

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

VS.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2019060620

DECISION

Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on September 13, 2019, in Pomona, California.

Claimant was represented by Damian Fragoso. Claimant was not present. (Claimant and his family members are identified by titles to protect their privacy.)

San Gabriel/Pomona Regional Center (Service Agency or SGPRC) was represented by Daniel Ibarra, Fair Hearing Manager.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 13, 2019. After the hearing, on her

own motion, the ALJ placed Exhibits 4-6, 8-12, 14-24 and C-2 and C-8 under seal pursuant to a protective order to protect the privacy interests of Claimant and her family.

ISSUE

Is Claimant eligible to receive services and supports from Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as someone with an intellectual disability or under the fifth category of eligibility as a person suffering from a condition similar to intellectual disability or requiring treatment similar to that required by someone with intellectual disability¹?

EVIDENCE

Documentary: Service Agency's exhibits 1-24, C-2 and C-8.

Testimony: Mother and Father

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a thirteen-year old-old girl who seeks eligibility for SGPRC services as a person with intellectual disability or "disabling conditions found to be

¹ Welfare and Institutions Code section 4512, subdivision (a).

closely related to intellectual disability or require treatment similar to that required for individuals with intellectual disability which is often referred to as the fifth category of eligibility.

Background

2. Claimant has a complex profile and a constellation of deficits. Claimant was born to biological parents who were both mildly intellectually disabled and both of whom had been diagnosed with Phenylketonuria (PKU), a birth defect and lifelong condition that causes the PKU amino acid to accumulate in the body and requires adherence to a special diet to avoid seizures, and brain damage among other symptoms. Claimant has been determined at-risk for brain damage based upon prenatal exposure to potentially high levels of PKU.

3. Claimant's biological mother drank alcohol, used methamphetamine and other illicit narcotics during her pregnancy. Claimant was released with her mother from the hospital despite testing positive for prenatal exposure to narcotics. Claimant's biological mother did not receive prenatal care until the final month of her pregnancy. In 2006, Claimant and her sibling, a regional center consumer, were removed from their biological mother's home due to neglect and abuse. Claimant was briefly placed in foster care. Since May of 2006, Claimant and her sibling have been raised by their grandparents (hereinafter Parents, Mother or Father). Both biological parents have been incarcerated at various times and neither is involved with Claimant.

Assessments and History of Eligibility Determinations

4. Claimant has been assessed by numerous professionals. She has been variously diagnosed with Asthma, Epilepsy, Attention Deficit Hyperactive Disorder (ADHD), Autism Spectrum Disorder (ASD), Expressive Language Disorder, Disruptive

Behavior Disorder, Regulatory Disorder, Hypersensitive type, Major Depression, Post Traumatic Stress Disorder (PTSD) and FAS. However, none of these diagnoses fully encapsulates her symptoms and deficits.

5. Claimant was referred to the Service Agency in December 2006 due to concerns about her behavior. Mother reported that Claimant fought with her sister of her toys and exhibited aggressive behaviors including biting, hitting, and pulling hair. She also rocked her body back and forth to comfort herself. Assessment at that time reported that Claimant's motor, cognitive, and language skills fell within the 10 and 12-month level. The Service Agency, therefore, deemed Claimant ineligible for services under the California "Early Start" program. In late 2007, Claimant was again referred to the Service Agency, which conducted new assessments. At that time, Claimant met most of her developmental milestones, but her sleeping difficulties and behavioral excesses continued and she was noted to significantly tense her body to the point that she shook. She appeared to have tactile defensiveness. A pediatric speech and language pathologist found moderate to severe deficits in auditory comprehension, language expression, and speech production. An occupational therapist reported that Claimant had sensory regulation and attention deficits that impaired her social interaction. Both therapist opined that Claimant had global developmental delays and would benefit from an intensive Early Start program.

6. Following these assessments, Service Agency determined that Claimant was at high risk for developmental disability based on prenatal substance exposure, and deemed her eligible for Early Start services as a child with developmental delays. The Service Agency recommended an intensive educational/behavior program to address all areas of delay and behaviors, and occupational therapy to address sensory integration issues.

