

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**SAN GABRIEL/POMONA REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2020090297**

**DECISION**

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 8, 2020, via videoconference.

Daniel Ibarra, Fair Hearings Specialist, represented the San Gabriel/Pomona Regional Center (SGPRC or Service Agency). Claimant was represented by her mother (Mother).<sup>1</sup> Sonia Hernandez, certified court interpreter, provided Spanish language interpretation services during the hearing.

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<sup>1</sup> To protect their privacy, Claimant and Claimant's family members are identified by titles.

Oral and documentary evidence was received. The record remained open until December 11, 2020, for Claimant to submit an additional exhibit. The exhibit was timely submitted and marked and admitted as Exhibit 14. The record was closed, and the matter was submitted for decision on December 11, 2020.

## **ISSUE**

Is Claimant eligible for services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act) under the category of Intellectual Disability?<sup>2</sup>

## **EVIDENCE**

The Service Agency submitted exhibits 1-14. Claimant submitted Exhibits A-C and also presented the sworn testimony of school psychologist Elizabeth Vosseler and Mother.

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<sup>2</sup> The parties stipulated to this category of eligibility during the hearing. The Fifth Category of eligibility was raised by the Administrative Law Judge, but after a review of the records it was determined that it was not presented by the Claimant, who was not informed of this area of eligibility. Claimant was not assessed for Fifth Category eligibility by the Service Agency prior to issuing its Notice of Proposed Action. As such, there was insufficient evidence for the Administrative Law Judge to reach a determination of eligibility on the basis of the Fifth Category as part of this decision.

## **SUMMARY**

Claimant requested eligibility for Lanterman Act services as an individual with an Intellectual Disability. The Service Agency denied her request. Claimant did not provide sufficient evidence to support eligibility on the basis of Intellectual Disability. However, there were weaknesses and omissions in the Service Agency's assessment and determination of eligibility. In particular, as part of the Service Agency's review of Claimant's eligibility, it should have also assessed whether Claimant is eligible under the Fifth Category of eligibility, but it did not. As such, the Service Agency shall be required to conduct a thorough assessment of Claimant's eligibility under the Fifth Category and issue a Notice of Proposed Action as soon as practicable, but no later than 90 days from the date of this decision.

## **FACTUAL FINDINGS**

### **Background and Jurisdiction**

1. Claimant is 15 years of age. She lives with her parents, one sister 12 years of age, and one 7-year-old brother. She was referred to the Service Agency to determine whether she was eligible for regional center services under the category of autism (a term used interchangeably with Autism Spectrum Disorder), and Intellectual Disability. Based upon the parties' stipulation and the Administrative Law Judge's review of the evidence, this decision will only address Intellectual Disability.

2. Mother requested regional center services for Claimant from the Service Agency. On August 12, 2020, the Service Agency sent Mother a Notice of Proposed

Action (NOPA) notifying her of its interdisciplinary team's (IDT's) decision that Claimant was not eligible for services.

3. Mother timely filed a fair hearing request on Claimant's behalf to appeal the Service Agency's decision. In Claimant's fair hearing request, Mother wrote that she was requesting the fair hearing to appeal the Service Agency's decision and the assessment upon which it was based. Mother stated that the Service Agency's assessment conflicted with the reports from Claimant's doctor about claimant's functioning, which was lower than that reported by the Service Agency in its assessment. Mother requested that the Service Agency reassess Claimant because she maintained Claimant was not performing in her usual manner during the assessment.

4. All jurisdictional requirements have been met for this matter to proceed to fair hearing.

### **Claimant's Service Agency and School Assessments and Observations**

5. On July 1, 2020, Yadira Vazquez, Psy.D. (Vazquez), prepared a psychological evaluation report of Claimant to assist the IDT in determining Claimant's eligibility for services under the Lanterman Act. Vazquez used a variety of assessment tools. Vazquez reviewed relevant documentation from Claimant's school and medical file. She administered standardized assessments to measure Claimant's cognitive ability, including the Wechsler Intelligence Scale for Children, 5th Edition (WISC-V), and she administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3) to measure Claimant's behavior and functioning. Vazquez also conducted a clinical observation of Claimant and interviewed Mother. (Exh. 11.)

