEP, when she was seven years old and still in kindergarten, stated that she was eligible for special education services based on SLD and SLI. The IEP noted the way her disability affected her progress in the general curriculum as follows: "[Claimant] demonstrates a discrepancy between ability and achievement was [*sic*] demonstrated [*sic*] in Listening Comprehension. The discrepancy is believed to be attributed to deficits in attention and auditory processing. [Claimant] presents with a delay in articulation and language that affects her ability to communicate effectively in the academic setting."

Her teacher described claimant as "very social and tries to please everyone." Claimant's parents' concerns were noted as: "[S]tudent struggles to retain information and stay focused in class. Parent indicated that student with [*sic*] not follow directions and does whatever she wants. Parent also indicated that student struggles to wait her turn, share toys, or follow rules. She will make a scene in public, complains a lot, lies, and interrupts others frequently. Parent indicated that [claimant] struggles in math, writing, and reading."

[7] The explanation in the report regarding why Ms. Bullock-Lombardo concluded Intellectual Disability was not an appropriate basis for special education services was illegible due to the extensive highlighting/lines over the text in that part of the report.

Under the "Social Emotional/Behavioral" heading, the IEP stated that "[c]lassroom teacher reports that socially, [claimant] gets along with others. Behaviorally, sometimes [claimant] gets distant and unfocused."

The IEP noted:

> The school psychologist reported that [claimant] shows signs of learned helplessness. Cognitively, she is in the pre-operational range (4-7 years), but very close to the 7-11 cognitive range. She does not have a concept of cause and effect. Academic assessment found the following: The WJ-R revealed that [claimant] struggles with Listening comprehension, oral comprehension and Understanding directions. Auditory processing was found to be a concern. She is in the average range for visual motor integration. Based on the data, the team agrees that [claimant] qualifies for special education services under the category of Specific Learning disability.

OTHER EVALUATIONS, ASSESSMENTS, AND MEDICAL REPORTS

Los Angeles County Department of Mental Health's April 27, 2017, Assessment and November 15, 2017, Assessment Addendum

13. The Los Angeles County Department of Mental Health assessed claimant on April 27, 2017, when claimant was five years and three months old, and prepared a written Child/Adolescent Full Assessment." The reasons listed for the referral were listed as: "Enuresis,[8] night wondering, insomnia with increased sleep latency, sleep refusal and

[8] "Enuresis" is commonly referred to as "bed wetting."

constricted affect" consistent with a Post Traumatic Stress Disorder diagnosis. Additionally, it was reported that claimant had regressed developmentally over the preceding six months. Claimant's symptoms, as reported by her adoptive (then foster) mother and claimant, included the following:

> [C]lient does not know when she is in dangerous [*sic*] and she would act impulsive and go with anybody while in the supermarket, mall or any place in the community. Client lacks sleep during the nigh [*sic*] client sleeping time is 9:00pm and she will fall asleep until 1:00am in the morning, she would just be in bed, when asked, client stated that she wants to sleep with caregiver, she does not like to sleep on her own. Caregiver shared that client is not able to dressed [*sic*] on her own, she cannot put her shoes [*sic*], she needs assistance to complete daily hygiene activities. Client is afraid of the darkness, she has night light in her room. Caregiver stated client often has accidents during the day. Client would also isolate, she had imaginary friends that she has full conversations [*sic*]. Client is sensitive to loud noise. Client shared that sometimes she has nightmares. Client has been exhibiting symptoms for about 3 months, lack of sleep is every day of the week, duration 4 hours, intensity severe.

According to the assessment, claimant's foster mother also reported that claimant was "loving and playful," and claimant did not engage in any self harm. Additionally, claimant's foster mother reported that claimant had been exposed to drugs and was abandoned by her biological mother when she was a newborn.

