BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER, Service Agency

OAH No. 2020120633

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by telephone/video conference on June 17, 2021.

Juanita Mantz and Allison Lowe, Deputy Public Defenders, County of Riverside, represented claimant, who was not present.

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

The record was closed and the matter submitted for decision on June 17, 2021.

ISSUE

Is claimant eligible for regional center services under the categories of intellectual disability or a disabling condition closely related to an intellectual disability or that requires similar treatment as an individual with an intellectual disability (fifth category) pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act)?

FACTUAL FINDINGS

Background

1. On June 16, 2020, the Superior Court of California, County of Riverside, ordered IRC to evaluate claimant, a 30-year-old female, for eligibility for regional center services after she was charged with lewd and lascivious conduct with a child under age 14 (Pen. Code, § 288, subd. (a)). After conducting a review of claimant's records, IRC determined that a face-to-face assessment was required. However, due to the public health emergency, such assessments were not being conducted.

2. On November 10, 2020, IRC Staff Psychologist Ruth Stacy, Psy.D., conducted a psychological assessment of claimant.

3. On December 1, 2020, IRC's eligibility team, which is comprised of a psychologist, program manager, and medical doctor, made an eligibility determination based on Dr. Stacy's assessment and claimant's records that she was not eligible for regional center services.

4. On December 3, 2020, IRC sent claimant a Notice of Proposed Action stating that its eligibility team found that claimant did not have a "substantial disability" as a result of intellectual disability, autism, cerebral palsy, epilepsy, or the fifth category.

5. On December 14, 2020, claimant filed a Fair Hearing Request challenging IRC's eligibility determination.

6. Following an informal meeting held between the parties on January 6, 2021, IRC adhered to its determination that claimant was not eligible for regional center services.

7. On June 2, 2021, after reviewing a psychological evaluation by William H. Jones, Ph.D., IRC's eligibility team again adhered to its original determination that claimant was not eligible for regional center services.

Diagnostic Criteria for Intellectual Disability

8. Neither the Lanterman Act nor title 17 of the California Code of Regulations further defines intellectual disability. However, the established authority for this purpose is the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), "a standard reference work containing a comprehensive classification and terminology of mental disorders." (*Money v. Krall* (1982) 128 Cal.App.3d 378, 384, fn. 2.) The DSM-5 identifies criteria for the diagnosis of intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability: deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from

experience; deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility; and, the onset of these deficits must have occurred during the developmental period.

Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range. Clinical training and judgment are required to interpret test results and assess intellectual performance. Highly discrepant individual subtest scores may make an overall IQ score invalid. 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.

Deficits in adaptive functioning refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. Adaptive functioning is assessed using both clinical evaluation and standardized measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment.

Diagnostic Criteria for Fifth Category

9. Under the fifth category, the Lanterman Act provides assistance to individuals with a disabling condition closely related to an intellectual disability or that

requires similar treatment as an individual with an intellectual disability but does not include other handicapping conditions that are "solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).) A disability involving the fifth category must also have originated before an individual attained 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

In *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 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. Another appellate decision has also suggested, 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 an intellectual disability, notwithstanding an individual's relatively high level of intellectual functioning. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462.) In *Samantha C.*, the individual applying for regional center services did not meet the criteria for intellectual disability. The court understood and noted that the Association of Regional Center Agencies had guidelines (ARCA Guidelines) which recommended consideration of 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 intellectual disability.

The ARCA Guidelines provide criteria to assist regional centers in determining whether a person qualifies for services under the fifth category. They provide that the

person must function in a manner similar to a person with an intellectual disability or who requires treatment similar to a person with an intellectual disability.

FUNCTIONING SIMILAR TO A PERSON WITH AN INTELLECTUAL DISABILITY

10. A person functions in a manner similar to a person with an intellectual disability if the person has significant sub-average general intellectual functioning that is accompanied by significant functional limitations in adaptive functioning. Intellectual functioning is determined by standardized tests. A person has significant sub-average intellectual functioning if the person has an IQ of 70 or below. Factors a regional center should consider include: the ability of an individual to solve problems with insight, to adapt to new situations, and to think abstractly and profit from experience. (ARCA Guidelines, citing Cal. Code Regs., tit. 22, § 54002.) If a person's IQ is above 70, it becomes increasingly essential that the person demonstrate significant and substantial adaptive deficits and that the substantial deficits are related to cognitive limitations, as opposed to a medical problem. It is also important that, whatever deficits in intelligence are exhibited, the deficits show stability over time.

11. Significant deficits in adaptive functioning are established based on the clinical judgements supplemented by formal adaptive behavioral assessments administered by qualified personnel. Adaptive skill deficits are deficits related to intellectual limitations that are expressed by an inability to perform essential tasks within adaptive domains or by an inability to perform those tasks with adequate judgement. Adaptive skill deficits are not performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.