6. Mother's testimony at hearing was consistent with her disclosures to Vazquez during her interview. Claimant has poor memory and recall. She easily forgets

what she has learned and gets frustrated. She forgets to perform self-care tasks like washing, bathing and brushing her teeth without reminders. She has poor safety awareness and elopes from the home frequently. She is physically and verbally aggressive. She uses profanity and strikes at people when she is frustrated or upset, including her Mother. Claimant's mood can shift suddenly. Claimant stays fairly isolated from her peers and although she attempted, without success, to have friends when she was younger, she currently stays mostly by herself in her bedroom when she is home. Claimant's behaviors in school resulted in her getting expelled before she was moved to a nonpublic school in ninth grade due to her behaviors.

7. Vazquez accurately summarized the school records she reviewed, which were also submitted as exhibits. Claimant is currently in tenth grade and is on a diploma track. In her August individualized education program (IEP), she was designated as eligible for special education under the category of emotional disturbance (ED)<sup>3</sup> and a specific learning disability. She receives supports including individual counseling and guidance, and accommodations and modifications for her learning deficits. She has ongoing behavioral and emotional deficits, manifested by irritable mood swings, verbal aggression toward authority figures, and has made suicidal threats. A report produced as part of Claimant's educational-related intensive counseling services (ERICS) identified her behaviors as: "'fighting with peers, bullies, uses profanity and vulgarity, harasses, threatens others and obscene acts, texting inappropriate pictures.'" (Exh. 11.)

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<sup>3</sup> As used by the school district, the term ED is defined by the California Education Code and is not necessarily equivalent to a psychiatric diagnosis.

8. Vazquez accurately reported Claimant's mental health services and her treatment. Claimant receives mental health services, twice a month, through Tri-City Mental Health Services and is treated by two therapists, one for behavior and one for decision making. She also is treated by a psychiatrist once a month for medication management.

9. Vazquez reviewed Claimant's three-year psychoeducational assessment report prepared by the school district in August 2019. The report memorialized Claimant's history of academic difficulties, cognitive delays, and borderline adaptive skills, which were consistent with Mother's observations.

10. Vazquez's administration of the WISC-V, which is used to assess the cognitive abilities of children, produced test and subtest scores that demonstrated some scatter in abilities because not all areas of cognition were uniformly subpar. Claimant scored extremely low on one test measuring working memory (digit span test) and verbal comprehension (similarities and vocabulary), and average on tests measuring working memory (picture span), visual spatial (block design and visual puzzles), processing speed (coding and symbol search), and fluid reasoning (matrix reasoning and figure weights). (Exh. 11.)

11. Claimant's full-scale intelligent quotient (IQ) was in the range of Borderline Intellectual Functioning, defined as an IQ of 70 to 79. (Exh. 11.)

12. Claimant's full-scale IQ is derived from the composite scores of four cognitive domains. In the four cognitive domains measured by the WISC-V, Claimant's composite score was in the extremely low range in the domain measuring verbal comprehension, which is defined as the "ability to access and apply acquired word knowledge" and includes verbal concept formation, reasoning and expression." (Exh.

11.) Claimant's composite score in the area of fluid reasoning was below average. Fluid reasoning includes the ability "to detect the underlying conceptual relationship among visual objects and to use reasoning to identify and apply rules." (*Ibid.*) Claimant's composite score in the areas of visual-spatial and processing speed were average. The visual-spatial domain includes the ability to "evaluate visual details and to understand visual spatial relationships to construct geometric designs from a model." (*Id.*) Processing speed includes the speed and accuracy of "visual identification, decision-making and decision implementation." (*Id.*)

13. Vazquez determined that Claimant's WISC-V scores were consistent with previous testing performed by the school district. The scores from three cognitive assessments administered as part of Claimant's three-year psychoeducational assessment report of 2019 were in the low or below average range. (Exhs. 5, 11 and 13.)

