BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT

and

INLAND REGIONAL CENTER, Service Agency

OAH No. 2021100420

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephonically on November 23, 2021, due to the ongoing COVID-19 pandemic.

Claimant's parents represented claimant who was not present.

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

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on November 23, 2021.

ISSUE

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

SUMMARY

Individuals qualify under the fifth category if they have a diagnosis similar to an intellectual disability or require similar treatment. IRC erroneously interpreted the fifth category criteria, incorrectly asserting that claimant must have a similar diagnosis and require similar treatment. However, the applicable laws and guidelines use the word "or," not the word "and," meaning claimant need only show one of these to qualify. Although much of IRC's expert's testimony focused on his opinions that claimant did not have a similar condition, that is but one part of the fifth category. The alternative part requires claimant to show he requires treatment similar to one with an intellectual disability which he clearly did, thereby qualifying him under the fifth category. Because claimant's fifth category condition constitutes a substantial handicap for him, he is eligible for regional center services and his appeal is granted. (Of note, given his young age, which made testing difficult, and because he satisfied the fifth category part that he requires similar treatment, the issue of whether he has a similar condition will not be addressed in this decision.)

FACTUAL FINDINGS

Claimant's Assertion for Eligibility

1. Claimant is currently a five-year-old male who participated in the Early Start program because of his developmental delays. Claimant asserted he was eligible for regional center services under the fifth category.

Jurisdictional Matters

2. On September 16, 2019, IRC notified claimant that he was not eligible for regional center services.

3. On October 12, 2021, IRC received claimant's fair hearing request appealing that decision and the matter was set for hearing.

The "Fifth Category"

4. Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to intellectual disability or that require treatment similar to that required for individuals with an intellectual disability," but does not provide services for "other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code, § 4512, subd. (a).) Along with the other four qualifying conditions (cerebral palsy, epilepsy, autism spectrum disorder, and intellectual disability), a disability involving the fifth category must originate before an individual attains18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

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

On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines). (Of note, the ARCA guidelines have not gone through the formal scrutiny required to become regulations and were written before the DSM-5 was in effect and are not entitled to be given the same weight as regulations.) In those Guidelines, ARCA noted that eligibility for regional center services under the fifth category required a "determination as to whether an individual functions in a manner that is similar to that of a person with mental retardation **OR** requires treatment similar to that required by individuals with mental retardation." (Emphasis in original; the Guidelines were created when the term "mental retardation" and not "intellectual disability" was still in use.) The Guidelines stated that *Mason* clarified that the Legislative intent was to defer to the professionals of the Regional Center Eligibility Team to make the decision on eligibility after considering information obtained through the assessment process. The Guidelines

listed the factors to be considered when determining eligibility under the fifth category.

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

Documents Introduced at Hearing

5. The records reviewed repeatedly and consistently documented claimant's sweet nature, describing him as friendly and outgoing.

6. On June 3, 2019, when claimant was two years, 10 months old, Joshua Lefler, Ph.D., performed a psychological evaluation at the request of Kern Regional Center (Kern RC). (Claimant has since moved to IRC's catchment area.) Dr. Lefler noted claimant's medical history, including that at birth the umbilical cord became wrapped around his neck and he spent five hours in the neonatal intensive care unit because he aspirated fluid. Dr. Lefler administered a mental status examination, the Wechsler Preschool and Primary Scale of Intelligence - Fourth Edition (WPPSI-IV), the Autism Diagnostic Observation Schedule, Second Edition-Module One (ADOS-2), and the Vineland Adaptive Behaviors-Third Edition (Vineland-3).

