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. 2020010617

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on April 6, April 15, June 24, and October 26, 2021, due to the ongoing COVID-19 pandemic.

Claimant's adoptive father, who is also her maternal uncle, represented claimant who was not present.

Senait Teweldebrahn, Fair Hearing Representative, represented Inland Regional Center (IRC).

Oral and documentary evidence was received. The record remained open for the parties to submit written closing arguments. The record was closed and the matter was submitted for decision on November 5, 2021.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) as a result of an intellectual disability or a disability closely related to an intellectual disability or that requires treatment similar to that required for individuals with an intellectual disability (the "fifth category") that constitutes a substantial disability?

SUMMARY

Claimant failed to establish that she is eligible for regional center services under a diagnosis of intellectual disability or under the fifth category. While claimant does have multiple psychiatric issues, the evidence did not establish that they are due to a developmental disability that would qualify her for regional center services. Claimant's appeal of IRC's determination that she is not eligible for services is denied.

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 4, 2019, IRC notified claimant that she was not eligible for regional center services.

2. On December 30, 2019, claimant's father/legal guardian filed a fair hearing request appealing that decision and the matter was set for hearing.

Claimant's Assertion for Eligibility

3. Claimant is currently a 14-year-old female. She asserted she was eligible for services on the basis of intellectual disability and/or under the fifth category.

Diagnostic Criteria for Intellectual Disability

4. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) contains the three diagnostic criteria that must be met in order to make a diagnosis of intellectual disability. Criterion A: deficits in intellectual functions; Criterion B: deficits in adaptive functioning; and Criterion C: the onset of these deficits during the developmental period. An individual must have a DSM-5 diagnosis of intellectual disability to qualify for regional center services. Intellectual functioning is typically measured using intelligence tests. Individuals with intellectual disability typically have IQ scores in the 65-75 range.

Claimant's expert misread the DSM-5 at pages 33 and 38 and incorrectly opined that the pages conflict. The expert erroneously concluded that page 38 states that only one of the three criterion is required to make a diagnosis of intellectual disability. However, contrary to his testimony, the DSM-5 does not conflict. Page 33 clearly states that these three criteria, Criteria A, B and C, are required for the diagnosis, whereas page 38 simply states how Criterion B can be satisfied. Page 38 does not state that only Criterion B is required for the diagnosis. Thus, claimant's expert's opinion in that regard is rejected.

The "Fifth Category"

5. Under the "fifth category" the Lanterman Act 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 provide services for "other handicapping conditions that are solely physical in nature." (Welfare and Institutions Code section 4512, subdivision (a).) Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

The fifth category is not defined in the DSM-5. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the court held that the fifth category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (Of note, the DSM-5 uses the term "intellectual disability," the condition previously referred to as "mental retardation." The cases were decided when the term mental retardation was in use and contain that term in their decisions. For clarity, that term will be used when citing to those holdings.)

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines). (Of note, the ARCA guidelines have not gone through the formal scrutiny required to become a regulation and were written before the DSM-5 was in effect and are not entitled to be given the same weight as regulations.) In those Guidelines, ARCA noted that eligibility for

Regional Center services under the fifth category required a "determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation **OR** requires treatment similar to that required by individuals with mental retardation." (Emphasis in original.) The Guidelines stated that *Mason* clarified that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines listed the factors to be considered when determining eligibility under the fifth category.

Another appellate decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, has suggested that when considering whether an individual is eligible for regional center services under the fifth category, that eligibility may be based largely on the established need for treatment similar to that provided for individuals with mental retardation, and notwithstanding an individual's relatively high level of intellectual functioning. In *Samantha C.*, the individual applying for regional center services did not meet the criteria for mental retardation. Her cognitive test results scored her above average in the areas of abstract reasoning and conceptual development, and she had good scores in vocabulary and comprehension. She did perform poorly on subtests involving working memory and processing speed, but her scores were still higher than persons with mental retardation. The court noted that the ARCA Guidelines recommended consideration of the fifth category for those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)." (*Id.* at p. 1477.) However, the court confirmed that 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 mental retardation.

Expert Witness Testimony

IRC's Expert Witness

6. Ruth Stacy, Psy.D. is a staff psychologist at IRC. Dr. Stacy received her Bachelor of Arts degree in psychology and sociology from California Baptist University in 1978. She received her Master of Arts in sociology from California State University, Chico, in 1980. In 1984 she received a Two Year Certificate from Rhema Bible Training Center and in 2008 she received her Doctor of Psychology degree from Trinity College of Graduate Studies. Dr. Stacy's curriculum vitae (CV) was received in evidence which documented her education, experience, and certifications/trainings. Claimant attempted to discredit Dr. Stacy because a book she wrote about living generously was not listed on her CV and the publisher's "#1 Best Seller" gold tag was on some website pictures of her book but not others. Dr. Stacy credibly explained why she omits her book from her professional CV - she does not want families applying for regional center services to feel pressured to purchase her book - and why she asked the publisher to remove the gold sticker - she did not want it on her cover. Neither of those matters diminished Dr. Stacy's credibility or opinions, and this attempt to discredit her was unpersuasive.

7. Dr. Stacy's opinions are incorporated in the findings reached herein. Of note, Dr. Stacy was called as a witness in both IRC's and claimant's cases in chief, so testified on two separate occasions. When called by IRC, most of Dr. Stacy's testimony was simply her reading and reciting from documents, without offering much insight into how she relied on those documents to reach her opinions, making her testimony of little worth. As set forth in Evidence Code section 720, subdivision (a), an expert is an individual who "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

Merely reading from reports is not the purpose of expert testimony. When Dr. Stacy ultimately did provide testimony about how she relied on the documents she reviewed to formulate her opinions, that testimony was helpful and was a proper use of expert testimony. When Dr. Stacy was examined during claimant's case in chief, much of the examination was spent questioning her about test protocols and articles and asking her to affirm matters in the records or explain why certain matters were not referenced in her report. Nothing in that questioning changed any of Dr. Stacy's opinions, or demonstrated that she had not considered all of the evidence and she credibly explained her testing methods and choices.

Dr. Stacy presented as a calm, forthright witness. She answered all questions posed to her and credibly explained her findings. She was patient during claimant's questioning, and it was clear she was trying to help claimant understand the bases for IRC's determination.

CLAIMANT'S EXPERT WITNESS

8. Richard Addison, Psy.D., LEP (Licensed Educational Psychologist), ABSNP (American Board of School Neuropsychology), is licensed by the California Board of Behavioral Sciences. He obtained his Master's in educational psychology from Azusa Pacific University and was certified to become a school psychologist in 2006. He then obtained his Doctor of Psychology, specifically educational psychology, from Alliant University. In 2013 he was certified by Dr. Daniel Miller, who is the Director of School Psychologists at Texas Women's College. Dr. Miller runs a separate one year program in school neuropsychology and that certification qualified Dr. Addison to join the American Board of School Neuropsychologists.