Under the "Developmental Milestones" heading, the assessment stated that claimant could walk and run, but fell down easily; had "speech challenges"; "lack of sleep"; was toilet trained; had "poor coordination"; had "good temperament"; did not exhibit "separation problems"; could "adjust easily to change"; could "go with any stranger at any time"; exhibited "sexualized behaviors with sibling"; and needed "help with self-care." Claimant told the evaluator that she liked school, and her foster (now adoptive) mother reported that she was "a good student, she has a positive attitude towards school." The following was noted in the "Mental Status" portion of the assessment: Claimant "exhibited appropriate activity level, good eye contact" and "was able to relate to caregiver and therapist"; she did not exhibit "aggression or impulsive behaviors"; she "did not have clear speech"; she was "able to repeat words, and use her words to communicate with no pressure or impediments"; she was scared of the dark and worried "something is going to happen"; she had good attention span, concentration, relational and coherent associations; she had "average vocabulary, poor abstraction, average intelligence"; and she had "adaptive capacity, good cooperation, poor insight and poor judgment."

The assessment concluded that claimant met the diagnostic criteria for Disinhibited Social Engagement Disorder and Unspecified Trauma and Stressor Related Disorder. The assessment did not mention Intellectual Disability. The assessment recommended that claimant receive individual/family and rehabilitation therapy two to four times per week due to the severity of her symptoms.

14. An assessment addendum was issued on November 15, 2017, when claimant was five years and ten months old, after claimant's social worker raised concerns that claimant may have suffered from hallucinations. The addendum listed the following concerns reported by claimant's adoptive (then foster) mother:

> [S]chool stopped giving child homework & in-school assignments because she gets confused. At school, child tells [*sic*] gets in staff's face, doesn't stay still, doesn't retain anything, tells teacher she loves her, doesn't want to do work. Has been potty trained. Client urinates in the daytime 3x/week, so caregiver has to go to school to change client's clothes. School evaluating client for IEP now and may retain her in kindergarten. Not able to learn the rules at home. Other symptoms reported: child doesn't pay attention and runs into herself, afraid of insects & animals (no pets in the home.) Runs on tippy toes while holding arms in. Is learning colors, doesn't know how to write her name, confuses letters with numbers. … Foster mom observes child reaching out to grab things, but foster mom can't understand what child is saying when asked what she is trying to grab. … Child not permitted to use a bottle per agency, per caregiver, so she gives child a sippy cup. Enjoys all activities at day care, limitations being outside. Mood usually happy, no tantrums. If she goes to a party, she wants everyone to hold and carry her, has to take stroller. Is very loving and will go with anyone who talks to her.

The assessment addendum also noted that claimant's foster mother reported claimant's biological mother was schizophrenic, causing foster mother to worry about claimant, and clinician explained that schizophrenia was extremely rare before adulthood. The addendum stated that a past therapist had stated claimant was not

ready for therapy, and that claimant "asked clinician and interpreting clinician to leave because she didn't want them in the house."

There were no diagnostic impressions or recommendations in the addendum. However, it should be noted that the version submitted at this hearing was only one page and had a "continued" box checked, such that it appeared that the version received as an exhibit may not have been a complete copy of the document.

October 20, 2017, LAC Medication Support Services Report

15. Uplift Support Services issued an "LAC[9] Medication Support Services" report on October 20, 2017. The report provided details regarding a 90-minute October 13, 2017, appointment with psychiatrist Richard Lee, M.D., when claimant was five years and eight months old and enrolled in kindergarten. The report noted that claimant was referred for a psychiatric evaluation and the chief complaint was "she's in her own world." The history of present illness was described as follows:

> [Claimant's] foster parents report that they are concerned about where client is developmentally at this time. They are concerned about her not focusing and not comprehending what's going on around her particularly at school. She has problems at night sleeping on a regular basis. Client has a history of developmental delays. She was very late speaking. She was not putting phrases together until age 4 and her speech remains behind. Socially, client is poorly related to peers. She does not have any significant friendships. She is

[9] Although not explained during the hearing, it appeared that "LAC" may have referred to "Los Angeles County."

> often [*sic*] her own world. She appears shy at times but also indiscriminate attachment at other times. Client did receive early intervention services [*sic*] school district but Client is noted to be behind academically.