7. On December 1, 2008, Victor Sanchez, Ph.D., an SGPRC psychologist assessed Claimant. His assessment results were recorded as background information in the reports of subsequent assessors. He reported that Claimant achieved a Full Scale Intelligence Quotient (FSIQ) of 100 on the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III) with a Verbal Intelligence Quotient (VIQ) score of 100 and a Performance Intelligence Quotient (PIQ) of 100. Sanchez diagnosed Claimant with Expressive Language Disorder, Disruptive Behavior Disorder, Not Otherwise Specified (Provisional). Based upon Sanchez's assessment and available records, the Service Agency determined that Claimant did not meet its eligibility criteria.²

8. Also in 2008, the local school district also assessed Claimant. Claimant performed in the low average range on standardized tests of intelligence and performed in the moderately low range of adaptive functioning. Claimant was determined eligible for special education as a person with a speech and language impairment "due to phonological processing errors that significantly impair her intelligibility and slow her language morphology." An IEP was developed. Pursuant to the IEP, Claimant received speech therapy twice a week for 30 minutes per session,

² The Service Agency's determination denying eligibility based upon a diagnosis of epilepsy was later affirmed in OAH Case Number 2009010039. In the decision after fair hearing, dated November 29, 2010, administrative law judge determined that Claimant was not eligible for service agency services under the Lanterman Act on the record presented.

behavior support consultations and classroom modifications and management in a general education classroom.

9. Pediatrician Jorge Fuentes, MD, at the Community-Based Assessment and Treatment Center (CATC) referred Claimant for a neurodevelopmental assessment to rule out intellectual disability and pervasive developmental disorders and to provide treatment recommendations.

10A. Claimant was referred by the Department of Children and Family Services to the Violence Intervention Project, a public and private partnership of medical and mental health clinics and centers in early 2008 to participate in a fetal alcohol spectrum disorder assessment.

10B. Madelyn Laboriel, M.D., Director of the Fetal Alcohol Spectrum Disorder, diagnosed Claimant with FAS, an incurable condition which results in physical and/or mental deficits due to prenatal alcohol exposure. FAS is a medical diagnosis and is characterized by distinctive facial features, learning disabilities, bone and joint deformities, heart defects, and hyperactivity, short stature, aggression, antisocial behavior, anxiety and intellectual disability and central nervous system damage/dysfunction. It is a neurobehavioral disorder. Dr. Laboriel noted that those working with Claimant should be mindful of the "likely presence of brain damage secondary to prenatal alcohol exposure. Many of the difficulties that [Claimant] is having with her development and behavior may well have their root in the impact of alcohol on her developing brain. It is also certainly possible that this birth mother did not follow an appropriate PKU diet during her pregnancy, and that if that is the case, there could also be a high risk of brain damage to [Claimant] due to elevated levels of PKU during the gestational period." (Ex. 14.)

10C. Dr. Laboriel noted that Claimant “will do best when given simple, single-step instructions. Tasks should be simplified into single discrete steps that allow completion of tasks one-step at a time. She would benefit from instructions that are framed in positive (“Please do...”) rather than negative (“Do not”) language. She should be praised at the completion of individual task. Instructions should also be given in multiple formats in order to assist her with understanding and remembering what is expected. Both verbal instructions and visual cues used together can mutually reinforce what is needed.” (Ex. 14.)

11A. Valerie Kolone, Ph. D (Kolone) performed the assessment over several days in July and August 2009. Kolone had difficulties administering standardized tests to Claimant because Claimant seemed to not understand the directions and would not cooperate. In Kolone’s administration of the WPPSI-III, Claimant achieved a FSIQ of 73, at the low end of the borderline range. Kolone opined that the score might be inflated. Kolone also administered the Vineland Adaptive Behavior Scales (VABS), the Achenbach Child Behavior Checklist (ACBC) and the Childhood Autism Rating Scale (CARS), all completed by Mother. On the VABS, Claimant’s adaptive functioning skills including communication, socialization, and daily living skills were within the moderately low range. On the ACBC, Claimant scored within the clinically significant range on emotional reactivity, anxious/depressed, somatic complaints, withdrawn, sleep problems, and aggressive behavior subscales. Claimant scored within the borderline range on the attention problems subscale. On Kolone’s administration of the CARS, Claimant’s scores were indicative of a diagnosis of Autism.

11B. Kolone recommended that Claimant be evaluated by a pediatrician or a pediatric neurologist to rule out seizure disorder due to observed tremors, twitches, non-responsiveness and blank stares during clinical testing and observations. Kolone

also recommended referral to the Service Agency because of developmental delays, poor cognitive and poor adaptive functioning.

12A. On October 22, 2009, the Service Agency's Autism Clinic assessment team conducted an evaluation of Claimant to make a new eligibility determination. The team included Deborah Lagenbacher, Ph.D. (Lagenbacher), Norma Lopez, MS, SLP, and Larry Yin, M.D. The team used the Autism Diagnostic Observation Schedule – Module 2 (ADOS-2), the CARS, clinical observations, records reviews, and parental report in their assessment. Claimant scored far below the cut-off for Autism on the ADOS. After the assessment, the team concluded that Claimant did not have Autism and the behavioral concerns that had been expressed related to poor self-regulation and sensory processing differences.