Dr. Addison has been a practicing school psychologist in the Temecula Valley school district since 2006, and was a paid intern in the Oceanside school district in 2005. He also performs independent evaluations for other school districts when there are objections to a student's Individualized Education Program (IEP). In order to serve in that role, Dr. Addison underwent a vetting process and all of his findings have always been accepted by those outside school districts. Dr. Addison explained that he provides objective evaluations, he "calls balls and strikes," and has no stake in the outcome.

Dr. Addison also presented as a calm, forthright, honest witness. He answered all questions posed to him and it was obvious that he was extremely well educated and competent to perform school evaluations. Of note, Dr. Addison readily admitted that he did not know regional center eligibility requirements and had only been asked to render opinions regarding claimant's eligibility for special education school services.

Dr. Addison first evaluated claimant in 2017, when her parents disagreed with her school district's determination that one of her three qualifying categories for special education services was "Emotional Disturbance." Dr. Addison authored reports, reviewed records, and testified in this hearing. His opinions are incorporated herein.

EVALUATION OF THE EXPERTS

9. Dr. Stacy rendered opinions regarding eligibility for regional center services under the Lanterman Act and California Code of Regulations, title 17. Using those criteria, she determined that claimant was ineligible for services. Dr. Addison, on the other hand, opined that claimant qualified under the Education Code and California Code of Regulations, title 5, category for special education services on the basis of Intellectual Disability. When asked about claimant's eligibility for regional

center services he replied, "I have no idea." Eligibility for regional center services under Title 17 is much more restrictive than eligibility for special education services under Title 5. Dr. Addison did not know regional center eligibility requirements, having only been asked to determine eligibility for special education services. Further, as noted above, Dr. Addison misread portions of the DSM-5 which detracted from his opinions.

Accordingly, Dr. Stacy was the only expert who rendered opinions regarding regional center eligibility using Lanterman Act criteria, making her opinions more persuasive than Dr. Addison's. Although Dr. Addison is an extremely well qualified educational neuropsychologist, and his testing of claimant for school district services was thorough, his opinions that she qualified for special education services under the special education category of intellectual disability did not mean she qualified for regional center services. Moreover, the evidence established that Dr. Stacy performed an extensive review of the records, and her testing of claimant was appropriate, contrary to claimant's contention that Dr. Stacy "cherry picked" those records that supported her opinions and discounted those that did not. The records received in evidence also supported Dr. Stacy's opinions regarding eligibility. As such, Dr. Stacy's opinions were given more weight.

Dr. Stacy's explanations were also reasonable, and none of her opinions were refuted by Dr. Addison nor were they shown to be unreliable or inaccurate. Dr. Stacy credibly explained why, although claimant may have "features associated with an intellectual disability," she does not have an intellectual disability, nor does she qualify under the fifth category. Nothing in Dr. Stacy's testimony undermined her opinions or demonstrated that they were incorrect. On this record, claimant failed to demonstrate she has an intellectual disability, or a disabling condition found to be closely related to

intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. As such, her appeal must fail.

Documents Introduced at Hearing

10. April 5, 2008, medical records document that when claimant was 18 months old, she was treated in the emergency room after her biological father swung her by the arm and dropped her on her head. Child Protective Services brought claimant to the emergency room and her father was arrested. The CT scan was negative. Claimant was diagnosed with child abuse, mild head injury, and possible nursemaid elbow-self-induced. Nothing in this record established eligibility for regional center services.

11. On September 23, 2009, when claimant was two years, eight months old, she underwent an occupational therapy (OT) evaluation because of concerns of sensory integration. After testing, the therapist concluded that claimant demonstrated impaired fine motor skills, difficulty with sensory processing and modulation, difficulty with attention, and decreased strength. Claimant would benefit from skilled OT to address those issues. Caregiver education was provided, and a treatment plan was created. Nothing in this report established eligibility for regional center services.

12. A December 23, 2009, pediatric neurology report, when claimant was two years, 11 months old, documented that claimant was seen because of "concerns about developmental delay." Claimant's prenatal exposure to methamphetamine and delayed cognitive and social skills were reported. The mental status exam noted that claimant was "alert, generally cooperative, [and] grossly oriented to person." She had some articulation difficulties. Her attention span and memory were "grossly age appropriate." In the Impression section, the physician noted that claimant had

"delayed speech, sensory issues, difficult behavior, brother with similar problems." Claimant's speech was "delayed, expressive more than receptive; behavior in office appears appropriate." The physician did not see a need for any further neurological workup, but "strongly" recommended that claimant continue to receive her occupational and NEIS (acronym not explained) services, "probably continue to be followed by a pediatric neurologist or developmental pediatrician," and would "probably also benefit from some counseling/behavioral management and even an evaluation by a child psychiatrist." The physician's assessment was "delayed milestones" which is not a qualifying diagnosis for regional center services.

13. A January 22, 2010, report from claimant's school district, when she was three years old, documented the assessment conducted to evaluate claimant for special education placement. Multiple tests were administered. The scores of the DP-3 Cognitive Scale assessment fell within the delayed range. The report noted that claimant "was not administered a direct assessment of cognitive functioning. Further testing to ascertain actual levels of cognitive functioning will be warranted when [claimant] is more ready to participate in such assessments." The Bracken Basic Concept Scale - Revised, a test used to assess the basic concept development of children, was attempted. Claimant "was unable to condition to the task" and her "readiness skills would be considered to be significantly delayed in comparison to children of a similar age." The Observation section noted the difficulty claimant had with tasks but, although she "was impulsive and busy, she was cooperative and willing to participate with imitating skills during the assessment process."

On the Developmental Profile 3 administered, the physical scale scores, social-emotional scale scores, and communication scale scores all fell within the delayed range. The adaptive behavior scale scores fell within the below average range. The

report noted that claimant frequently bumps into things and attempts have been made to get her to straighten her posture. Her scores on the Beery-Buktenica Developmental Test of Visual-Motor Integration, 5th Edition, fell within the below average range. A test to determine claimant's speech and language skills was discontinued because of her decreased expressive vocabulary and increased distractibility. The report documented that although claimant's "speech/articulation skills are increasing, her current level is less than what would be expected and may impact her involvement and progress in developmentally appropriate activities" and direct speech intervention services were recommended. A test to determine her auditory comprehension of language was also attempted but could not be completed "due to her increased activity level coupled with her inability to condition to task as the language presented became longer and more complex in nature."

Claimant was observed to be "fairly distractible and often required several repetitions of stimulus items and prompts." The Summary and Recommendations section noted that the "results of the assessments conducted . . . suggest that [claimant] is experiencing delays in motor skills, cognitive development, receptive and expressive language development, adaptive behavior/self help skills, and social skills." It was recommended that the assessments be reviewed to determine whether claimant met eligibility criteria for special education services under the category of Developmental Delay, which is not a qualifying diagnosis for regional center services. Moreover, as noted above, special education qualifying criteria are less stringent than those for regional center services.