The report noted that claimant was then receiving special education services. The report also stated claimant's attention span was "poor"; her mood and affect were "euthymic, blunted range"; there was "no clear evidence of hallucinations"; her impulse control, alertness, orientation, insight, and judgment were all "poor"; and her memory was "remote recent instant retention & recall poor."

Dr. Lee did not diagnose any specific disorders, but he wrote the following under the "Diagnostic Impression" heading:

> [Claimant] is a young girl presenting today with significant pervasive developmental delays. She is behind socially. She is behind academically and intellectually. She has sleep disturbance that could be related to current condition versus early history of trauma and neglect.

Dr. Lee recommended a comprehensive diagnostic evaluation, additional tests (but the report did not identify specific tests), counseling, and pursuit of "all regional center benefits." He also noted that claimant's adoptive (then foster) parents were advised "on communication with schools."

February 15, 2018, Psychological Report by Veronica A. Ramirez, Psy.D.

16. IRC referred claimant for a psychological evaluation with Veronica A. Ramirez, Psy.D., in 2018 to determine whether claimant was eligible for regional center services based on diagnoses of Autism Spectrum Disorder and/or Intellectual Disability.

Dr. Ramirez conducted an evaluation and prepared a Psychological Report. According to Dr. Ramirez's report, claimant's adoptive (then foster) mother reported that claimant had difficulty learning and was "disruptive in her classroom as she has poor boundaries, interrupts the teacher, and invades other children's personal space."

The report included the following description of Dr. Ramirez's observations of claimant's behavior (along with some of the foster parent's reports of her behavior):

> [Claimant] presented as a very social little girl. She was initially shy but opened up and became playful with the examiner after a few minutes. [Claimant] was observed to engage in joint attention. She utilized a 3-point gaze shift to direct the examiner's attention to a puzzle piece she found. [Claimant] was observed to show toys to her foster mother. She appears to be a very loving child and sought affection from her foster mother. Foster mother reported that [claimant] enjoys playing with other children. [Claimant] engaged in age-appropriate play during the evaluation. She pretended to take care of a baby doll and put her to sleep. She then pretended to feed her and then gave the doll toys for entertainment.
>
> [Claimant] was fidgety and hyperactive. She has poor boundaries and sometimes does not understand she bothers other children. Foster mother reported that [claimant] has difficulty retaining information and is very forgetful. Foster mother reported that [claimant] has difficulty falling asleep at night. Foster mother will send [claimant] to bed around 8:30

> pm, but [claimant] will not fall asleep until approximately 1 a.m. [Claimant] is then very tired in the morning. Foster mother will give [claimant] multiple-step instructions but [claimant] can only recall the first step. [Claimant] has problems at school because she interrupts the teacher, blurts out answers, has difficulty concentrating, and is constantly trying to touch other children. [Claimant] was also observed to be easily distracted. During cognitive testing, she was fidgety and looking around the room. She required a break after each subtest to keep her focused.

Dr. Ramirez administered the Childhood Autism Rating Scale 2nd Edition (CARS-2), Vineland Adaptive Behavior Scales, 3rd Edition, Comprehensive Parent (VABS-III), and Wechsler Preschool and Primary Scale of Intelligence (WPPSI-IV). Claimant's scores on the CARS-2 were in the "minimal-to-no-symptoms" range. Her scores on WPPSI-IV placed her in the "borderline range of intellectual functioning" and the report stated that her "intellectual abilities should be monitored as she is in the at-risk range." Claimant's results on the VABS-III indicated that she displayed "skills that are in the deficient range of overall adaptive functioning."

Based on the scores from the assessment tools administered, along with Dr. Ramirez's observations and document review, Dr. Ramirez concluded in her report that claimant did not meet the diagnostic criteria for Autism Spectrum Disorder or Intellectual Disability and was therefore not eligible for regional center services. Dr. Ramirez noted the following diagnostic impressions in her report: "Attention Deficit/Hyperactivity Disorder, Combined presentation." Dr. Ramirez also explained in her report that claimant's presentation appeared consistent with ADHD.