TREATMENT SIMILAR TO A PERSON WITH AN INTELLECTUAL DISABILITY

12. In determining whether a person requires treatment similar to a person with an intellectual disability, a regional center should consider the nature of training and intervention that is most appropriate for the individual who has global cognitive deficits. This includes consideration of the following: individuals demonstrating performance based deficits often need treatment to increase motivation rather than training to develop skills; individuals with skill deficits secondary to socio-cultural deprivation but not secondary to intellectual limitations need short-term, remedial training, which is not similar to that required by persons with an intellectual disability; persons requiring habilitation may be eligible, but persons primarily requiring rehabilitation are not typically eligible as the term rehabilitation implies recovery; individuals who require long-term training with steps broken down into small, discrete units taught through repetition may be eligible; and the type of educational supports needed to assist children with learning (generally, children with an intellectual disability need more supports, with modifications across many skill areas).

SUBSTANTIAL DISABILITY

13. The ARCA Guidelines refer to California Code of Regulations, title 17, sections 54000 and 54001, regarding whether a person has a substantial disability. This means the person must have a significant functional limitation, as appropriate for the person's age, in three or more of these major life areas: communication (must have significant deficits in both expressive and receptive language), learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

Testimony of Dr. Stacy

14. Dr. Stacy has been a staff psychologist at IRC since 2015. She has also held positions at IRC over the past 31 years that included Senior Intake Counselor and Senior Consumer Services Coordinator. In addition to her doctorate degree in psychology, she also holds a Master of Arts in Counseling Psychology, a Master of Arts in Sociology, and a Bachelor of Arts in Psychology and Sociology. Dr. Stacy qualifies as an expert in the diagnosis of intellectual disability, and in the determination of eligibility for IRC services. Dr. Stacy testified about her psychological assessment and records she and the IRC eligibility team reviewed before determining that claimant did not qualify for regional center services.

SCHOOL DISTRICT ASSESSMENTS

15. Dr. Stacy reviewed multiple records from claimant's school district. An Individualized Education Plan (IEP) report form from October 2002 showed that claimant was receiving special education services under the category of Speech/Language Impairment. The report indicated claimant first began receiving services in 1998.

Dr. Stacy testified that speech/language impairment is not the same as intellectual disability, and the two have different symptomologies. The report also indicated that claimant had been making improvements in the previous IEP goals. Typically, an individual with intellectual disability only make minimal progress in goals and objectives.

16. On September 23, 2004, claimant's school district conducted a psychoeducational evaluation when claimant was 14 years old and in 9th grade. According to the assessment, claimant was attending a special day class program

because she had previously been deemed eligible for special education services on the basis of language disorder. Although she had been exited from therapy in November 2003, she continued in the day program for academic support. The report reviewed previous test results from October 1998, when the Wechsler Intelligence Scale for Children-III (WISC-III) was administered. Claimant received the following scores: Verbal IQ: 55, Performance IQ: 81, Full-Scale IQ: 65.

In 2004, claimant was again administered the WISC-III, receiving the following scores: Verbal IQ: 59, Performance IQ: 75, and Full-Scale IQ: 64. The results indicated claimant's language-based/verbal skills fell within the Extremely Low/Deficit range and her nonverbal cognitive skills fell within the Borderline range.

Dr. Stacy noted significant variance in the subtests within each category. Under the verbal subtests, claimant scored as follows: 1 (extremely low) in vocabulary and written comprehension; 2 (extremely low) in information; 4 (borderline) in similarities; and 6 (low average) in arithmetic and digit span. Under the performance subtests, claimant had scores ranging from 4 (borderline) on picture completion up to 8 (average) on coding. According to Dr. Stacy, the subtests are more indicative of a learning disability, specifically speech/language impairment, rather than intellectual disability. Individuals with speech/language impairment often have much lower scores in verbal subtests than performance subtests. Claimant's results follow a common pattern for those with speech/language impairment but not intellectual disability. Typically, those with intellectual disability would have uniformly consistent scores that fall in the deficient range rather than the wide variation seen in claimant's scores.

Claimant was also administered the Test of Auditory-Perceptual Skills – Revised (TAPS-R), which Dr. Stacy testified is administered to determine whether there is an auditory processing disorder. Claimant scored in the extremely low range, indicting an

auditory processing disorder. Dr. Stacy explained that such a disorder occurs when a person is unable to understand and interpret auditory information, in other words, what the person hears is a distortion of what exactly is said. Auditory processing disorders are not consistent with intellectual disability. As with claimant, individuals with auditory processing disorder often have more difficulty with language-based cognitive testing. In claimant's case, her subtest scores on the verbal portion of the WISC-III indicate as much.