14. Claimant's January 22, 2010, IEP documented that she was eligible for special education services under the category of developmentally delayed. Nothing in this IEP established eligibility for regional center services.

15. Claimant's February 17, 2010, IEP from the school district where she was enrolled after being adopted by her maternal uncle, documented that her primary disability qualifying her for special education services was mental retardation, the term formerly used for intellectual disability. It was unclear how that classification was determined. This classification was even more confusing because the Notes section stated that the reason for this IEP was to inform claimant's parents of the IEP process, to convert the IEP from her prior school district, and that the "[a]nnual goals and objectives . . . were taken from the original initial IEP and slightly modified to focus on the skills the team felt should be focused on for [claimant]." As the former IEP did not reference "mental retardation" it was not explained why this IEP had that as a qualifying category. (Although a possible explanation for this classification was contained in the IRC report referenced below in Factual Finding No. 18.) The IEP further noted that claimant's "parents agreed that her current placement as specified in the original initial IEP, of SDC (acronym not explained) pre-school speech services would be most appropriate for her." Claimant was placed in a general education class with consult and/or collaboration from the special education staff. Even assuming that the "mental retardation" classification was correct, school districts are governed by Title 5, which is more inclusive and less restrictive than Title 17.

16. An IRC social assessment on June 11, 2010, when claimant was three year, five months old, was performed when claimant initially requested services. Claimant had been referred to IRC because of suspected developmental delays. Claimant had poor independent living skills, limited vocabulary, and was hyperactive with disruptive and aggressive social behaviors. The Impressions section documented that it was "really unclear if [claimant] is going to qualify or not. She has some obvious delay, but in other areas, she seems to be quite alert and smart. She will need to be tested at [IRC] to find out if she is going to qualify."

17. IRC's June 11, 2010, medical evaluation of claimant determined that a review of systems was unremarkable, and the physical exam was essentially normal. Claimant had moderate speech delay and eligibility for regional center services was deferred pending a psychological evaluation.

18. On July 14, 2010, claimant underwent an IRC psychological assessment. Sara Hibbs, Psy.D., an IRC staff psychologist, performed that assessment and authored a report. Claimant's parents were interviewed, and claimant was observed. Her file was reviewed, and background information was obtained. The Wechsler Preschool and Primary Scale of Intelligence, 3rd Edition (Wechsler), the Autism Diagnostic Observation Schedule (ADOS) Module 1, and the Child Development Inventory (CDI) were administered. Claimant's scores on the Wechsler were in the average and low average ranges. Her ADOS scores demonstrated that she did not have autism. Her CDI was approximately one to two years below her age level. IRC determined that claimant did not to meet DSM-IV criteria (the DSM in effect at the time) for a diagnosis of mental retardation, as it was then called, because her scores were in the low average to average ranges of functioning, and she did not exhibit substantial deficits in at least two areas of adaptive functioning.

The Summary noted that claimant's previous developmental assessment indicated global developmental delays[1] in the range of mental retardation which was

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[1] The DSM-5 defines Global Developmental Delay as:

> This diagnosis is reserved for individuals *under* the age of 5 years when the clinical severity level cannot be reliably assessed during early childhood. This category is diagnosed

used as a basis for special education eligibility under the category of "mental retardation" pursuant to the Title 5 regulations, which governs school districts. Dr. Addison testified that because very young children cannot be given the cognitive tests that are given to older children, the "global developmental delay" diagnosis is used. He opined that claimant being assessed with global developmental delays meant "someone determined that at age three she was severely behind intellectually." However, global development delays are not qualifying regional center diagnoses.

19. IRC's July 14, 2010, "Continuous Notes" documented that the eligibility team determined claimant was not eligible for services because she did not have a developmental disability or autism. It was recommended she continue with special education, speech and language interventions, medical and dental care, and occupational therapy at school.

20. A February 10, 2011, county Mental Health Plan, noted claimant's diagnoses of Reactive Attachment Disorder, Disinhibited Type; Disruptive Behavior Disorder; Rule Out Attention Deficit Hyperactivity Disorder (ADHD); and Rule Out Encopresis (involuntary defecation). Claimant was also noted to have Pervasive Development Disorder and impaired speech. Therapy was recommended. The February

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> when an individual fails to meet expected developmental milestones in several areas of intellectual functioning, and applies to individuals who are unable to undergo systematic assessments of intellectual functioning, including children who are too young to participate in standardized testing. This category requires reassessment after a period of time. (Emphasis in original.)

23, 2012, Discharge Summary noted that treatment goals were met. Claimant had "huge improvement," was to continue psychotropic medications with Maria Moya, M.D., a psychiatrist, and return if needed. Claimant's discharge diagnoses were ADHD Combined Type and Reactive Attachment Disorder, neither of which are regional center qualifying diagnoses.

21. Claimant's February 16, 2011, IEP, when she was four years old, noted that her primary disability was intellectual disability, and her secondary disability was "none." Claimant met all of her annual goals except writing which she partially met. An area of concern was her ability to express feeling and emotions. There were amendments documented in the IEP, one of which was dated May 14, 2020, and noted that claimant was approved for Extended School Year (ESY) services due to her significant delays in speech, articulation, and peer interaction. It was not established how the intellectual disability category was determined, but as noted above, this category assigned by school districts is not controlling on regional centers.

22. A May 6, 2011, Psychiatric Evaluation performed by Sean Barlow, M.D., at Barbara Sinatra Children's Center, when claimant was four years old, indicated she was being evaluated for possible psychiatric illness because she was "often difficult to manage." Dr. Barlow diagnosed Oppositional Defiant Disorder (ODD); Phonological Disorder; Rule out Reactive Attachment Disorder infancy and childhood; and Encopresis. None of these are qualifying regional center diagnoses. Dr. Barlow recommended claimant continue with individual psychotherapy, clinics, and in-home behavioral support. Dr. Barlow wrote that he did "not see any clear mental retardation or other clear developmental issues other than reactive attachment issues." That opinion mirrored Dr. Stacy's opinions and IRC's eligibility team's findings.

23. A February 10, 2012, Psychological and Education Report prepared by claimant's school district, when claimant was five years, zero months old, documented the reevaluation performed to determine her continuing eligibility for special education services prior to entering kindergarten. The areas of suspected disability were Intellectual Disability and Other Health Impairment. The school psychologist made direct observations, reviewed records, and administered the Kaufman Assessment Battery for Children II, the NEPSY II, the Beery VMI - Fifth Edition, the Adaptive Behavior Assessment System II, the Behavior Assessment System for Children II (BASC II), and the Bracken School Readiness Assessment. Claimant was tested over four days. She was cooperative but easily distracted and displayed impulsivity. The report specifically noted: "Although results gathered are believed to be valid for purposes intended, due to [claimant's] young age, testing results cannot be regarded as predictive of future functioning."