14. Claimant's history of poor academic achievement was consistent with Vazquez's testing. Claimant's school records describe her as a student struggling in all academic areas and performing below grade level, having poor comprehension, displaying confusion, and having difficulties mastering basic skills in reading, writing and math. Consistent with Mother's reports, although she has progressed in her grade reports over time, especially in the structured setting of a nonpublic school, Claimant generally has difficulty retaining what she has been taught, even with intensive interventions, and performs well below her grade level. (Exhs. 4, 5, 11 and 13.)

15. Despite her cognitive deficits and severe academic struggles, the school district determined that Claimant did not meet the criteria of Intellectual Disability under the applicable education statute, California Code of Regulations, title 5, section 3030, subdivision (h), because her scores in all areas of cognitive abilities and adaptive

behaviors were not uniformly significantly below average, or two standard deviations below her peer-group. (Exhs. 5, 13.) Claimant's cognitive scores were low average in the area of planning and learning. Her adaptive behavior scores were not uniformly significantly below average. Instead of Intellectual Disability, the school district identified Claimant as a student eligible for special education under the category of ED, with a secondary eligibility of specific learning disability under California Code of Regulations, title 5, section 3030, subdivision (j), due to the significant discrepancy between her ability and achievement in written expression, reading fluency, and mathematics calculation. (Exhs. 5, 13.)

16. However, it was unclear from Claimant's school records if the discrepancy was determined by a statistical measure or by the judgment of the members of the IEP team. The school district's reason for identifying Claimant as a student with a specific learning disability appeared to be based almost exclusively on Claimant's uneven cognitive scores, because there was compelling evidence that Claimant's academic achievement in all areas was well below grade level. (Exh. 5.) The school district administered the Woodcock-Johnson Test of Achievement IV (W-J 4) to measure Claimant's academic skills and found that she was significantly below average in the area of broad reading, math, written language, and academic language. Teachers' reports confirmed Claimant was performing significantly below grade level. (*Ibid.*)

17. Claimant's social-emotional challenges were well-documented in school records and confirmed by Vasquez's administration of the ABAS-3, a comprehensive assessment of adaptive skills "needed to effectively and independently care for oneself, respond to others, and meet environmental demands at home, school, work and in the community." (Exh. 11.)



18. Mother provided the information used by Vasquez to measure Claimant's adaptive skills. The information Mother provided and reflected in the ABAS-3 was consistent with Mother's testimony during the hearing. Mother's observations produced more severe ratings than that of Claimant's teachers memorialized in school records or assessments. Understandably, Claimant's teachers observed her in a more structured environment with supports. After Claimant was transferred to a nonpublic school, with a program more structured and tailored to her behavioral challenges, Claimant improved. (See, e.g., Exh. 6, ERICS report.)

19. Vasquez found that Claimant's adaptive skills, when compared with her same-aged peers, were in the extremely low range. Claimant scored in the extremely low range on the three adaptive domains: "conceptual" which measures "behaviors needed to communicate with others, apply academic skills and manage and accomplish tasks"; "social" which measures interpersonal interactions, social responsibility and use of leisure time; and "practical" which measures self-care, care of home, school or work settings and functioning in the community. (*Ibid.*)

20. Claimant scored in the extremely low range on several adaptive skill areas: "community use" or skills and behaviors needed to function in the community, functional academics, which include basic reading, writing and math skills; health and safety; and leisure. She performed in the low range for self-direction and social skills. She performed in the below average range for home living skills. She performed in the average range in the areas of communication and self-care. (*Id.*)

21. Claimant's adaptive skills were also evaluated by the Service Agency as part of its June 1, 2020, intake assessment, which included a review of records by staff psychologist Deborah Lagenbacher, Ph.D. (Langenbacher), and an interview with

Mother.<sup>4</sup> Mother confirmed Claimant's strengths in cooking, completing household chores and overall self-care, but noted she required constant reminders. Mother also confirmed Claimant's adaptive deficits in the area of social interactions. Claimant does not initiate or respond to social contacts with peers, prefers to stay alone and has increased anxiety when being looked at or when she is part of larger gatherings and is disruptive in the community. Claimant fights with her siblings and cannot follow a simple game rule. Claimant also struggles with the use of money. In the cognitive domain, Claimant's struggles were reported by Mother as including her inability to associate events with time such as past and future, her inability to write sentences without a model, her resistance to completing non-preferred activities, and her inability to retain information, including her home address and parents' phone numbers. In the area of communication, Mother reported Claimant's limited vocabulary of 100 words and her failure to respond when spoken to "most of the time." (Exh. 9.)