12B. The assessment team also reviewed the various intelligence tests that had been administered to Claimant. Although no new intelligence tests were administered, the team concluded that Claimant was able to use language appropriately. During the team's behavioral observations, she spoke using complete sentences and could be easily understood. She frequently used words to gain the attention of the adults. Based on an informal assessment, the team concluded that Claimant presented with functional reception receptive language and appeared to have functional comprehensive skills for her age and gender. The team also noted that she had mild-to-moderate deficit in sound production and did not present with indications of Expressive Language Disorder. The team diagnosed Claimant with Regulatory Disorder, Hypersensitive Type, and Disruptive Behavior Disorder-Not Otherwise Specified.

13. In February 2010, Claimant had an Electroencephalogram (EEG), measuring brain activity and an Electrocardiogram (EKG), measuring heart activity. Dr.

Neda Heidari, M.D. reported that the EEG was irregular and the EKG indicated an abnormal arrhythmia.

14. On August 26, 2010, Dr. Arthur Partikian, Director of the Division of Child Neurology at Los Angeles County USC Medical Center provided a letter which stated that Claimant was under his care and had recently been diagnosed with Epilepsy.³ According to Dr. Partikian, Claimant was on a trial of Depakote, a seizure medication.

15. On March 29, 2013, Claimant was assessed at the Teratogen Research Project at San Diego State University. The assessment was supervised by Sarah N. Mattson, Ph. D., Clinical Psychologist and Program Director. At that time the assessors administered the Wechsler Intelligence Scale for Children- 4 (WISC-IV), Wechsler Individual Achievement Test-II (WIAT-II), A Developmental NEuroPSYchological Assessment-II (NEPSY-II) (selected subtests), Tests of Variable Attention (TOVA), Vineland Adaptive Behavior Scales, Second Edition (VABS-II), Child Behavior Checklist (CBCL) and the Grooved Pegboard. Claimant achieved a FSIQ of 76 within the very low range, a Verbal Comprehension (VC) score of 73, within the borderline range, a Perceptual Reasoning (PR) score of 77, within the borderline range, a Working Memory (WM) score of 94, within the average range, and a Processing speed (PS) score of 85, within the low average range.

³ The ALJ inquired about whether or not Claimant was seeking eligibility for regional center services pursuant to the diagnosis of epilepsy. Claimant's counsel confirmed that at the time of the hearing only intellectual disability and 5th category eligibility are at issue.

16. The NEPSY-II showed Claimant to have a weakness in auditory attention where she scored in the "below expected" range. She had relative weaknesses in memory for names and designs, where she scored in the borderline range and arithmetic memory where she scored in the low average range. Claimant's scores in memory for faces, and narrative memory were at expected levels. Claimant also showed weaknesses in the Nepsy-II measurements of visual-spatial and Visual-Motor abilities, sensorimotor abilities, reasoning and problem solving.

17. Claimant's behavioral and emotional functioning was rated in the average range except in the areas of withdrawn/depressed and somatic complaints which were rated as in the borderline range. Claimant's adaptive skills were measured as moderately low (71) using the VABS-II. In the areas of communication (79), and socialization (71), Claimant was rated in the low range. In daily living skills (66) and motor skills (70), Claimant was rated in the moderately low range.

18. Assessment results from a second administration of the WISC-IV and VABS-II by the San Diego State University Teratogen Research Project are recorded as history in subsequent assessor reports. It is noted that on September 25, 2015, Claimant achieved a FSIQ of 70, A VC of 85, Fluid Reasoning (FR) of 73, a WMI of 74 and a PS of 65. At that time, her VABS-II adaptive functioning composite score was 80. The actual assessment reports and details of the subtests were not offered at hearing.

19. On June 9, 2017 Dr. Lagenbacher drafted an interdisciplinary note regarding the review of outside agency reports. Her note states:

"I reviewed the psych eval (2009) which indicates DX of prenatal exposure and neglect. Cognition was in the borderline range (WPP-III VIQ 77 PIQ76 FSIQ 73) DX

impression Autistic D/O, R/O, MR. More recent testing (2013) indicates borderline (WISC-IV VC 73 PR 77 WM 94 PS 85 FSIQ 76) and adaptive skills delayed to borderline (Vineland communication 79 daily living 66 social). Psych Eval (2015) suggests low average academics (WJ-III Reading 88) and borderline cognition (WISC-IV VC 85 PR 73 WM 74 PS 65 FSIQ 70). Adaptive skills borderline to low average (Vineland II Communication 92 Daily Living 73 Social 82 and Communication 84 Daily living 66 social 80). According to the IEP (2015) eligibility is OHI due to seizure d/o and ADHD. She received early start services but the case was closed at 3 yrs. w/ average IQ and Expressive Language d/o. She returned to SGPRC in 2009 and was assessed in the Autism Clinic. Autism was ruled out and she was not found for RC services.