Claimant was administered the Woodcock-Johnson III Test of Achievement (WJ-III), which showed she was academically at a third and fourth grade level.

In conclusion, the evaluator noted the discrepancy in verbal and nonverbal cognitive functioning, which suggested deficits in auditory processing. Claimant continued to receive special education services under the category Speech/Language Impairment.

17. Claimant's school district conducted a triennial review on September 7, 2007, when claimant was 17 years old and in 11th grade. At the time, claimant was receiving services under the category Learning Handicapped. The report noted claimant's grade point average was 1.35 and she had earned 120 credits out of 170 attempted. The report noted claimant's poor attendance. For the previous school year, she missed between 62 to 103 class periods. She had several disciplinary infractions related to attendance.

The evaluator administered the WJ-III, in which claimant scored an age equivalent of 8 and in 2nd grade for reading and mathematics, and age 11 and 5th grade for written language. No other tests were administered.

The evaluator wrote that the cognitive profile is consistent with one who has deficient to borderline cognitive functioning, and her higher ability scores, though still borderline, were in the areas of rote tasks. The evaluator believed that her consistently poor attendance may have contributed to poor school progress, however her lower ability scores have been consistent over time. The evaluator recommended vocational/certificate track placement and encouraged the parents to seek services from IRC. The classification was changed to Mental Retardation.

Dr. Stacy testified that poor attendance can negatively affect achievement because a student who is not in class is not learning any of the material. Dr. Stacy noted that no further cognitive testing was conducted. However, on the WJ-III, the sub-scores that were reported were more consistent with a learning disability rather than intellectual disability. Dr. Stacy noted the variance in the scores, ranging from 47 for academic apps to 91 for writing fluency. A person with intellectual disability would generally have scores consistently 70 and under. Dr. Stacy disagreed with the change of classification to mental retardation (now reclassified as "intellectual disability") and believed it was an erroneous determination not supported by the evidence. She noted that the performance subtests on the previously administrated cognitive testing was within the borderline and low average range. The evaluator seemed to imply in the report that these were due to "rote tasks." Although some of the performance tests such as coding and simple search involve more rote skills, other measures in the performance category such as perceptual reasoning, picture completion and arrangement, and sequence reasoning test more than ability to perform rote tasks. Dr. Stacy also did not believe mental retardation was the correct classification because of the variance in academic testing scores, where she demonstrated the same pattern of having split scores. In 1998, 2001, and 2004, the IEP team concluded that she had speech/language impairment. However, the 2007 evaluator, looking at the same data,

made a conclusion that it was mental retardation. In sum, Dr. Stacy felt that the jump to mental retardation was a leap that was not supported by the records. Finally, she noted the criteria used by school districts for special education is different than the DSM-5 criteria used in assessing regional center eligibility.

SOCIAL SECURITY ADMINISTRATION EVALUATIONS

18. In February 2009, at age 18, claimant was evaluated by Shirley Simmons, Ph.D., to identify mental impairment affecting functioning as part of a Social Security Administration (SSA) disability application. At the time, claimant was living at home with her family. She said she could perform household chores, run errands, and fully dress and bathe herself. She was capable of handling her own money and move about the community on her own.

Dr. Simmons administrated the Bender Gestalt test of visual motor integration, which required claimant to replicate several geometric figures. Claimant had a raw score of 100, which was in the average range of visual motor integration.

Dr. Simmons administered the Test of Memory Malingering, which claimant scored 40 out of 50, suggestive of malingering. Dr. Simmons believed this was consistent with her presentation and her functional impairment capabilities as she described them would require at least low average intelligence. Claimant's performance in other areas was consistent with and suggestive of possible malingering, where claimant may have had some motivation to exaggerate any deficits.

Dr. Simmons administered the WISC-III. Claimant had a verbal index score of 61 (extremely low), performance IQ of 73 (borderline), and full-scale IQ of 63 (extremely low). Subtests under the verbal category ranged from a low of 1 (arithmetic) to 4 (digit

span, information, and comprehension). On the performance subtests, she ranged from 4 (picture completion, digit symbol coding) to 8 (block design). Dr. Simmons believed that claimant's performance was "believed to be a less than accurate representation of claimant's overall cognitive abilities." Dr. Simmons estimated her actual intelligence capabilities to be in the low average to borderline range.

Finally, Dr. Simmons administered the Wechsler Memory Scale, which scored in the borderline to low average range. Dr. Simmons wrote that claimant was still capable of learning and could perform mental operations successfully. As diagnosis, Dr. Simmons had no diagnosis under Axis I and borderline intellectual functioning under Axis II.

19. A case review completed by a psychiatrist noted that despite some evidence of malingering, claimant had full scale IQ scores in the 60s since 1998, and her activities of daily living indicate she is not able to care/function independently. Consequently, claimant began receiving SSI benefits based on a disability determination originating on September 1, 2003.