22. Vasquez provided "diagnostic impressions" for consideration by the IDT, which included borderline intellectual functioning, and "by history" specific learning disabilities, post-traumatic stress disorder, and major depressive order. She also added a "rule-out" of conduct disorder. Post-traumatic stress disorder as a provisional diagnosis. (Exh. 3.)

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<sup>4</sup> Langenbacher did not testify but was responsible for conducting the record review and referring Claimant for further evaluation. The Service Agency submitted her summary of documents, which was marked and admitted as Exhibit 14, but which was used as a guide to the evidence, but not given independent weight.

23. Vasquez did not determine whether Claimant met the diagnostic criteria for Intellectual Disability contained in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), the reference tool used by psychologists and relied upon by the regional centers. She did not analyze whether the school district's conclusion that Claimant had specific learning disabilities was consistent with Claimant's test scores or the school district's records. The "by history" specific learning disability designation by the school district was made with reference to the governing statutes for special education, not the DSM-5. The IDT determined that Claimant's testing scores were typical of an individual with a Learning Disability due to the absence of global delays. (Exh. 12.)

24. The DSM-5 discusses the diagnostic criteria for Intellectual Disability in pertinent part as follows:

Intellectual disability (intellectual developmental disorder) 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 sociocultural 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

[11] . . . [11]

The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with

individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 ( $70 \pm 5$ ). Clinical training and judgment are required to interpret test results and assess intellectual performance.

Factors that may affect test scores include practice effects and the "Flynn effect" (i.e., overly high scores due to out-of-date test norms). 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. . . . Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. . . .

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that

the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and socio-cultural background.

Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior and school and work tasks organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning. . . .

[¶] . . . [¶]

Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. **To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.**

(DSM-V, pp. 37-38, italics in original; bold added.)<sup>5</sup>

25. Vasquez did not provide guidance to the IDT for a determination of eligibility under the Fifth Category, and there is insufficient evidence that the IDT considered the Fifth Category aside from the reference made to it in the NOPA. (See, e.g., Exhs. 6 and 9.) According to the NOPA “the psychological evaluation completed by Dr. Yadira Vazquez, Psychologist, on July 1, 2020 indicates no evidence of substantially handicapping intellectual disability, cerebral palsy, autism, epilepsy, or conditions similar to intellectual disability.” (Exh. 1.) In its more detailed NOPA letter, after ruling out Autism, the IDT provided this assessment of ID, but no assessment of the Fifth Category:

In addition, Dr. Vazquez used the [WISC-5] to assess [Claimant’s] cognitive ability and the [ABAS-3] to assess her adaptive skills. She performed in the low range of cognitive ability which falls in the range of Borderline Intellectual

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<sup>5</sup> Official Notice is taken of the DSM-5 pursuant to Government Code section 11515.

Functioning, and her adaptive skills were reported within the extremely low range. To meet eligibility criteria under [ID] both intellectual and adaptive scores must show significant deficits. Based upon her level of cognitive and adaptive functioning, she does not meet criteria for a diagnosis of [ID]. Dr. Vazquez has suggested diagnoses of Borderline Intellectual Functioning; Specific Learning Disability, by history; Post Traumatic Stress Disorder, by history; and Major Depressive Disorder, by history. She has recommended a mental health evaluation to rule out Conduct Disorder.

(Exh. 1.)

26. Claimant's social-emotional and behavioral profile is not subject to dispute. Claimant's profile was confirmed by Mother, by her mental health records, and by the school district in its administration of a wide variety of behavior assessments, and school-based observations. (Exh. 5.) Claimant had been given at one point a tentative diagnosis of post-traumatic stress disorder (PTSD) and has been prescribed medication for depression, sertraline, since January 2020. Claimant had been the victim of sexual abuse (fondling which did not lead to rape), had witnessed domestic violence between her parents and community violence when a peer was shot and killed in front of her, and has suffered from bullying. Claimant has engaged in inappropriate sexual behavior at school (texting inappropriate pictures) in addition to her verbal and physical aggression. Her PTSD symptoms include being anxious and fearful, having night terrors when she thinks of her past trauma, being hypervigilant, self-harm behaviors, and having difficulties experiencing happiness. (Exhs. 3, 13.)