Further Eval needed for RC eligibility determination. IQ results after her Eval at SGRPC at 3 yrs. have been lower. Some records indicate seizure d/o. Re-eval needed to include IQ test (WISC-V) and Eval of adaptive skills. Review of medical records, w/further eval if needed, for eligibility based on seizures.

(Ex. 8.)

20. On August 28, 2017, Louis Canales, SGPRC Intake Service Coordinator, performed a social assessment of Claimant and prepared a report of his findings. The social assessment noted that Claimant has good gross motor skills, but has difficulty

catching a ball. She is able to go up and down stairs without assistance. The report notes that she uses a fork or spoon without spillage, can prepare a snack or drink herself and uses the microwave. Her grandmother brings a lunch to school for her every day. Claimant insists on the same lunch each day and that it be prepared fresh. Claimant toilets without assistance. She performs personal care activities and hygiene, but needs assistance to complete those tasks. Claimant does not change her clothes and will wear the same clothes until she is told to change them. She also requires assistance to remain safe in unfamiliar places.

21. As to the communication domain, the report noted that Claimant uses sentences of three words or more and her speech is easily understood by others. It is also noted that she makes eye contact and follows two-step directions.

22. With respect to the social domain/emotional domain, the report notes that Claimant does not initiate social interactions, prefers to play alone and does not have friends. It also notes that Claimant had been bullied at school, exhibited disruptive behavior at school and stated that she did not want to live. Claimant was under the care of a therapist to address her behavior and emotional outbursts at home.

23. In the cognitive domain, the report notes that Claimant is able to tell a story, recite her Mother's cell phone number and her complete address. It was also noted that Claimant knows her multiplication tables up to 10, prints her name and can write a full sentence. She is also able to identify the days of the week and the complete date. Claimant receives assistance at school completing homework and understands her assignments.

24. On September 1, 2017, Clinical Psychologist Franklin Carvajal, Ph.D., LCP, (Carvajal), evaluated Claimant on behalf of the Service Agency to determine her level of cognitive, adaptive, and social functioning and to rule out Intellectual Disability. To conduct the assessment, Carvajal reviewed available records, conducted a structured observation, obtained parent and caregiver input, and administered the WISC-V and Adaptive Behavior Assessment System–Third edition (ABAS-3). Carvajal noted that Claimant appeared “tired, fatigued, and depressed. She did not engage the evaluator much when he attempted to interact with her. Claimant worked diligently and steadily without exhibiting aggressive or oppositional even when she was frustrated.” (Ex. 10.)

25. On the WISC-V, Claimant received a FSIQ of 88, within the low average range. Her subtest scores were generally consistent with her FSIQ. On the ABBAS-3, Claimant’s adaptive skills were in the low and below average range. The report noted that her skills were consistent throughout each domain without significant variance and she functions in the below average range on basic academic skills. It further noted that Claimant’s ability to make independent choices, exhibit self-control and take responsibility when appropriate were in the low range.

26. With respect to the social domain, Claimant was rated in the extremely low range for leisure skills and her ability to interact socially, initiate friendships, expressing emotions and assisting others.

27. With respect to the practical domain, her ability to function and get around in the community, including shopping and using community resources was rated in the extremely low range. Claimant’s abilities to protect her physical well-being, prevent injuries and follow safety rules were also rated in the extremely low range. Her abilities to perform self-care activities such as eating, dressing, and taking care of personal hygiene were rated in the extremely low range.

28. Carvajal opined that Claimant was not intellectually disabled based upon her FSIQ score. Carvajal noted that the FSIQ of 88 from his administration of the WISC-5 was 18 points higher than the previous score obtained in 2015 when she was nine years and eight months old. (Ex. 15.) Additionally, Carvajal opined that it was unlikely that Claimant's adaptive deficits were caused by her cognition level. Instead, he opined that the adaptive deficits Claimant exhibits "may be due to another psychological condition." He opined that Claimant should be closely followed by a mental health professional. Carvajal's diagnosis was: "R/O major depressive disorder R/O generalized anxiety disorder." (Ex. 10.) He also noted expressive language disorder, disruptive behavior disorder, epilepsy, FAS and ADHD, all by history.

29. Carvajal recommended that Claimant continue to receive services from the school district and continue to be followed by a neurologist and a psychiatrist. He also recommended psychotherapy for anxiety, depression and anger.