20. Adrienne Pasek, Psy.D., evaluated claimant in June 2016, when claimant was 26 years old. Dr. Pasek noted claimant reported she was self-sufficient, has a car, and has a driver license. She was managing her own funds and reported caring for her seven-year-old son without difficulty. She reported she sometimes gets lost, but she knew how to use her navigation system to find her way around. Claimant could remember two out of three objects in five minutes, she had "fair" attention span, she could name the President of the United States but not the California Governor. She could not perform simple calculations. As for a DSM-IV diagnosis, Dr. Pasek diagnosed her with Axis I: mild anxiety, not persistent and Axis II, learning disability, mental retardation. Dr. Pasek opined claimant was not limited in her ability to follow detailed

instructions, follow simple oral instructions, interact with the public or co-workers, comply with job rules, respond to changes in routine in a usual work setting, and maintain focus and attention.

Dr. Stacy testified that the prognostic impressions articulated by Dr. Pasek were not consistent with the diagnosis of mental retardation.

21. In November 2016, claimant was evaluated by Roger Tilton, Ph.D. Claimant reported difficulty following instructions and remembering things. She has not worked and claimed to suffer from anxiety. She reported being able to complete activities of daily living and can drive, but she does not remember how to get places.

Dr. Tilton administered the Wechsler Adult Intelligence Scale-IV (WAIS-IV), for which he reported the subtests for the verbal ranging from 3 (vocabulary, similarities, and information) to 6 (digit span), and subtests from performance ranging from 3 (matrix reasoning) to 6 (coding and symbol search). The composite scores were: verbal comprehension 58, perceptual reasoning 65, working memory 66, and processing speed 79. Her full-scale IQ scored at 61 in the mildly deficient range. Dr. Tilton noted a significant discrepancy in the composite and subtest scores, ranging from mildly deficient to high borderline. Dr. Tilton also administered several other tests, including the WRAT 4, in which she performed in the low average range for spelling, in the borderline range for word reading, and mildly deficient range in math computation.

In his conclusion, Dr. Tilton noted that while claimant might have some difficulty with performing complex tasks, and shows some significant cognitive deficits, she does fairly well in adaptive behavior. Her low average performance on the spelling portion of the WRAT was inconsistent with her performance on intellectual testing and at least suggestive that her performance on the WAIS-IV was an underestimate of her ability.

For these reasons, Dr. Tilton put intellectual disability, mild, as a rule-out diagnosis. For the functional assessment, Dr. Tilton categorized as mildly limited claimant's ability to understand, remember, and carry out simple instructions; maintain concentration and attention; and accept instructions from supervisors. Dr. Tilton categorized as moderately limited claimant's ability to do detailed tasks and follow complex instructions; maintain regular attendance in the work-place and perform work activities consistently; and perform work activities without special or additional supervision. Finally, Dr. Tilton indicated claimant was unable to manage funds.

22. In August 2016, a psychiatric consultant reviewed the documentary evidence and concluded that claimant no longer qualified for SSI benefits because the severity of her mental impairment had improved. SSA terminated her SSI benefits and claimant appealed. On appeal, the decision to terminate her SSI benefits was affirmed by a hearing officer and the administrative law judge.

DR. STACY'S EVALUATION

23. Dr. Stacy evaluated claimant in person on November 10, 2020. At the time of the evaluation, she was 30 years old. She has an 11-year-old son, who she lived with and her mother and stepfather. As an adult, she and her son lived with her son's father for three years, from 2015 to 2018 in their own place. They both paid bills. Claimant had her own car and did grocery shopping. She made and took her son to his medical appointments. After she and her boyfriend split up, she could not afford to live on her own and moved in with her father. In September 2020, she and her son moved in with her mother and stepfather.

Claimant has a history of alcohol and drug use. Her license was suspended in 2017 after she was arrested for driving under the influence. She began using

methamphetamine and cocaine in 2017 but denied currently using alcohol or drugs. She has held occasional jobs cleaning houses and offices. Her son was recently diagnosed with Type I diabetes. She is her son's caregiver/In-Home Support Services (IHSS) provider. She monitors his eating and gives him insulin injections.

24. Dr. Stacy interviewed claimant's mother. Claimant's mother noted claimant was hospitalized twice as a child for asthma, but she did not lose consciousness. Claimant was bullied in school and had a lot of anxiety. Consequently, she stopped attending school.