Claimant's Kaufman composite scores were in the average ranges, with subtests scattered in the extreme, below average, and average ranges. The examiner noted that sustaining claimant's attention may have affected her poor scores. NEPSY scores ranged from At Expected Levels, Borderline, and Below Expected Levels. Claimant was noted to have difficulties expressing herself verbally. Claimant's VMI scores were below average, and she used an intermediate pencil grip. Her parent's scores regarding claimant's behaviors on Adaptive Behavior tests were much lower than her teacher's scores. Claimant's achievement scores had a wide range of results, with her math scores being low. Her "pre academic skills appear age appropriate." As a result of this assessment, claimant qualified for special education services under the categories of Other Health Impairment because of her ADHD and Speech and Language Impairment, which are not regional center qualifying diagnoses. Specifically, claimant did "not qualify for special education under the primary handicapping condition of

Developmental Delay Ages 0-7/ Intellectual Disability" which was consistent with Dr. Stacy's opinions.

24. Claimant's February 10, 2012, IEP noted that her primary qualifying disability was Other Health impairment, and her secondary impairment was Speech or Language Impairment. Her receptive language was now within normal limits, but she still had delays in verbal expression and articulation. She was taking medication for her ADHD and met monthly with a psychiatrist. Nothing in this report established eligibility for regional center services.

25. Claimant's February 8, 2013, IEP noted that her primary qualifying disability continued to be Other Health Impairment and her secondary impairment was Speech or Language Impairment. She continued to exhibit delays in verbal expression and articulation and have some social interaction difficulties. She continued to take medication for her ADHD. Nothing in this report established eligibility for regional center services.

26. A March 15, 2014, Psychoeducational Case Study Report, prepared by claimant's school district as part of her three-year reassessment of special education services was performed when claimant was seven years, one month old. Other Health Impairment and Speech or Language Impairment were reassessed, as well as the category of Specific Learning Disability because of claimant's parents' concern about her processing skills. Background information was obtained. Claimant's psychiatrist reported that claimant was showing signs of bipolar disorder, but was too young to diagnose. Claimant's kindergarten grades were "highly scattered." Her first grade report cards reflected "difficulties in showing academic development" and she continued "to show skill developed well below grade level." Her prior test scores, classroom observations, and scores on current tests administered were documented.

Based on her performance on the Kaufman Assessment Battery for Children - 2nd Edition (KABC-2), claimant's current intellectual functioning was at the second percentile rank, which fell into the low end of the borderline range of intellectual functioning. Her scores fell "significantly below the [Fluid Crystallized Index] score from two years ago." "Given that the overall score on the [Differential Ability Scales, 2nd Edition] showed as significantly lower than the overall result of the KABC-2 from two years ago, the KABC-2 was administered to provide a more direct comparison."

The report noted areas of strengths and weaknesses and "[t]he difference between the previous cognitive ability test results and the present results may well be due to the changing developmental demands of the tests. That is, though many of the present tasks were the same or similar to those from two years ago, the specific demands of the items were more advanced, with [claimant's] skills not having developed to a level to match this increase." Claimant's achievement test scores showed "development significantly below the average range and grade level." Difficulties coordinating what claimant sees and what she writes down, what she remembers, and her ability to conceptualize certain tasks were reported. Concerns with behavior, especially behavior at home, were documented. Test scores were found to be consistent with claimant's diagnoses of ADHD and ODD.

The Summary noted that claimant's cognitive ability presented as less developed than suggested by test results from two years ago. Previous testing had estimated her ability at the low end of the average range, but the present assessment results showed Borderline Range development. The scores suggested that claimant, in general, would be slower to learn information, be more challenged by concepts and inferential/abstract learning and concrete facts, and be able to process less information at one time. There was a suggestion that her short-term memory skills

were a relative weakness and her cultural/experiential knowledge a relative strength, but that data was not conclusive. Claimant's perceptual process testing generally showed development at comparable levels to her measured ability. Final logical processing presented as an area of significant weakness, with visual memory also being a potential area of deficit. Her basic processing speed showed as developed within the average range and presented as a relative strength. The academic testing reflected skills significantly below grade level, which was consistent with her report card grades. Teacher and parent questionnaire data reflected behaviors consistent with her diagnoses of ADHD and ODD.

As a result of the testing, claimant was found to meet eligibility for special education services under the handicapping condition of Other Health Impairment. She did not meet eligibility under the category of specific learning disability because a severe discrepancy, defined as 23 points between her ability and her achievement, was not apparent in any area measured. The report referred to the speech and language pathologist's report for information regarding her speech and language skill development and her potential continuing eligibility for special education services under the category of speech or language impairment. Nothing in this report established eligibility for regional center services.

27. Claimant's May 15, 2014, IEP documented that her primary disability was Other Health Impairment, and her secondary disability was Speech or Language Impairment. Claimant's teacher reported she was making slow progress in class and not achieving grade equivalency. She continued to experience behaviors in class, but those were improving. Nothing in this report established eligibility for regional center services.

28. An October 3, 2014, Psychoeducational Assessment Report, Addendum to Triennial Evaluation dated March 15, 2014, performed when claimant was seven years, nine months old, noted that claimant had been referred for an additional assessment to determine whether she qualified for special education services under the handicapping condition of Autism Spectrum Disorder. Following that assessment, it was determined that claimant did not qualify for such services. Nothing in this report established eligibility for regional center services.

29. Claimant's May 5, 2015, IEP noted her primary qualifying disability as Other Health Impairment, due to her ADHD and ODD, and her secondary qualifying disability as Speech or Language Impairment. Claimant had made progress with her speech and language skills and her gross/fine motor development. She needed guidance and support when socializing as she continued to have screaming outbursts. Nothing in this report established eligibility for regional center services.

30. Claimant's April 26, 2016, IEP, continued to document her eligibility for services due to her Other Health Impairment and Speech or Language Impairment. She continued to make steady progress with her speech and language and gross/fine motor skills. In reading and math she continued to perform below grade level. Her social behavioral development was mixed, noting she was generally polite and liked to please others but would act out when frustrated. Nothing in this report established eligibility for regional center services.

31. A February 28, 2017, Speech and Language Evaluation report conducted by claimant's school district when she was 10 years, one month old, was part of her three year reassessment of special education services. Based upon the testing performed, claimant met special education eligibility criteria for speech/language

impairment in the area of pragmatic language skills. Nothing in this report established eligibility for regional center services.

32. The March 27, 2017, Educationally Related Mental Health Assessment, updated May 3, 2017, and May 19, 2017, was generated as part of claimant's triennial assessment. Her scores on achievement tests for basic reading were in the low average range. Her scores for reading comprehension, math problem solving, and math calculation were in the deficit range. Claimant's prior diagnoses of ADHD, mood disorder, ODD, and Reactive Attachment Disorder (RAD), disinhibited type, were noted. Claimant had many improved skills, but all the adults in claimant's life "echo the same continued concerns for her that directly affect her learning and social interactions." These concerns included: task refusal, distractibility, very short attention span punctuated by irrelevant comments, and socially inappropriate/immature behaviors. Services to address those concerns was recommended. This report did not establish eligibility for regional center services.