30. On October 12, 2017, the Service Agency issued a Notice of Proposed Action (NOPA) denying Claimant's request for services. According to the NOPA, Service Agency determined that Claimant was not eligible for services because she did not have a substantially handicapping qualifying condition. The decision was primarily based upon Dr. Carvajal's report ruling out intellectual disability. Claimant appealed the denial and requested a fair hearing. (Ex. 12.) On June 25, 2018, Claimant's appeal, OAH Case No. 2017110005, was dismissed because neither Claimant nor her representatives appeared for the hearing. (Ex. 13.) This was Claimant's second appeal of the Service Agency's denial of eligibility. However, the merits of Claimant's appeal were not adjudicated.

31. Assessment results from a third administration of the WISC-IV and VABS-II by the San Diego State University Teratogen Research Project are recorded as history

in subsequent assessor reports. Notes indicate that on July 20, 2018, August 24, 2018 and September 14, 2018, assessments were administered to Claimant. Notes indicate that Claimant achieved a FSIQ of 76, A VC of 76, and FR of 82. At that time, her VABS-III adaptive functioning composite score was 69. The actual assessment reports and details of the subtests were not offered at hearing.

32. On December 18, 2018, Hilary Jacobs Trout, M.S., an educational psychologist, prepared an independent assessment of Claimant. Ms. Trout's evaluation is a psycho-educational evaluation and is based upon the Individuals with Disabilities in Education Act of 2004 and American Psychological Association guidelines regarding psycho-educational evaluation. Ms. Trout is not a clinical psychologist and is not qualified to provide a diagnosis using the DSM-5 criteria.

33. Ms. Trout assessed Claimant using selected subtests of the WISC-V and the Kaufman Brief Intelligence Test (K-BIT). Because the WISC-V had been recently administered, and a re-administration would potentially be impacted by the "practice effect" of test familiarity, she only administered six subtests: information, comprehension, picture concept, arithmetic, letter-number sequencing and cancellation. Claimant performed in the average range on the picture concepts and cancellation subtests and in the very low range on arithmetic. She scored in the low range on the remaining subtests. Ms. Trout opined that Claimant's performance was consistent with her performance in 2013 and 2015 at San Diego State. The testing results showed Claimant's strength in the visual realm and weakness in the verbal and memory domains. Her processing speed as demonstrated on the Cancellation subtest was higher than previously assessed.

34. Claimant received a IQ Composite score of 75, within the low range, on the K-BIT. She received a composite score of 70 on the Verbal index, within the low

range, and a composite score of 87, on the non-verbal index, within the low average range. Ms. Trout opined that Claimant's cognitive ability is within the low range of intellectual functioning. Ms. Trout also considered the 2018 administration of the VABS-III by San Diego State that yielded a score of 69, within the very low range and "is characteristic of an individual with a[n] Intellectual Disability." (Ex. 17.)

35. Ms. Trout concluded that based upon her cognitive scores and adaptive deficits, Claimant "requires support across multiple environments, currently both home and school, and will likely require support in a vocational setting. Assessment data indicates that [Claimant] should be considered by the Regional Center for the 5th category: a disabling condition similar to that which requires support for individuals with an intellectual disability." (Ex. 17.)

36. On February 1, 2019, Disability Rights of California provided Mother with a "Closing Advice Letter" from Aimee Delgado, Clients' Rights Advocate expressing her "legal opinion" that Claimant qualifies for Regional Center Services as either a person with "Intellectual Disability or '5th Category' based on her diagnosis of Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure." (Ex. 18.) The evidence did not establish that Ms. Delgado was a physician or psychologist qualified to diagnose Claimant or a lawyer qualified to give a "legal opinion."

37. On February 12, 2019, Dr. Lagenbacher again reviewed Claimant's file. Dr. Lagenbacher wrote the following note:

I reviewed new records received. [Claimant] has received Early Start services, and was tested at the RC in 2009 and 2017. ASD was ruled out in Autism Clinic in 2009. Testing by

Dr. Carvajal in 2017 was not suggestive of ID. In new records, prior IQ tests results are cited:

2009 WPPSI-III FSIQ 73 VC 73 PR 77 PIQ 76

2013 WISC IV FSIC-IV FSIQ 76 VC 73 PR 77 WM 94 PS 75

2015 WISC-IV FSIQ 70 VC 85 PR 73 WM 74 PS 65 Only odd numbered pages from the 12/18 report were submitted. It would be helpful to review full report subtests from WISC-V (Pg 7) indicate several in the average range and some borderline, which may reflect LD. There is also an undated report from SED State University that appears to be missing pages. Table of scores on Vineland indicates Borderline to delayed skills. Please resubmit with full report."