Claimant was hospitalized once for self-harming behaviors (cutting) in or about fall of 2018, but there is no evidence that she currently is engaging in this behavior. (Exh. 6.) Claimant has also physically assaulted Mother. (Exh. 9.)

27. Claimant's social-emotional status is also affected by the pressure she feels to complete her school assignments. She may be able to follow instructions at school, but by the time she comes home she forgets the instruction, and generally "forgets things easily." (Exh. 6, Mother's interview and testimony.) Claimant still elopes from home and has to be constantly monitored by Mother to keep her safe. Mother has also had to call the police to escort Claimant home. (Exh. 9 and Mother's testimony.)

28. Due to her behaviors at a general education campus, as part of her IEP, Claimant was transferred to a nonpublic school as of February 14, 2019. Her qualifying disabilities as defined by the statutes governing special education has been emotional disturbance and a "secondary" disability of specific learning disability. (Exh. C.)

### **Additional Evidence**

29. School psychologist Elizabeth Vosseler (Vosseler), testified at the request of Mother. Vosseler was part of Claimant's IEP team, was her ERICS counselor, and was familiar with Claimant's psychoeducational assessment, school history, and overall profile. Vosseler's understanding of Claimant was derived from her direct work with Claimant, her participation in the IEP with Claimant's teachers and other service providers, and her review of the results of the psychoeducational assessment. Vosseler provided clear and unbiased responses to questioning during the hearing and her testimony was given great weight.

30. Claimant's school-based behavior ratings varied between teachers, with at-risk ratings, low average and average ratings provided depending on the class. Vosseler explained that the basis for Claimant's eligibility for special education was accurate. She did not evidence global delays in every area of cognitive ability, with some scores in the low average range and others in the average range.

31. From her experience with Claimant and understanding of her behavior from teachers' reports, Vosseler maintained that Claimant's atypical conduct, not her learning deficits, are primarily responsible for her adaptive deficits. Vosseler admitted that Claimant has difficulty processing information, which can lead to her misperceptions of what is said to her and result in atypical and inappropriate reactions. Claimant may always have difficulty in building and maintaining satisfactory relationships. Claimant was transferred to a nonpublic school due to her emotional disturbance. Vosseler set goals for counseling to address Claimant's anxiety so that she can better manage her reactions to circumstances. Before the COVID-19 pandemic required Vosseler to switch interventions from in-person meetings to telephonic or video consultations, Claimant was showing improvement in her ability to manage her behaviors.

## **LEGAL CONCLUSIONS**

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) The Lanterman Act provides services and supports to individuals with developmental disabilities.

2. A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant

properly and timely requested a fair hearing, and therefore jurisdiction for this case was established. (Factual Findings 1-4.)

3. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on her. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].) The standard of proof in this case is preponderance of the evidence. (Evid. Code, § 115.) Thus, Claimant has the burden of proving her eligibility for services under the Lanterman Act by a preponderance of the evidence.

4. In order to be eligible for regional center services, a person 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.

5. According to California Code of Regulations, title 17, section 54010, subdivision (c), a 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.

6. Welfare and Institutions Code section 4643, subdivision (b), provides: "In determining if an individual meets the definition of developmental disability contained in subdivision (a) of Section 4512, the regional center may consider evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources."

7. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, the individual must show that he has a "substantial disability." California Code of Regulations, title 17, section 54001, subdivision (a), defines "substantial disability" as follows: "(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."

8. California Code of Regulations, title 17, section 54002 defines the term "cognitive" as "the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly, and to profit from experience."

## **Determination**

9. It was not established by a preponderance of the evidence that Claimant has a "developmental disability" as defined under Welfare and Institutions Code section 4512, as a result of Intellectual Disability.