25. Dr. Stacy administered the WAIS-IV to assess cognitive functioning. Claimant had the following standard scores: verbal comprehension index of 69 (extremely low); perceptual reasoning index of 82 (low average); working memory of 71 (borderline); and processing speed of 86 (low average). Like with previous testing, there was a wide range of variability in the subtests. Of the three verbal comprehension subtests, all were in the borderline range. Of the three perceptual reasoning subtests, they ranged from 6 (low average) to 8 (average). In working memory she scored a 6 (low average) for digit span and 4 (borderline) for arithmetic. In processing speeds, she scored a 7 (low average) for symbol search and 8 (average) for coding. Thus, the subtests ranged from a 4 (borderline) to 8 (average). Because the index scores had an 18-point difference between verbal comprehension and processing speed, Dr. Stacy believed that the index scores provided the most accurate representation of claimant's cognitive ability. Claimant's full-scale IQ was 72, which Dr. Stacy did not indicate in her report. Dr. Stacy testified about her decision not to report a full-scale IQ. She noted that under the DSM-5, a single score is not the most reliable indicator of intellectual disability. Where there is a significant split in the scores, as with the case of claimant, a psychologist can utilize clinical judgment and not report

the full-scale IQ. Because of the variance in the subtest scores, Dr. Stacy did not believe the full-scale IQ of 72 represented claimant's actual cognitive abilities.

As with the past tests, claimant performed far better on the performance components than the verbal scores. This is often the case when an individual has a speech/language disorder or an auditory processing disorder, as opposed to intellectual disability.

Dr. Stacy noted claimant was anxious during the assessment and believed claimant's anxiety did impact the test results. On one occasion, claimant said she did not want to answer as she did not want to give a wrong answer. On numerous occasions, she initially provided the correct answer, then seemed to second guess herself and changed the answer to an incorrect answer. This resulted in claimant obtaining lower scores than what she would have obtained if she had not second guessed herself/changed her answers. Consequently, Dr. Stacy believed the reported scores may be lower than her true ability.

26. Dr. Stacy assessed adaptive functioning using the Street Survival Skills Questionnaire (SSSQ). Compared to other adults her age with no neuropsychological disability, she received a SSSQ Quotient of 91, within the Average range. Unlike other standardized measures of adaptive functioning, which require third-party questionnaires, the SSSQ tests claimant's ability to perform tasks in areas such as functional signs, domestics, health and safety, public services, time, and money. All of the subtests were in the average or low average range.

Dr. Stacy also noted that claimant has her driver's license. She can count money, make change, and make purchases. When she had an apartment with her boyfriend, she ran the household, including grocery shopping, doing the laundry, and cooking.

She helped pay the bills. She manages her own money. Claimant is responsible for her son's care and she is his IHSS provider. She has a history of making his medical appointments and taking him to the appointments. She gives him insulin injections and supervises his diet. Dr. Stacy did not believe claimant's adaptive skills indicate or suggest a developmental disability. Rather, her adaptive skills support the belief that her true cognitive ability is within the low average range.

27. In conclusion, Dr. Stacy did not believe claimant satisfied the diagnostic criteria for an intellectual disability based on her nonverbal cognitive skills in the low average range and her adaptive skills in the average range. Dr. Stacy also did not believe claimant met the diagnostic criteria for fifth category eligibility because two index scores in the range of low average intelligence is not closely related to intellectual disability. Furthermore, her condition does not require treatment similar to what individuals with intellectual disability require. Instead, claimant has a history of language disorders and anxiety.

Claimant's Evidence

INTERVIEW OF CLAIMANT'S FATHER

28. An investigator with the Riverside County Public Defender's Office interviewed claimant's father on February 25, 2021, and documented the interview in a report, which is summarized as follows: He reported that when claimant was eight months old, a babysitter left claimant outside in the cold, and when they found her, she was "dying." Claimant had asthma as a result. Claimant's father reported that until recently, claimant and her child lived with him for one and one-half to two years. While living with him, claimant would not drive but would ride her bike or scooter to school. She would often misplace her bike and other items. Claimant is easily side-tracked or

distracted. She can cook food but often overcooks or burns it. She can only care for her son because the entire family assists her. Claimant is nice and happy one day and "out of control" the next. He believes she is bipolar. Claimant's husband left her, and his family does not want claimant around.

TESTIMONY AND REPORT OF DR. JONES

29. Dr. Jones obtained his Ph.D. in psychology in 1974. After completing two internships, he was licensed to practice psychology in California in 1976. Since that time, he has performed forensic, substance abuse, and psychological assessments. He is on the superior court psychologist panel for conducting competency evaluations. He has experience evaluating intellectual disability, however, he has never conducted an eligibility determination under the Lanterman Act. Dr. Jones prepared a report on April 15, 2021, and an addendum on June 11, 2021. His reports and testimony at hearing are summarized as follows:

30. Dr. Jones's initial report indicated he was asked by claimant's attorneys to evaluate whether claimant "appreciated the wrongfulness of her action in light of her diagnosis and whether was likely to reoffend." He reviewed reports related to her arrest and psychological testing documents related to Dr. Stacy's testing (but not Dr. Stacy's evaluation). Dr. Jones interviewed claimant on April 15, 2021 via videoconference, lasting 1 hour and 45 minutes. He obtained a family, educational, and employment history. Claimant reported completing 11th grade but leaving school because other girls harassed her. She has been employed doing housekeeping. She reported living with the father of her son for three years. She denied any psychiatric history. She reported becoming addicted to methamphetamine in 2017. She last used it in 2018. Dr. Jones also interviewed claimant's mother.