(Ex. 19.)

38. On February 15, 2019, Dr. Lagenbacher reviewed additional materials and wrote the following note:

The psych eval from Cal State SD indicates Borderline Cognition (WISC-V FSIQ 76, VC 76 IR 82 PS 75) 2 subtests were in the average range. Language scores were also in the Borderline range (CELF5 Core 79 Receptive 77 Expressive 73). Adaptive Skills Borderline to mildly delayed (VABS-3 Communication 77 Daily Living 65 Social 66). The Psych Ed Eval (12/18) indicates Borderline cognition (KBIT-2) verbal 70 nonverbal 87 FSIQ 75). School psych

recommends RC to consider 5th category (?). Re-Eval needed to determine RC eligibility. Scores have been variable with most recent in the Borderline range.

(Ex. 19.)

39. On March 12, 2019, Louis Canales, SGPRC Intake Coordinator, completed a social assessment of Claimant which included a meeting with Claimant and Mother. Mr. Canales noted that although Claimant had a long history of treatment for depression, Mother advised that the treating therapist had recently informed her that Claimant had not been depressed. Additionally, "absent" seizures were ruled out and Claimant does not take seizure medication. Mr. Canales gathered information concerning Claimant's current functioning in the areas of motor, independent living/self-help, communication, social/emotional and cognitive.

40. In the motor domain, Claimant was noted to have good gross motor skills "as she can use both hands to manipulate objects and can walk at least twenty feet with good balance. [Claimant] can throw and she has difficulty catching a ball. [C]laimant] can climb up and down stairs without assistance." (Ex. 20.)

41. In the Independent Living Domain/Self-help domain, Canales noted that Claimant eats with a fork or spoon without spillage, makes herself a snack, uses the microwave, and an air fryer. She is also able to brush her teeth, and shower independently without reminders. She is able to pick out her own clothes, but prefers to wear the same thing all the time. She also knows to watch out for cars and to follow traffic signals when crossing the street.

42. In the communication domain, it was noted that Claimant is able to "communicate her needs using sentences of three words or more and her speech is

easy to understand by strangers. [Claimant] can answer yes/no questions and responds to her name. She and she indicated she does not have friends.” (Ex. 20.) The report notes that Claimant does not have friends and prefers to play alone and does not like attending family events.

43. In the social/emotional domain, it was noted that Claimant does not typically initiate social interactions with peers and she has one best friend. She has been bullied at school and has had behavior problems at school. Claimant has also made suicidal statements. Claimant is now able to make change for a twenty-dollar bill although she does not like to shop and prefers to make her purchases from home. Claimant has emotional outbursts at home which are primarily triggered by her older sister.

44. Psychologist Cynthia Bautista, Psy. D. assessed Claimant on March 25, 2019 and drafted a report dated April 29, 2019. To conduct the assessment, Bautista conducted a clinical interview and observations, review of records, WISC-V, ABAS-3, and ADOS-2. Bautista administered all 10 subtests of the WISC-V. During this evaluation, Claimant received a FSIQ of 85 placing her in the low average range. She received a scaled score of 81 on the Verbal Comprehension Index (VCI) within the low average range; a 100 on the Visual Spatial Index (VSI) within the average range, Fluid Reasoning Index (FRI) 79, within the borderline range; Working Memory Index (WMI) 97, within the average range; processing speed (PSI) 83, within the low average range; nonverbal index (NVI) 85, within the low average range, and general ability (GAI) 83, within the low average range.

45. Bautista used the ABAS-3, a rating scale, to gauge Claimants’ adaptive skills. Mother was the informant for the rating scale. Claimant’s general adaptive composite (GAC) score was 67, within the very low range. Claimant’s conceptual score

of 73 was in the low range; her social score of 71 was in the low range and her practical score of 66 was in the extremely low range.

46. The ADOS-2, module 3 was administered to assess the likelihood that Claimant has Autism Spectrum Disorder. Claimant showed no signs of stereotyped behaviors or restricted interests, (e.g. she made eye contact with the assessor) and she demonstrated her ability to be imaginative and creative when playing with toys and objects including creating a short and engaging story. She utilized a range of gestures and was able to express emotions and made attempts to engage the assessor by asking for more puzzle pieces during the clinical observation. Her speech was not stereotypical and did not evidence echolalia. Claimant's Communication and Social Interaction score was 6 and her comparison score was 3, classifying her in the non-spectrum category.