10. There was insufficient evidence that Claimant met the DSM-5 diagnostic criteria for Intellectual Disability. There was insufficient evidence to establish that Claimant fulfilled Criterion A. By assessment, Claimant did not have a global delay in all areas of cognitive ability. There was also insufficient evidence through observations that Criterion A was met. Claimant's cognitive deficits appeared to significantly impact

her ability to learn and interpret verbal information, in particular, which may have had a connection to her atypical reactions to communications, although that was not established by the evidence as the primary reason for her adaptive behavior deficits. It was unclear from the evidence whether Claimant was designated as an individual with a specific learning disability based upon the statistical difference between her cognitive ability and academic achievement, because she was working well below grade level and it did not appear that there was a statistically significant difference between her ability and achievement. Nevertheless, there remained insufficient evidence to establish that Claimant fulfilled Criterion A. Claimant did not have a full-scale IQ within the typical range of an individual with an ID.

11. There was insufficient evidence that Claimant met Criterion B of the DSM-5. Individuals may be diagnosed with Intellectual Disability in those instances where the full-scale IQ is higher than that typically associated with individuals with global developmental delays, but where adaptive deficits reduce their functioning to that of individuals with global developmental delays. However, the adaptive deficits must be directly attributed to Claimant's cognitive deficits. Based upon the record presented, particularly the testimony of Vosseler, there is insufficient evidence that Claimant's adaptive deficits are directly and attributable to her cognitive deficits. There was evidence that Claimant's frustration and atypical emotional reactions to events are due to her inability to understand verbal communication. However, Vosseler attributed her atypical performance more to her social-emotional challenges than her cognitive limitations. Vosseler's testimony is not entirely consistent with Claimant's other school records but she was a member of the IEP team and had the opportunity to directly observe Claimant.

12. The evidence did not establish that Claimant is disqualified from eligibility based upon the exclusion of solely learning or psychiatric disabilities. It is unclear from the record whether Claimant was in fact correctly identified as a person with a learning disability by the school district, given her uniformly subpar academic scores and her cognitive deficits. The Service Agency did not question the school district's conclusion with reference to the DSM-5, or the uniform observations of Claimant's teachers. Claimant's cognitive deficits do contribute to her emotional reactions to events. The record did not firmly establish that Claimant's deficits are solely the result of psychiatric disabilities. Claimant's profile is complex, and her cognitive and adaptive deficits are profound.

13. Whether Claimant is eligible for Lanterman Act services under the Fifth Category remains unresolved. The assessment of whether Claimant suffers from a Fifth Category condition requires consideration of both prongs of potential Fifth Category eligibility, i.e., whether Claimant suffers from a disabling condition found to be closely related to Intellectual Disability **or** whether Claimant requires treatment similar to that required for individuals with Intellectual Disability. (Welf. & Inst. Code § 4512, subd. (a); emphasis added.)

14. In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127 (*Mason*), the appellate court held that "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." (*Id.*, at p. 1129.)

15. Under the DSM-5, which was enacted after *Mason*, adaptive functioning is a critical component of the analysis, not just standardized test scores and

mathematical measures of cognitive ability. Claimant's adaptive deficits are severely deficient in at least three of the seven categories delineated under the Lanterman Act. A more thorough assessment is required to determine whether Claimant's functioning is closely related to her cognitive deficits or requires treatment similar to those with Intellectual Disability.

16. The Service Agency determined Claimant did not meet the criteria of Intellectual Disability, but there is no evidence that it performed an assessment of Claimant's eligibility under the Fifth Category. Given Claimant's severely compromised cognitive and adaptive behavior profile, it is incumbent upon the Service Agency to assess Claimant's eligibility under the Fifth Category.

## **ORDER**

1. Claimant is ineligible for regional center services and supports under the category of Intellectual Disability under the Lanterman Act.

2. Claimant's appeal from the Service Agency's determination that she is not eligible for regional center services and supports under the category of Intellectual Disability is denied.

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3. The Service Agency shall conduct a reassessment of Claimant for eligibility under the Fifth Category, prepare a report, and serve a Notice of Proposed Action, + within 90 days of the effective date of this Decision and Order.

DATE:

EILEEN COHN

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.