Dr. Jones noted claimant has limited vocabulary and ability to express herself. She has had low self-esteem and is socially immature. He believed her verbal intelligence was in the "mentally disabled" range and has "quite limited" social maturity. He wrote:

> Because of her disability in the area of intellectual disability in the area of verbal comprehension, her significant social immaturity and limited expressive and receptive language abilities, she has had limited ability at the time to appreciate the wrongfulness of her actions. She has been a law-abiding citizen in other respects. If she were to abstain from alcohol and illegal drugs, she would be very unlikely to reoffend. At the time of the alleged events that led to the charges against her, she had lost a relationship with the father of her son, and she was attempting to cope with her depression and feelings of loss by abuse of alcohol and methamphetamine. This had the effect of exacerbating her mental illness.

31. In his addendum report, Dr. Jones indicated he reviewed the public defender report summarizing the interview with claimant's father in addition to the reports and evaluations discussed above (with the exception of Dr. Stacy's report). He also indicated he conducted a Gilliam Autism Rating Scale. He provided no additional analysis except to conclude the test results do not support a diagnosis of autism.

32. Dr. Jones testified that he thought claimant would be a "suitable candidate" for IRC services because she had long history of consistent psychological test findings regarding intellectual functioning, a long history of special education, and

no documented history of employment he was aware of. He believes claimant's cognitive testing scores were consistent, but the test administered by Dr. Stacy was an "outlier." He thought it was unusual that she did not list the full-scale IQ in her report, which he reviewed just prior to his testimony. He believed that her use of the SSSQ was "questionable as a qualifier" for IRC services because her scores show higher functioning but there are no adults in the normative group other than those with neurological problems. There are two normative groups, those with significant neurological problems and the other is high school students. The American Psychological Association has a rule that it is "not kosher" to test someone "on a procedure not based on her group." The content of the items in the test are geared toward people in job training. There is no mention of social functioning in the scores. The test was not developed as an identifier for people to receive services, it was developed for guiding job training programs for individuals neurologically impaired. Dr. Jones would have used the Vineland, which is more detailed and covers broader range of functioning. It is done by someone familiar with the person, such as a parent or teacher with knowledge of day-to-day functioning. He believed the statement by claimant's father to the public defender investigator indicated she had a lot of problems with functioning and could not do a lot of things. Both parents presented her having difficulty with daily functioning. He believed that when she was receiving SSI, she was receiving benefits to a payee, which means that she could not handle her own funds.

33. Dr. Jones believed claimant is substantially impacted in three or more life domains. She was identified as having a speech/language problem on a long-term basis, she has limitations in learning and mobility, self-direction, capacity for independent living, and self-sufficiency. She presents herself as being more competent than her parents present her. He believes individuals with intellectual disability play

down their limitations and present being able to do more things than they are able to because they are used to being bullied for being in special education. He believes the estimation of claimant's adaptive skills by Dr. Stacy are not accurate. He does not believe she has custody of her son, which "says something about her parenting ability," she had a payee for SSI benefits indicating a problem with economic self-sufficiency. Finally, her legal problems indicate impulsivity and limited social ability. Because of her limited social ability and intellectual ability. Claimant's mother said she had severe asthma and had to take her to the emergency room, she suffered oxygen deprivation.

34. Dr. Jones reviewed the IEPs and evaluations, which he believed were "appropriate and professional." He did not have any reason to doubt their conclusions. Based on the records he believed her full-scale IQ was "around 65." He would have expected that claimant would have found to be eligible for IRC services because she has a long-term history of special education up until leaving school, long-term treatment for speech and language problems, she has no documented employment history, she does not have much social development. When asked specifically under what grounds under the Lanterman Act does she qualify, he said she had been diagnosed in the past with intellectual disability and she shows impairment in major life activities. He believed that the parents transport claimant, she cannot follow directions, she cannot handle money, burns her food, and lost custody of her son.

35. Dr. Jones did not conduct any psychological testing because that was not his assignment. He estimated her full-scale intelligence based on earlier evaluations and his interaction with her. He estimated this full-scale because most of the evaluations were "close to that number."