47. Bautista opined that Claimant is not intellectually disabled. Bautista opined that Claimant's developmental history points to limitations regarding her cognitive abilities and adaptive functioning. Bautista noted that Claimant has low average cognition and her abilities are limited by her cognition. Her cognitive abilities were measured with an FSIQ score of 85, Nonverbal score of 85 and GAI of 83. Her adaptive functioning skills are measured with a score of 67. According to Bautista, "[l]ow cognition in children causes learning difficulties, social problems, motor skill impairment, and can adversely affect ability to perform successfully in life." (Ex. 21.)

48. Bautista's recommendations for Claimant are as follows;
- a. Encourage independence. It would be beneficial for parents to help [Claimant] learn daily care skills.

- b. Create opportunities. It is recommended that parents create multiple opportunities to practice skills and learn more information to move into long term memory; break tasks into smaller parts.
- c. Generalize skills. It is recommended that parents help [Claimant] generalize what she will learn to other contexts; natural contexts.
- d. Give frequent feedback. It would be beneficial to praise [Claimant] when she does well. Build her abilities.
- e. Open up opportunities to develop social skills. It is recommended for parents to seek social activities in the community to help [Claimant] build social skills.
- f. It is important to have [Claimant's] attention before giving oral directions; give only one direction at a time; use short and simple sentences to ensure understanding.
- g. It is important to repeat instructions or directions frequently. Proceed in small ordered steps and review each frequently.
- h. It is recommended for [Claimant] to seek ways to improve her adaptive skills to maintain and generalize skills by using visuals or natural environment teaching.

(Ex. 21.)

49. On May 29, 2019, the eligibility team determined that Claimant was not eligible for services because she was determined not to have a developmental disability. (Ex. 22.) The team recommended that she continue appropriate education services, social/recreational activities and that independent living skills be encouraged.

50. On May 30, 2019, SGPRC issued a Notice of Proposed Action wherein it notified Claimant that she "was found ineligible for SGPRC services because she was found not to have a developmental disability" and "does not meet the criteria for regional center services." (Ex. 1.) Claimant appealed SGPRC's eligibility determination and requested a fair hearing. In her request for hearing, she asserted that, based upon information she received from Disability Rights of California, she has a disability that is closely related to intellectual disability or requires treatment similar to the treatment required by people with intellectual disability and is therefore eligible for services pursuant to the criteria of the fifth category. (Ex. 2.)

51. Neither party offered expert testimony to further explain the assessment results, proposed treatment or rationale for the various diagnoses. Claimant offered the testimony of Mother and Father at hearing. The credible testimony corroborated the adaptive functioning deficits set forth in the various assessment reports and detailed the dedication and care that Mother and Father have given to Claimant and her sister. It was evident from the testimony that Claimant's parents are frustrated with the lack of resources available to her and have diligently sought out and fought for resources to assist Claimant. There is no doubt that the stability, patience, love and care that Mother and Father displayed at hearing have benefitted Claimant.

52. Father credibly testified about observing seizures that made him think she had lost consciousness or died. Father also testified about Claimant's confusion and inability to remember how to complete tasks such as cleaning herself after

toileting, rinsing conditioner from her hair and choosing clothes to wear from a selection of identical outfits. Mother testified about Claimant's idiosyncrasies regarding food and clothing and the pain of watching Claimant struggle with daily activities.

LEGAL CONCLUSIONS

1. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (Welf. & Inst. Code, §§ 4700-4716.) Parent requested a hearing, on Claimant's behalf, to contest Service Agency's proposed denial of Claimant's eligibility for services under the Lanterman Act and therefore jurisdiction for this appeal was established.

2. Generally, when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on her to prove by a preponderance of the evidence that she meets the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; Evid. Code, §§ 115, 500.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it. [Citations] . . . [T]he sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325.)

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

[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. . . . [T]his 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.

The eligibility categories of cerebral palsy, epilepsy and autism are not at issue in this fair hearing. Only the eligibility categories of intellectual disability, and the disabling condition closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, also known as the fifth category, will be addressed.

4. To prove the existence of a qualifying developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that she has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (a)(1):

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

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

5. Additionally, California Code of Regulations, title 17, section 54001 further refines the definition of "substantial disability." It states, in pertinent part:

(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

6. California Code of Regulations, title 17, section 54001, subdivision (b), provides, in pertinent part, that the "assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines," and the "group shall include as a minimum a program coordinator, a physician, and a psychologist."

7. In addition to proving that she suffers from a "substantial disability," a claimant must show that her disability fits into one of the five categories of eligibility set forth in Welfare and Institutions Code section 4512.

8. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of "Intellectual Disability." Consequently, when determining eligibility for services and supports on the basis of intellectual disability, that qualifying disability had previously been defined by the DSM-5 diagnostic definition of intellectual disability.

9. The DSM-5 describes intellectual disability as follows:

Intellectual disability . . . is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

(DSM-5, p. 33.)