Dr. Lefler reported that during the mental status examination claimant appeared his stated age, made eye contact, revealed a normal affect, and interacted in a friendly manner, but did not respond to questions regarding his mood, fund of general knowledge, working memory, or processing abilities. During administration of the WPPSI-IV, claimant initially put forth some effort, but became distracted and did not continue. Based on some scores, it appeared unlikely his intelligence was impaired, but "future assessments will clarify his intellectual functioning." The ADOS-2 revealed scores that fell below the autism spectrum threshold. Claimant's scores on the Vineland-3 were in the one- to two-year-old ranges. His adaptive behavior composite score of 77 classified his general adaptive functioning as "moderately low," meaning he scores higher than six percent of similarly aged individuals. Dr. Lefler diagnosed claimant with language disorder, provisional, to account for claimant's persistent difficulties in the acquisition and use of language across modalities due to deficits and comprehension or production. Dr. Lefler wrote that the diagnosis "will need to be confirmed by a speech language pathologist." Dr. Lefler concluded that claimant was not eligible for regional center services.

7. A June 10, 2019, school district multidisciplinary report of testing performed when claimant was two years, 10 months old, documented that claimant had been referred for special education consideration by Kern RC. Delays in claimant's gross motor, fine motor, cognitive, receptive language, expressive language, social/emotional, and adaptive/self-help skills were noted. Claimant was recommended for further assessment at Kern RC to determine continued eligibility after the age of three. The school district performed numerous tests and made multiple recommendations to address claimant's deficits.

8. A June 10, 2019, Individualized Education Program (IEP) from claimant's school district documented that he was eligible for special education services under the "Speech/Language Impairment" category. The IEP documented claimant's many needs and the strategies and plans the school district was going to put in place to address those needs. Primary specialized academic instruction and speech and language services were put in place. Claimant's significant medical history was noted and his developmental screening documented concerns in the following areas: communication, personal/social, fine motor, and problem-solving. There were issues regarding claimant's hearing ability. His auditory comprehension and expressive communication were delayed, and his receptive vocabulary fell below average. He constantly put things in his mouth and his cognitive abilities and adaptive skills fell in the below average ranges. Social skills were his strength.

9. On July 11, 2019, Kern RC concluded that claimant had a non-developmental disability diagnosis of speech delay, making him ineligible for regional center services.

10. In its closing note, Kern RC documented that claimant, who had been participating in Early Start services, was deemed no longer eligible for regional center

services because he was turning three years old and did not have a qualifying developmental disability.

11. A University of California, Los Angeles (UCLA) after-visit note documented claimant's March 4, 2020, visit with Lyre Fribourg, Ph.D., for his developmental delay and apraxia. Apraxia is a neurological motor speech disorder that makes it hard to speak. With apraxia, the messages that travel from the brain to the mouth to enable speech do not get through correctly, thereby preventing speech. The UCLA problem list included fine motor delay, apraxia of speech, developmental language disorder with impairment of receptive and expressive language, and constipation. Claimant was also noted to have developmental delay. Included with this note was a clinical note documenting a February 5, 2020, visit with Rolando Gott, M.D. Claimant had language and fine motor delay, apraxia of speech, and motor apraxia, as well as some sensory processing and attention deficits. His strength was in social skills and nonverbal communication. He had low auditory comprehension and expressive language with relative strength in receptive language. He had low fine motor skills based on an occupational therapy (OT) evaluation performed on February 3, 2020.

12. A March 4, 2020, progress note by Dr. Gott titled, "Developmental Behavior Pediatrics Program Multi-disciplinary Team Evaluation," documented that claimant had been referred by his pediatrician to the developmental-behavior pediatric program at Mattel Children's Hospital, UCLA Medical Center. The reason for the referral was concern regarding developmental delay, communication, and behavior difficulties. Prior testing showed low average cognitive skills, below average adaptive skills, and mixed language disorder. Claimant's language, motor, and sensory issues were noted. His behaviors were listed as hyperactivity, short attention, invades others' space, talks loud, places hand of others on objects, and leads people places. He had