33. Claimant's March 10, 2017, and March 8, 2018, IEPs continued to show claimant's qualifying categories, her classroom performances, and her behavior. Nothing in those IEPs established eligibility for regional center services.

DR. ADDISON'S 2017 ASSESSMENT

34. The December 8, 2017, Assessment Report prepared by Dr. Addison when claimant was 10 years, nine months old, documented that the reason for the referral was because her parents were concerned about her special education designation. Dr. Addison assessed claimant over three different days. He noted that the Individuals with Disabilities Education Act (IDEA) areas in which claimant had previously been assessed were Specific Learning Disability, Other Health Impairment,

Autism, and Emotional Disturbance. Dr. Addison testified that claimants' parents disagreed with the Emotional Disturbance category as did the teachers and aides Dr. Addison interviewed. He also believed that claimant's looks/personality, he described her as an "attractive little girl who is sweet," could have caused the school district not to think of Intellectual Disability as a category for claimant, although her scores showed this category should have been considered.

Dr. Addison reviewed available records, conducted interviews, took a health and developmental history, made and took observations, reviewed a vision and hearing screening test, and performed a psycho-educational assessment. He reported on results of previous assessments administered which included the March 3, 2017, Wechsler; Differential Ability Scales, 2nd Edition (DAS-2); Test of Auditory Processing Skills, Third Edition (TAPS-3); Comprehensive Test Phonological Processing, Second Edition (CTOPP-2); Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI-6); and the Woodcock Johnson Test of Achievement-IV.

Dr. Addison administered the following assessment tools: Adaptive Behavior Assessment System, Third Edition (ABAS-3); ADOS-2; Autism Spectrum Rating Scales (ASRS); Conners Behavior Rating Scales; Delis-Kaplan Executive Function System (D-KEFS) (Selected Subtests); Gray Oral Reading Test, Fifth Edition (GORT-5); Scales for Assessing Emotional Disturbance, Second Edition (SAED-2); Social Responsiveness Scale, Second Edition (SRS-2); Wechsler; and Woodcock Johnson.

Dr. Addison noted that owing to the scores obtained on the cognitive tests administered, it was "difficult to sum up [claimant's] unique set of thinking skills with one score." Claimant's abilities were below average for her age group and it "would be difficult for her in classroom settings." Tests administered to evaluate attention demonstrated that claimant has difficulty paying attention for long periods of time,

loses her place on tasks, loses her train of thought or her mind goes blank, and she is inattentive to details or makes careless mistakes. Claimant received high average and average scores on hyperactivity/impulsivity testing, suggesting a DSM-5 ADHD diagnosis. Claimant often received inconsistent scores with her teacher reporting better behavior than her parents reported. Claimant's autism rating scores were inconsistent, but Dr. Addison opined that she did not qualify for an Autism Spectrum Disorder diagnosis, although she did exhibit autistic like characteristics. Claimant's achievement scores were below average which was consistent with her performance in the classroom.

Dr. Addison concluded that the current psychoeducational testing revealed deficits in processing that might interfere with claimant's academic progress. Executive functioning deficits in the areas of planning and self-monitoring were also revealed and endorsed by claimant's parents and teacher. This may cause claimant to have difficulty completing tasks and following multi-step directions. Claimant also has difficulty decoding words. She presents with behavioral challenges which Dr. Addison felt were more related to ADHD than due to a severe emotional disturbance. Claimant's overall IQ has consistently fallen below 70 which "could be argued to be the sole reason" for her inability to learn at a rate that is typical of her same age peers. However, Dr. Addison did not diagnose claimant with Intellectual Disability and found that his assessment did not support a designation of Autism, which he concluded was consistent with the school district's prior evaluation. Instead, Dr. Addison recommended that claimant continue with her current designations of "Other Health Impairment" and "Speech or Language Impairment," neither of which is a qualifying diagnosis for regional center services.

35. A January 14, 2019, Initial Assessment/Care Plan from Barbara Sinatra Children's Center noted that claimant's diagnoses were RAD; ADHD, Combined Type; Intellectual Disability Rule Out Mild versus Moderate; and Sexual Abuse of Child. Claimant's "Presenting Problems" were that she was a victim of sexual grooming/sexual abuse by her special education school bus driver. (It is unclear how the diagnosis of intellectual disability was made as nothing in the document supported that entry.) Claimant had no insight into the behavior with the bus driver as being inappropriate. Claimant had poor attachments to her caretaker and others, difficulty with boundaries, found "significant comfort with strangers," had poor attention, was easily distracted, was impulsive, had poor organization, had high energy, had cognitive/intellectual disability seen in skills related to learning, and lacked social learning and basic life skills. The mental status exam noted poor judgment and insight, short attention and anxious mood. Claimant's symptoms put her at high risk for abuse. Individual and family therapy was recommended. The March 26, 2020, discharge summary noted that claimant would continue psychotropic medications with Dr. Moya and return as needed.

36. Dr. Moya's February 5, 2019, letter, stated she has been following claimant since 2011, listed claimant's diagnoses, none of which were qualifying diagnoses for regional center purposes, and identified claimant's medications. Dr. Moya identified claimant's cognitive and intellectual limitations which affect her learning and social interactions, and the risks claimant faces because of her poor choices caused by her poor understanding. Dr. Moya requested that claimant continue with her school accommodations and modifications.

37. A February 20, 2019, Occupational Therapy Triennial Assessment, conducted by claimant's school district, concluded that she does not require occupational therapy services.

38. A February 22, 2019, school district Triennial Assessment was performed when claimant was 12 years old, to determine her current educational needs to assist with middle school planning and to assess her for eligibility for special education services. The assessment primarily focused on special education eligibility in the areas of Other Health Impairment, Speech/Language Impairment, and Intellectual Disability. The report contained test scores of the Wechsler administered on January 30, 2019, which were in the low average, borderline, and deficient ranges, with subtest scores in the average, low average, borderline, and deficient ranges. The full scale score was deficient. The ancillary indices were borderline and deficient with a note that the results were to be viewed with caution given the variance within the indices. The scores on the Differential Ability Scales, 2nd Edition, were in the average, low average, borderline, and deficient ranges. This test was administered to obtain additional information regarding claimant's cognitive skills given her low nonverbal skills on the Wechsler. The scores suggested delays and low skills, but "given the significant variance" in scores, were not considered to be a "valid representation of [claimant's] overall abilities." Achievement test scores also fell in the average, low average, borderline, and deficient ranges. Other tests also had scores in these ranges. On adaptive tests, it was noted that claimant's parents consistently scored claimant lower than teachers, suggesting claimant has higher adaptive skills in a school setting. As a result of the numerous tests administered, the school psychologist determined that claimant met the criteria for Other Health Impairment and possibly Specific Learning Disability, but not Intellectual Disability. Although claimant's general ability scores fell below 70, they were "not considered a valid representation of her general intellectual

functioning given significant variance within her composite scores." Of note, this finding was consistent with IRC's determination.