10. The DSM-5 notes the need for assessment of both cognitive capacity and adaptive functioning and that the severity of intellectual disability is determined by adaptive functioning rather than IQ score. (*Id.* at 37.)

11. Pursuant to Welfare and Institutions Code section 4512, subdivision (a), the "fifth category" of Lanterman Act eligibility provides assistance to individuals with "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 does "not include other handicapping conditions that are solely physical in nature."

12. The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the California Court of Appeal held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to [intellectual disability], with many of the same, or close to the same, factors required in classifying a person as [intellectually disabled]. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well."

13. Individuals may qualify for regional center services under the fifth category on either of two independent bases, with one basis requiring only that an individual require treatment similar to that required for individuals with intellectual disability. Thus, an individual can qualify for regional center services under the fifth category if he or she satisfies either prong: (1) a condition closely related to intellectual disability or (2) a condition requiring treatment similar to that required for an

intellectually disabled individual. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.)

14. Determining whether a claimant's condition "requires treatment similar to that required" for persons with intellectual disability is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people, including those who do not suffer from intellectual disability, or any developmental disability, could benefit from the types of services offered by regional centers (e.g., counseling, vocational training, living skills training, or supervision). The criterion therefore is not whether someone would benefit from the provision of services, but whether that person's condition requires treatment similar to that required for persons with intellectual disability, which has a narrower meaning under the Lanterman Act than services. (*Ronald F. v. Dept. of Developmental Services* (*Ronald F.*) (2017) 8 Cal.App.5th 94, 98.)

Discussion

15. Claimant consistently displays cognitive skills in the high borderline to low average range and moderate to severe deficits in adaptive skills on a variety of measures. Claimant's cognitive skills, regardless of her adaptive skill deficits, make her cognitive level too high for her to be considered intellectually disabled. Therefore, Claimant does not meet the criteria under the DSM-5 for a diagnosis of intellectual disability, despite her adaptive deficits because her cognitive performance is much higher than could be achieved by someone with intellectual disability and her adaptive skills deficits alone, although important, are not enough to warrant a diagnosis of intellectual disability. Furthermore, no assessor diagnosed Claimant with intellectual disability. Therefore, she does not qualify for regional center services under the category of intellectual disability.

16. However, Claimant has provided sufficient evidence to establish that she demonstrates deficits in cognitive and adaptive functioning to such a degree and in such a manner that she qualifies under the fifth category of eligibility, i.e., a person suffering from a condition similar to intellectual disability or requiring treatment similar to intellectual disability. Claimant has a seizure disorder and suffers from central nervous center damage related to FAS and possibly PKU. Claimant's overall cognition scores place her in the low average to borderline range. However, subtests that require memory, processing speed, logic or integration of ideas show consistent deficits. Furthermore, both Dr. Laboriel and SGPRC's assessor, Bautista, provided treatment recommendations that included repetition, simple steps, verbal and visual instruction and generalization for the improvement of Claimant's adaptive and social skills. These recommendations are consistent with the types of interventions and treatments of an individual with intellectual disability. (see Ex. C-9, 14 and 17.) While Claimant has been diagnosed with a number of mental health issues, there is no evidence that her deficits are solely related to such conditions. Claimant's mental health issues and ADHD diagnosis are consistent with her diagnosis of FAS and may be symptoms of her FAS diagnosis. (see Exs. C-9 and 14). Moreover, although Ms. Trout did not diagnose Claimant with intellectual disability, she opined that Claimant's assessment results were consistent with intellectual disability (Factual Finding 35) and "requires support across multiple environments, currently both home and school, and will likely require support in a vocational setting" similar to that required for an intellectual disability. (Factual Findings 32-35 and Ex. 17.)

17. Claimant's disability is substantially handicapping to her and impacts her learning, self-care, self-direction and capacity for independent living as is evidenced by her scores on various measures of adaptive functioning over an extended period of time and as corroborated by the credited testimony of her Parents. The Service Agency

offered no credible evidence to rebut the overwhelming evidence of substantial disability proffered by Claimant in the form of clinical observations, history, assessment data and anecdotal testimony of Claimant's parents.

Disposition

18. The preponderance of the evidence supports a finding that Claimant is eligible to receive regional center services under the fifth category of eligibility, as a person suffering from a condition similar to intellectual disability or requiring treatment similar to intellectual disability. There is no disagreement about the substantially handicapping nature of Claimant's disability. (Factual Findings 1-52 and Legal Conclusions 1-17.)

ORDER

Claimant's appeal is granted. Claimant is eligible for regional center services under the fifth category of eligibility.

DATE:

GLYNDA B. GOMEZ
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 90 days.