36. After Dr. Jones's testimony, Dr. Stacy was recalled and testified that she believed the SSSQ is an appropriate tool used as part of eligibility determination. The test provides a raw score, which can be compared to two different groups, adults with neurocognitive disorders and those age 11 and higher. It is not specifically geared for high school students. Dr. Stacy believed it is a more objective test than the Vineland, which is based on third-party reports. Dr. Stacy has found that when people are seeking a benefit, the information presented sometimes does not present the person's true ability. While the SSSQ does not contain any social domains, Dr. Stacy ascertained this information from her interview with claimant and claimant's mother. Dr. Stacy did not believe claimant has substantial deficits in social skills.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine eligibility, claimant has the burden of establishing that he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, §§ 115; 500.)

Relevant Law and Regulations

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday

living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. The Department of Developmental Services is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.)

4. 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." A developmental disability includes intellectual disability, cerebral palsy, epilepsy, and autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid*.)

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

> (a) "Developmental Disability" means a disability that is attributable to mental retardation[1], cerebral palsy, epilepsy,

---

[1] Although the Lanterman Act has been amended to eliminate the term "mental retardation" and replace it with "intellectual disability," the California Code of Regulations has not been amended to reflect the currently used terms.

autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

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

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

generalized intellectual disability, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

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

6. 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.

7. Upon an application for services, the regional center is charged with determining if an individual meets the definition of developmental disability contained in Welfare and Institutions Code section 4512. In this assessment, "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." (Welf. & Inst. Code, § 4643, subd. (b); Cal. Code Regs., tit. 17, § 54010.)

Evaluation

EXPERT TESTIMONY

8. In order to establish eligibility for regional center services, claimant has the burden of proving she has *both* a qualifying condition and a substantial disability (significant functional limitations in three or more areas of a major life activity). Along with the documentary evidence submitted for review in this case, two experts testified, Dr. Stacy and Dr. Jones. A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which the testimony relates. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.) The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.* at pp. 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

9. In resolving any conflict in the testimony of expert witnesses, the opinion of one expert must be weighed against that of another. In doing so, consideration should be given to the qualifications and believability of each witness, the reasons for each opinion, and the matter upon which it is based. The testimony in this case by Dr. Stacy is determined to be more persuasive than the testimony of Dr. Jones. Dr. Stacy has devoted virtually her entire career to assessing individuals specifically for the presence of developmental disabilities such as intellectual disability, assessing individuals for regional center eligibility under the fifth category, and other aspects of the Lanterman Act. Although claimant questioned her objectivity as an expert because she is an IRC employee, she was found to be objective, thorough, and fulfilled her obligation to conduct a complete evaluation of a potential consumer required under Section 4643.[2] She articulated clear understanding of the requirements for Lanterman Act eligibility and the diagnostic criteria for qualifying conditions.

In contrast, Dr. Jones did not articulate the diagnostic criteria for intellectual disability and failed to provide more than a cursory explanation for why he believed IRC should have found claimant eligible. Indeed, his initial report, based on a relatively short interview and almost no documentations related to her intellectual functioning, focused almost exclusively on claimant's competency, culpability for criminal acts, and

[2] Although the Legislature could have mandated eligibility evaluations be conducted by an independent evaluator, it instead delegated this task to the regional centers. While the regional center's evaluation is given no deference or on appeal (*Tri-Counties Association for Developmentally Disabled Inc. v. Ventura County Public Guardian* (2021) 63 Cal.App.5th 1129), Dr. Stacy's evidence is not in any way diminished by virtue of her employment by IRC.

mental illness, rather than an analysis of eligibility under the Lanterman Act. In his testimony, rather than applying any methodological analysis, he cited previous findings by the school district and SSA that claimant had an intellectual disability as the basis for his conclusion; but he did not articulate clear knowledge of eligibility criteria for intellectual disability under the Lanterman Act. He discounted claimant's results on the WAIS-IV administered by Dr. Stacy as an "outlier" without having reviewed her evaluation report. He opined that claimant presently had a full-scale IQ of 65 based solely on previous test results but excluding Dr. Stacy's most recent evaluation. Many of his conclusions were based on scant information or anecdotes, that often conflicted with other evidence. For example, a statement by her father that claimant sometimes burns her food led Dr. Jones to the conclusion that she cannot cook for herself; the statement that she had an SSI payee led him to conclude that she cannot handle money; and that claimant and her child now live with her mother led him to believe that she lost custody of her child. Finally, and perhaps most significantly, Dr. Jones did not address the historically consistent variability in claimant's scores as a rule-out for intellectual disability. Although Dr. Jones's opinion is not completely discounted, with respect to weight, Dr. Stacy's opinion in this case was given more weight and relied upon more heavily with respect to rendering a conclusion in this case.