39. A March 1, 2019, school district "Educationally Related Mental Health Assessment" documented that claimant began treatment with Dr. Moya on October 19, 2011, who diagnosed ADHD, ODD, Unspecified Mood Disorder and RAD. Claimant received counseling and has been receiving mental health services either in the form of individual counseling or group counseling from the school district since April 30, 2014. The current goal of therapy was to assist claimant with expressing and controlling her emotions, which had greatly improved. Nothing in this report indicated claimant was eligible for regional center services.

40. Claimant's March 8, 2019, IEP, and amendments thereto, when claimant was 12 years old, documented that her primary disability was Other Health Impairment, and her secondary disability was Speech or Language Impairment. Nothing in the IEP or the amendments established eligibility for regional center services.

41. The county's special education May 29, 2019, Tier 2 Positive Behavioral Interventions report documented claimant's passive yet noncompliant behavior which was disruptive. Nothing in this report established eligibility for regional center services.

42. Dr. Moya authored a letter on June 1, 2019, addressed "To Whom It May Concern." In it she noted that claimant has been diagnosed with RAD, ODD, Unspecified Mood Disorder, and ADHD. Dr. Moya has been following claimant for medication management since October 19, 2011. Dr. Moya referenced the difficulties claimant's condition caused her, but nothing in this letter established eligibility for regional center services.

43. A June 27, 2019, psychiatric evaluation was performed by Dr. Barlow at the Barbara Sinatra Children's Center. He previously performed an evaluation when claimant was four years old, as noted above. Dr. Barlow documented claimant's past histories and performed a mental status exam that appeared to be little more than him interviewing claimant and did not include any formal cognitive testing. Dr. Barlow wrote that claimant "clearly has limited capabilities cognitively and would have a difficult time making decisions on her own or planning for herself." Dr. Barlow diagnosed claimant with Probable Mild Intellectual Disability; Attention Deficit Hyperactivity Disorder, Inattentive Type; And RAD, Disinhibited Type. It was unclear how he diagnosed a probable mild intellectual disability as he did not perform any type of cognitive testing or document his review of prior tests performed and his diagnoses, alone, was not sufficient to overcome the multiple opinions of others who had performed cognitive testing and concluded claimant did not have an Intellectual Disability. Moreover "probable mild intellectual disability" is not a regional center qualifying diagnosis.

44. A July 15, 2019, Order Requisition Form from Unique Pediatrics, requested a "Referral Coordinator" and listed claimant's diagnoses as Mild cognitive impairment and Oral contraceptive advice. The basis for the first diagnosis was not established at this hearing and this notation on a referral was not controlling.

45. A July 17, 2019, medical referral authorized treatment with a diagnosis code of Unspecified Mental Disorder due to Physiological Condition. This is not a regional center qualifying condition.

46. Senior Intake Counsellor Elizabeth Flores conducted and prepared the Social Assessment of claimant on October 7, 2019, as part of claimant's application process. In the Social Assessment, Ms. Flores documented claimant's challenging

behaviors and noted that she would be returning to IRC for a psychological evaluation on October 30, 2019. Ms. Flores testified that she created the Social Assessment while meeting with claimant and her parent and placed it in the claimant's file for the clinicians to review as part of their evaluation. Although claimant pointed out that the claimant's brother's birth date in the Social Assessment was incorrect and that there were emails exchanged with IRC on dates that were earlier than the date the Social Assessment noted claimant was referred for services, those facts did not alter any of the findings made in the Social Assessment. Moreover, claimant seemed to not understand that the role of the intake counselor was simply to gather information for the clinicians, Ms. Flores's role did not include making findings about that information. As she explained, she is not the clinician making eligibility determinations, her role is "data collection."

DR. STACY'S 2019 ASSESSMENT

47. On October 30, 2019, when she was 12 years, nine months old, Dr. Stacy performed a psychological assessment and authored a report which she amended after claimant's father pointed out that she incorrectly reported claimant's IQ composite score as 82 instead of 81. Dr. Stacy credibly explained that this error did not invalidate her report or her opinions nor did it demonstrate that her opinions were unfounded. Dr. Stacy administered the Kaufman Brief Intelligence Test, Second Edition (KBIT-2); the Adaptive Behavior Assessment System, Third Edition (ABAS-3), Parent/Caregiver Form; conducted a diagnostic interview, made and obtained observations, and reviewed claimant's file. Dr. Stacy's report documented the results of her testing, as well as earlier test results and diagnoses. On the KBIT-2 claimant obtained a verbal score of 78, below average; a nonverbal score of 90, average; and an

IQ composite score of 81, below average. Her adaptive scores were all in the extremely low range. In her Summary, Dr. Stacy wrote:

> 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. [Claimant's] cognitive skills are within the Below Average to Average range. Overall, they are within the Below Average range. [Claimant] does not meet criteria for a diagnosis of Intellectual Disability.
>
> [¶] . . . [¶]
>
> [Claimant] does not meet criteria for "fifth category eligibility," . . . [Claimant's] cognitive skills are within Below Average to Average range. Overall, they are within the Below Average range. Below Average intelligence is not closely related to Intellectual Disability. [Claimant] also does not have a disabling condition that requires treatment similar to what individuals with Intellectual Disability require.
>
> [¶] . . . [¶]
>
> [Claimant's] expressive and receptive language skills appear to be delayed and she is eligible for special education services under Speech and Language Impairment. It is

> recommended [claimant] continue to receive speech therapy to improve her communication skills.
>
> Claimant is currently being receiving [*sic*] treatment for mental health disorders including [ADHD], Reactive Attachment Disorder, Oppositional Defiant Disorder and Unspecified Mood Disorder. Each of these disorders can impact [claimant's] social skills, adaptive skills, and her ability to function successfully in new situations or situations that require flexibility. It is recommended [claimant] continue to receive mental health behavioral health services.

Dr. Stacy's diagnostic impressions were Rule out Language Disorder; [ADHD], Combined Presentation, RAD, ODD, and Rule out Bipolar and Related Disorder.

Dr. Addison was critical of Dr. Stacy's use of the KBIT-2 because it is a brief intelligence test. He pointed out that the DSM-5 specifically notes, "Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid." Thus, Dr. Addison believed that Dr. Stacy's selection of the KBIT-2, a brief intelligence test, was improper. Dr. Addison testified that he would never use that brief test "for any type of high stakes assessment, especially for an Intellectual Disability diagnosis." He opined that the KBIT-2 is a good test, but not for this type of assessment. Dr. Stacy explained that she used the KBIT-2 because it offers "lots of breaks" and claimant had a short attention span. She also chose this test because she could not administer the Wechsler to claimant since claimant had already taken it at the beginning of the year and the KBIT-2 has a strong correlation to the Weschler scales, so is a compatible test. Dr.