DR. DIAZ'S PSYCHOLOGICAL ASSESSMENT REPORT AND TESTIMONY

17. Alejandra Diaz, Psy.D., is a bilingual (Spanish and English) staff psychologist at IRC, where she has worked since April 2018. Her duties include conducting psychological assessments to determine regional center eligibility. She received her Bachelor of Science Degree in Psychology from the University of Phoenix, Los Angeles in 2009; Master of Arts Degree in Clinical Psychology from the California School of Professional Psychology at Alliant International University, Los Angeles in 2012; and Doctor of Psychology Degree from the California School of Professional Psychology at Alliant International University, Los Angeles in 2015. She completed a fulltime post-doctoral internship at West Marin Health and Human Services, Division of Mental Health and Substance Use Service, in August 2015. She is licensed as a clinical psychologist by the State of California. Before working as a staff psychologist for IRC, Dr. Diaz worked from March 2017 to 2018 as a staff psychologist for Memory Check Psychological Service in Los Angeles, California.

18. Dr. Diaz conducted a psychological assessment of claimant on January 28, 2019, when claimant was seven years old, and Dr. Diaz wrote a report regarding her assessment. Dr. Diaz was also a member of IRC's eligibility determination team that considered whether claimant was eligible for regional center services in January 2019. Dr. Diaz based her psychological assessment on her review of all the records supplied by claimant, Dr. Diaz's clinical interview and direct observations, and the results of the following assessment tools: Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), Primary Test of Nonverbal Intelligence (PTONI), and Adaptive Behavior Assessment System, Third Edition (ABAS-3), Parent Form, Spanish. Dr. Diaz's hearing testimony was consistent with the information provided in her written psychological assessment.

Dr. Diaz made the following observations of claimant in her report, under the "Test Observations" heading:

[Claimant] is a 7-year-old cute girl who appears younger than her stated age. Initially, she was quiet and timid but after a few minutes, she began to engage with examiner. [Claimant's] speech was difficult to understand at times. This clinician noted that [claimant] was easily distracted, and her attention span was between 1-5 minutes. During the WISC-V, she was able to focus but required frequent redirections to focus. She was fidgety and became restless at times, especially towards the end of the second test. Examiner offered breaks during the assessment to allow [claimant] to move or stretch if needed. During the second test (PTONI), [claimant] was able to point to answers, but was observed to make impulsive decision [*sic*] several times. She was encouraged to slow down and to pay attention before choosing an answer. She was able to slow down and to pay attention but required constant reminders. During the digit test (subtest of WISC-V), [claimant] had difficulty repeating the numbers backwards or repeating the numbers starting from the smallest number. She smiled and shrugged her shoulders but was not able to complete this task. She also demonstrated some difficulty with her vocabulary, she was able to give short and vague definitions for only a few words. She appeared to perform better on the non-verbal tasks of the WISC-V and the PTONI. [Claimant] was talkative and friendly, she offered spontaneous information that was not related to the task at hand. Overall, [claimant] put forth great

> effort, she appeared alert and oriented, with limited attention span and was easily distracted. However, she responded when redirected to slow down and focus. Social-emotional concerns were not observed or reported.

On the WISC-V, which is "used to measure the general thinking and reasoning skills of children aged 6 to 16" across "five areas of cognitive abilities," claimant's overall score fell in the "Low Average" range when compared to other children her age.[10] Her scores were in the "Low Average" range on the Verbal Comprehension, Fluid Reasoning, and Processing Speed indices, in the "Average" range on the Visual Spatial index, and in the "Borderline" range in the Working Memory index. On the PTONI, which is a method of "assessing intellectual ability nonverbally," claimant's score was 78, which fell in the "Borderline" range. Dr. Diaz's report also stated:

> Comparing [claimant's] cognitive score from previous psychological evaluation (02/15/2018) and today's cognitive scores, it is inferred that [claimant] has made significant progress in the area of cognitive functioning. Overall, cognitive scores indicate borderline to average range levels and do not support a diagnosis of Intellectual Disability.