INTELLECTUAL DISABILITY

10. Claimant failed to establish that she suffers from intellectual disability. While claimant received special education throughout most of her academic life, she was serviced under the category of speech/language impairment, not intellectual disability. Her cognitive testing showed great variability between the language-based and performance tests, consistent with someone who suffers from a learning disability

and an auditory processing disorder rather than the global cognitive delays consistent with intellectual disability. While the school district changed her category to intellectual disability shortly before she turned 18, Dr. Stacy testified as to why this categorization was erroneous and not supported by the evidence. Moreover, the eligibility criteria for special education are different than under the Lanterman Act. The school district's categorization is given no deference; it is the underlying assessment results that are relevant. Similarly, the decision by SSA to grant – and then terminate – SSI payments to claimant is given no weight as the eligibility for disability is based on different criteria. The psychological evaluations that underpinned the decision are of probative value. Dr. Stacy clearly explained why the historical data, consistent with her findings, continued to show high variability between her verbal and performance functioning and is inconsistent with a DSM-5 diagnosis for intellectual disability.

Dr. Stacy conducted a comprehensive assessment on November 10, 2020. Dr. Stacy's assessment showed claimant's cognitive abilities in many domains were higher than the level required for intellectual disability. The DSM-5 states that highly discrepant individual subtest scores may make an overall IQ score invalid, and co-occurring disorders that affect communication, language, 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. Additionally, Dr. Stacy believed that claimant's true intellectual capabilities were not accurately reflected during the examination due to claimant's anxiety and second-guessing of correct answers. This was not the first evaluation where the evaluator indicated that testing likely did not reflect her true abilities.

11. Regarding the second criterion for a DSM-5 diagnosis for intellectual disability, deficits in adaptive functioning refer to how well a person meets community

standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. Adaptive functioning is assessed using both clinical evaluation and standardized measures.

Dr. Jones speculated that claimant overestimated her true abilities because of a reluctance to accept her limitations. However, it was not established why Dr. Jones chose to discount claimant's self-reports over those of claimant's mother and father. While Dr. Jones criticized Dr. Stacy's use of the SSSQ because he believed it inappropriate to compare claimant to the normative group of high school students, Dr. Stacy was clear that the test can be administered to adults, and Dr. Jones presented no corroboration to support his claim. Furthermore, Dr. Jones did not administer any standardized third-party assessments, such as the Vineland, in an attempt to obtain an accurate evaluation of claimant's adaptive limitations. Moreover, neither claimant, nor her family members testified at hearing, which is highly unusual in an eligibility determination case and prevents the factfinder from evaluating conflicting claims about claimant's abilities. Claimant argues that the reporting by her mother and father should be given more weight than claimant's self-reporting, there is no basis for such a conclusion. Just as claimant could have motivations to overestimate her abilities, the reverse could be said for the reporting by claimant's family. Indeed, the interview of claimant's father by the public defender investigator stated that claimant had been married (which she had not) and provided other vague details. Both his interview and Dr. Jones's initial report indicates PTSD and other mental health issues as having significant impact on claimant's adaptive functioning.

12. In conclusion, the weight of the evidence shows claimant does not meet the criteria for intellectual disability because cognitively, claimant functions in the low

average range in non-verbal abilities. Similarly, her adaptive skills are found to be in the low average range. Rather than intellectual disability, her cognitive and adaptive deficiencies (or deficits) are more likely the result of learning disabilities (speech/language impairment) and psychiatric conditions (anxiety).

FIFTH CATEGORY

13. In *Mason, supra*, 89 Cal.App.4th 1119, 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]." (*Id.* at p. 1129 [emphasis added].) Further, the presence of adaptive deficits alone, absent cognitive impairment, is also not sufficient to establish that a person has a condition closely related to an intellectual disability. (*Samantha C., supra,* 185 Cal.App.4th at p. 1486 [intellectual disability "includes both a cognitive element and an adaptive functioning element"].)

Dr. Jones did not address fifth category eligibility in his reports or testimony. Thus, there is no qualified expert evidence to base a conclusion that claimant suffers from a condition closely related to intellectual disability. As discussed above, claimant does not suffer from the kind of general intellectual impairment found in persons with intellectual disabilities. Nor was there any evidence that claimant suffers from a condition that requires treatment similar to an intellectual disability. While many individuals suffering from conditions that are not developmental disabilities may benefit from the types of services offered by regional centers, claimant must show that she requires "treatment" similar to a person with an intellectual disability as opposed to benefitting from "services" similar to a person with an intellectual disability, which is not the standard. Claimant does not qualify for services under the fifth category because a preponderance of the evidence did not establish that she suffers from a

condition closely related to an intellectual disability or suffers from a condition that requires treatment similar to an intellectual disability.

ORDER

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

DATE: June 30, 2021

ADAM L. BERG
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.