Stacy's explanations were reasonable and persuasive. Claimant also asserted that Dr. Stacy began her testing at the wrong starting point, but, again, Dr. Stacy credibly explained her selection and claimant's argument was not persuasive.

48. Of note, in the section describing the various factors that may affect test scores, the DSM-5 notes at p. 37:

> Co-occurring disorders that affect communication, language, and/or motor or sensory function may affect test scores. Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning.

Thus, claimant's speech and language difficulties as documented extensively in the records, could have affected her scores.

49. IRC's December 2019 "Eligibility Determination" documented that the team found claimant ineligible for services and recommended she utilize academic supports and continue mental health services.

50. A January 28, 2020, letter from claimant's father responded to IRC's January 23, 2020, letter regarding the informal conference. He noted that the decision to have claimant repeat first grade was made with the school district. Claimant transferred schools and repeated first grade as her original school did not offer a special day class setting. Since repeating first grade, claimant has remained in a special day class setting with supports. Claimant has also qualified for extended school year

services every year since the 2009-2010 school year. The letter referenced claimant's match burning incident, recent shoplifting, inappropriate social boundaries, and sexual molestation when she was targeted by the school bus driver due to her low cognitive functioning and inability to discern right versus wrong and safe and appropriate interactions.

Claimant's father pointed out that Dr. Stacy did not reference any of these incidents in her assessment. When asked why she did not reference this information, Dr. Stacy explained that these are "private matters" that she did not think should be included in her report. Claimant's father questioned that explanation since regional center reports are confidential and these issues demonstrate claimant's significant functional limitations in the areas of self-care, receptive and expressive language, learning, self-direction, and her capacity for independent living. Claimant's father noted his concern that IRC was "cherry picking" information from the records to support Dr. Stacy's opinion that claimant was not eligible for regional center services. He expressed his displeasure that Dr. Stacy had given his child candy during the assessment without asking his permission, especially given claimant's well-documented history of ADHD. Claimant's father also expressed his concern that IRC had not considered the Barbara Sinatra Children's Center Assessment Care Plan which referenced mild to moderate intellectual disability or claimant's pediatrician's referral which referenced a mild cognitive impairment diagnosis.

51. Dr. Stacy testified that she offered claimant candy from her Halloween candy dish as a "social gesture," but not during testing. Dr. Stacy did not reference the "extended school year" (ESY) in her report as it is common for regional center consumers to be enrolled in ESY. Further, Dr. Stacy did consider all reports in formulating her opinions and offering testimony. While it was surprising that Dr. Stacy

failed to reference the sexual molestation incident or the other social issues that claimant's father referenced in his letter, her opinions were well-supported by the evidence.

52. On January 30, 2020, IRC sent claimant's father a CD containing the records he requested.

53. Claimant's March 5, 2020, IEP, when she was 13 years and one month old, noted that her primary disability was Intellectual Disability, and her secondary disability was Other Health Impairment. It appeared that the Intellectual Disability category came from Dr. Barlow's assessment noted above. The section titled "Strengths/Preferences/Interests" noted that claimant "is a very energetic young woman with the ability to express herself in a variety of ways." Claimant "enjoys participating in school activities and loves to watch YouTube and listen to music. She enjoys debating and is becoming very strong at using academic language when debating other students." She enjoys math but not showing her work and reads but does not enjoy having to re-read for comprehension. Her father expressed concern regarding her leaving class and spending time in the health office and that was an area that would be addressed. Behavior issues were also noted in the report, including claimant taking too much food or things that did not belong to her, but she was showing improvements in these areas. Claimant had delays in social development and read below grade level. Claimant's various services were documented including year round academic instruction, speech and language services, and counseling. Claimant's father expressed his concern regarding her cognitive progress which was why he requested an assessment.

54. A March 6, 2020, letter from the school district to IRC requested that IRC return the March 3, 2017, and May 6, 2017, psychoeducational reports. The district

explained that it had inadvertently sent them to IRC when it released records and those reports were not considered by the district when identifying claimant as a student eligible for special education services. IRC returned numerous IEP records to the district on March 27, 2020.

55. In her March 9, 2020, letter to IRC, Dr. Moya wrote that claimant has been followed since 2011 and diagnosed with RAD-Disinhibited type, ADHD (combined type) and Disruptive Mood Dysregulation Disorder. Of note, none of these are regional center qualifying diagnoses. Dr. Moya referenced claimant's "below average to low intellectual functioning across the areas of intellect" for which she has received special educations services. Dr. Moya noted that in her role as a child and adolescent psychiatrist, she has "treated many low functioning children like [claimant]." Dr. Moya opined that "medications are not expected to improve overall functioning" but are indicated to control behaviors and moods. Dr. Moya wrote further:

> Considering [claimant's] conditions and limitations, I believe she requires interventions to learn how to cope with daily activities, to learn to be safe and to find ways to control her extreme emotions and frustrations. Adapting to her environment to be able to function more independently is necessary. She also is in need for ABA interventions to improve social interactions, learn coping skills and maintain good relationships through positive behaviors.

While claimant may require these services, she needs a regional center qualifying diagnosis in order for regional center to fund them. As noted in Dr. Moya's letter, claimant does not have such a diagnosis.

DR. ADDISON'S 2020 ASSESSMENT

56. On May 19, 2020, Dr. Addison conducted a second assessment of claimant for intellectual disability. She was evaluated because of her parents' concerns about her special education designation. Claimant's parents reported that she had been molested by the school bus driver, but she defended the perpetrator as "being nice to her." Her parents were concerned about what would happen to claimant in the future after their deaths. Dr. Addison agreed with that concern which was supported by his assessment.

Dr. Addison documented claimant's history and previous assessment results. He noted that the February 22, 2019, Wechsler Intelligence Scale for Children - Fifth Edition, administered by claimant's school district, had composite scores ranging from slightly below average to well below average, with a full scale IQ score of 66, well below average. Her processing scores were below average. Her 2017 cognitive scores were below average to well below average. Dr. Addison interviewed claimant and administered several assessments.

Claimant's scores on the Adaptive Behavior Assessment System, Third Edition, were very low. Her Wechsler Individual Achievement Test, Third Edition, scores were below average. Those scores were consistent with her school testing scores. Subtests were in the average to below average ranges. The scores she received on the Woodcock-Johnson Tests of Cognitive Abilities, Fourth Edition, were well below average. The scores meant that her skills were not well developed for her age. Based upon his assessment, Dr. Addison made several recommendations and concluded:

> **Diagnostic Impression: (318.0 F71) Intellectual Disability (Moderate)**

In consideration of California Education Code (3030):[2]

> **Intellectual Disability:** Intellectual Disability means sub average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance. **[Claimant] meets Ed Code definition for Intellectual Disability (ID).** (Emphases in original.)

Of note, again Dr. Addison used the Education Code diagnoses which are less stringent than regional center eligibility diagnoses.