Dr. Diaz administered the ABAS-3 to assess claimant's "competence in meeting independent needs and satisfying the social demands" of her "environment." Dr. Diaz

[10] The report stated that claimant's composite Full Scale Intelligence Quotient (IQ) score was 80 and fell in the "Borderline" range. During Dr. Diaz's testimony, she explained that a score of 75 to 80 was in the "Low Average" range such that use of the word "Borderline" in the report was a typographical error.

explained in her report that the ABAS-3 was based on claimant's adoptive mother's reports of claimant's skills and behaviors, and as a result it could be subject to over or under reporting. On the ABAS-3, claimant's overall level of adaptive behavior fell in the "Extremely Low" range. Dr. Diaz's report noted: "[Claimant's] overall adaptive behavior can be characterized as lower functioning than that of almost all individuals her age. It is worth noting that possible ADHD may be significantly impacting her adaptive skills."

Dr. Diaz concluded that claimant did not meet the diagnostic criteria for Intellectual Disability and was not eligible for regional center services. Dr. Diaz's diagnostic impressions were: "Attention-Deficit/Hyperactivity Disorder, Combined presentation, Moderate," and "(Rule-out) Language Disorder." Dr. Diaz's reasoning was set forth in the "Summary of Assessment Results" section of Dr. Diaz's report as follows:

> A diagnosis of Intellectual Disability may be appropriate when an individual demonstrates deficits in intellectual functioning with concurrent deficits in adaptive functioning, the onset of which occurs in the developmental period. Overall, [claimant's] cognitive skills are in the Borderline to Average range of intellectual functioning. Overall, her adaptive skills are in the Extremely Low to Low Average range of adaptive functioning. …
>
> According to the DSM-5, Attention Deficit/Hyperactivity Disorder (ADHD) is A) a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with functioning or development, as characterized by inattention and/or hyperactivity and impulsivity; B) several inattentive or hyperactive-impulsive symptoms were present prior to age

12; C) several inattentive or hyperactive-impulsive symptoms are present in two or more settings (e.g., at home, school); D) there is clear evidence that the symptoms interfere with, or reduce the quality of, social, academic, or occupational functioning.

It is important to note that [claimant's] adaptive skills may be an underrepresentation of her actual adaptive functioning or abilities. Information gathered from [claimant's] records, her foster mother's report, and clinical observation, suggest that [claimant's] presentation is consistent with Attention-Deficit/Hyperactivity Disorder (ADHD). ADHD is significantly impacting her cognitive, social, and overall adaptive functioning.

Dr. Diaz explained during her hearing testimony that the cognitive functioning of a person with an Intellectual Disability will be stable over time and not fluctuate. As a result, it was Dr. Diaz's opinion that claimant's foster mother's reports that claimant had good days and bad days were not consistent with an Intellectual Disability but were consistent with ADHD.

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 of proof is a preponderance of the evidence. (Evid. Code, §§ 115 and 500.)

2. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid.*, italics in original.) "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. California Code of Regulations, title 17, section 54000,[11] provides:

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

(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.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of

educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

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

(a) "Substantial disability" means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

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

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

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

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

EVALUATION

10. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet to qualify for regional center services. There is no question that claimant suffers from a learning disability and a speech language impairment for which she has been receiving special education services and that she has exhibited troubling deficits in her adaptive functioning. Her adoptive mother justifiably wants to make sure her daughter receives any and all services for which she is eligible. However, the documents and testimony introduced at this hearing were not sufficient to prove by a preponderance of the evidence that claimant suffers from Intellectual Disability. Based on the previous assessments and evaluations, claimant has been found to suffer from ADHD, specific learning disability, and a speech and language impairment, none of

which would be grounds for regional center services absent a diagnosis of at least one of the conditions listed in Welfare and Institutions Code section 4512, subdivision (a).

Based on the previous evaluations and Dr. Diaz's own assessment of claimant, Dr. Diaz explained that claimant does not meet the diagnostic criteria for Intellectual Disability and her problems are better explained by her ADHD, which is not a basis upon which a claimant may be found eligible for regional center services. Accordingly, claimant is not eligible to receive regional center services at this time. Thus, her appeal from IRC's determination that she is ineligible to receive regional center services must be denied.

ORDER

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

DATED: May 3, 2019

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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.