57. Other records IRC reviewed were a June 4, 2020, Tier 2 Positive Behavioral Interventions, prepared by claimant's school district, which set forth claimant's behaviors and plans to address them. Nothing in this document established eligibility for regional center services.

58. IRC's June 2020 Eligibility Determination documented that the team determined that claimant was not eligible for regional center services under diagnoses of autism, intellectual disability, or fifth category. The team listed all educational records that had been reviewed.

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[2] Presumably this refers to Education Code section 3030 which sets forth eligibility criteria for special education services. Those criteria are not controlling for regional center eligibility matters.

59. A November 3, 2020, report from Brian P. Jacks, M.D., F.A.P.A., F.A.A.C.P., noted that he performed a "complete and comprehensive psychiatric consultation" on July 10, 2020, when claimant was 13 years old. Dr. Jacks referenced claimant's sexual abuse by her school bus driver. Dr. Jacks performed psychological testing which included the Multidimensional Anxiety Scale for Children, a self-report instrument that assesses anxiety; the Children's Depression Inventory, a self-rated scale; and the Child Behavior Checklist, a test completed by parents. Dr. Jacks had claimant draw a picture and he performed a mental status exam. Dr. Jacks's diagnoses were Childhood Sexual Abuse, Dysthymia (mild depression), Disinhibited Social Engagement Disorder, ODD, ADHD, Trichotillomania (pulling out hair), Speech Sound Disorder and Mild Intellectual Disability. Dr. Jacks wrote that he diagnosed Mild Intellectual Disability "from the history as well as her interview behavior, difficulties in school, and developmental delays." Of note, Dr. Jacks performed no cognitive testing and his method to diagnose Intellectual Disability is contrary to how regional centers must diagnose that condition. As such, his opinion is not controlling.

60. A March 16, 2021, email between claimant and IRC noted that IRC had reviewed additional records claimant provided and did not find claimant eligible for regional services.

61. Claimant offered several reference materials which were received as administrative hearsay. Although claimant argued the articles supported her position, the articles did not establish that claimant qualified for regional center services.

Testimony of Elizabeth Flores

62. Ms. Flores is an IRC Senior Intake Counsellor who was asked why she did not reference claimant's former June 11, 2010, Social Assessment in the 2019 Social

Assessment she prepared. Ms. Flores explained that when claimant first applied for services in 2010, she went by a different name (her adoptive parents later changed her name) and IRC did not initially cross reference the two names, which was most likely why the 2010 document was not originally in her file. Claimant asked several questions regarding Ms. Flores's opinions regarding her observations, but those opinions were not relevant and exceeded the scope of her expertise. Ms. Flores was not the clinician making the eligibility determination; as she stated, "I am data collection." Nothing in Ms. Flores's testimony altered any of IRC's findings regarding eligibility.

Testimony of Claimant's Father

63. Claimant's father discussed his and his husband's adoption of claimant and her special needs brother (an IRC consumer). Both fathers are special education teachers and advocate for their children. Claimant's father discussed claimant's lack of stranger danger and how she approaches and physically interacts with strangers. She lacks the ability to decipher safe and appropriate behavior. During the 2018/2019 school year, when she was 11 years old, claimant was molested by her school bus driver. He was the one person who was not part of the extensive safety goal training that was part of claimant's IEP. The bus driver's acts were caught on video cameras on the bus and he has been criminally charged for his lewd acts with claimant.

Claimant's father explained that the school district was unwilling to conclude that claimant had an intellectual disability which was how Dr. Addison came to evaluate claimant. Dr. Addison found that claimant had an intellectual disability and also that she had emotional disturbance. After reviewing his report, the school district "expunged" its own school psychologist's report and adopted Dr. Addison's report. Again, a school district's eligibility determination is not controlling on a regional center. Claimant's father also referenced his daughter's many evaluations and

diagnoses which he believes qualifies her for regional center services. He believes she behaves as someone half her age and she has multiple delays.

Claimant's father also explained that scores on self-assessments are different because school settings are more structured with more supports than home settings tend to be. He was told during the IRC intake process that the parent reports are given more weight because of that fact, but does not feel IRC did that in this case. Moreover, IRC did not evaluate claimant in the school setting and, unlike other assessments his children have undergone, the IRC assessment was "not thorough." He and his spouse are appealing as they do not believe the assessments, testing, and reports conducted and prepared by IRC were "thorough." Further, even though Dr. Stacy references all of the assessments and evaluations claimant has undergone, it seems the IRC determination was based only on the IRC assessments and Dr. Stacy's opinions.

Claimant's father's testimony was heartfelt and sincere. It is clear he and his spouse are devoted to caring for claimant and seeking what is best for her. However, his testimony was insufficient to establish eligibility for regional center services or to refute IRC's determination that claimant is not eligible.

Parties' Written Closing Arguments

64. Claimant cited to several of her school and medical records which identified her as having an intellectual disability in support of her position that she is eligible for regional center services. Claimant argued that her expert agreed she has an intellectual disability, and that other experts expressed their concerns for claimant's safety and overall well-being, a concern realized when she was molested by her school bus driver. Claimant refuted IRC's findings, pointing out specific testing errors allegedly made by Dr. Stacy and requested her opinions be discounted. Claimant

asked that her appeal be granted and she be found eligible for regional center services.

65. IRC's closing argument contained a summary of various exhibits offered at hearing and argued that they supported its position. IRC asserted that claimant does not have an intellectual disability nor is she eligible under the fifth category. IRC requested that its decision denying eligibility be affirmed.

LEGAL CONCLUSIONS

Burden and Standard 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.)

Statutory Authority

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

3. 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.

4. 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.

5. California Code of Regulations, title 17, section 54000, provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. (Note: The regulations still use the term "mental retardation," instead of the term "Intellectual Disability.")

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

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

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized 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.

6. 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.

Evaluation

7. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. The documents introduced in this hearing do not demonstrate that claimant has a diagnosis of intellectual disability that constitutes a substantial disability, or that she qualifies under the fifth category which is defined as a disability closely related to an intellectual disability, or that requires treatment similar to that required for individuals with an intellectual disability, that constitutes a substantial disability. Although claimant does have numerous other emotional and psychiatric conditions, none of them are qualifying conditions. Her diagnosis of intellectual disability noted in a few of the records was either not based on the type of testing required to make a regional center qualifying diagnosis or was not persuasive in light of the overwhelming evidence that she did not meet the criteria for that diagnosis. Further, even though claimant's school district at times qualified her for special education services based on intellectual disability, a school providing services to a student under a disability category is insufficient to establish eligibility for regional center services. Schools are governed by California Code of Regulations, title 5, and regional centers are governed by California Code of Regulations, title 17. Title 17 eligibility requirements for services are much more stringent than those of Title 5.

On this record, claimant's appeal must be denied.

ORDER

Claimant's appeal from IRC's determination that she is not eligible for regional center services is denied. IRC's determination that she is not eligible for regional center services is affirmed.

DATE: November 12, 2021

MARY AGNES MATYSZEWSKI
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.