mild hearing loss and visual issues. The review of systems was positive for language and fine motor delay, poor motor coordination, sensory processing difficulties, hyperactivity, short attention, constipation, seasonal allergies, and mild vision problems. Claimant received OT, speech therapy, and physical therapy early start services at his local regional center. Claimant had difficulty with chewing. School, medical, parental, and behavior intervention recommendations were made to address claimant's issues. Dr. Fribourg's psychological evaluation documented the tests performed and scores obtained. On the cognitive domain, claimant's developmental age was in the low average range. On the language domain, his scores represented a discrepancy between his receptive and expressive language skills. He had language delays, with his language composite being in the extremely low range, but he performed better on receptive language tests. Claimant did not show an understanding of colors, quantities, or prepositions. On motor testing, claimant's scores were in the second percentile which were in the borderline range and he had difficulty grasping objects. Claimant's Vineland scores also showed deficits in communication, daily living skills, and fine motor skills. Claimant became more upset, screaming and crying, when more demands are placed on him during testing. Recommendations were made to address claimant's numerous delays.

13. A May 26, 2020, Individualized Education Program plan (IEP) from claimant's school district noted his eligibility category of Speech/Language Impairment. The IEP documented claimant's strengths and weaknesses and plans to address his issues. Claimant's speech and language impairments affect his ability to communicate effectively and negatively impact his ability to interact with peers and others. Claimant had difficulty grasping a writing instrument and issues with clumsiness. Classroom strategies and adaptations to address claimant's needs were

documented. Those needs were identified as: language development, communication, oral and sensory needs, trips and falls down a lot, and drawing/fine motor skills.

14. An LKS & Associates Occupational Therapy Initial Evaluation Summary Report documented testing that was performed on July 1, 2020. The diagnoses were "Other lack of coordination" and "Delayed milestone in childhood." Claimant had limited visual attention and loss of balance with tripping over items on the floor. He had limited attention, motivation, and task persistence resulting in limited ability to get through non-preferred testing items. He frequently demonstrated avoidance behaviors and had difficulty participating in nonpreferred visual and fine motor activities. His eye contact was fleeting. His functional communication, quality of play, impulse control, and safety awareness were limited. Claimant was able to doff his clothes but needed help donning them and required assistance to orient them. He was unable to complete fasteners on clothing and was daytime toilet trained only. His grasping was very poor, his visual-motor integration was poor, and his fine motor skills were very poor. Sensory processing tests noted that claimant had limitations in almost every single area tested: adaptive/self-help skills, attention, strength/endurance, motor planning and praxis, social participation, social emotional skills, fine motor coordination, visual motor skills, sequencing/planning and ideas, sensory processing, oral motor skills, safety and environmental awareness, gross motor coordination, visual processing, functional communication, sensory modulation, endurance/activity tolerance, self-regulation, visual-spatial/orientation difficulties, functional play skills, organizational behavior, and frustration tolerance/coping skills. The only two areas where he did not have limitations were executive functioning and feeding difficulties. Claimant's impairments would "require the skilled and professional intervention of a licensed occupational therapist and are not expected to resolve or self-correct with the child's growth or time alone." The report recommended occupational therapy.

15. A September 18, 2020, School Occupational Therapy Evaluation report documented the referral performed when claimant was four years, one month old. The purpose of the evaluation was to help the IEP team determine claimant's present levels of function and related developmental needs to see whether any additions or modifications to his special education or related services were needed. Claimant's teachers expressed concerns for claimant in every category of fine motor skills and also expressed concerns with his visual skills, sensory processing, and almost all areas of self-care. The teachers were aware that that claimant falls frequently, has difficulty using his hands, has low muscle tone, cries when tasks are challenging, puts everything in his mouth. Now with the Zoom lessons because of COVID-19, claimant has limited participation in instruction on-line, only looking at the screen approximately 25 percent of the time. During recess claimant was observed being able to climb on the play structure. Observations during classes Zoom sessions noted that he did not appear to be engaged in the lessons and required redirection from his father. The general observations of the report noted claimant's strengths and weaknesses. Claimant's many needs with self-care skills were documented, including assistance required with toileting, eating, and the hand-over-hand assistance required. On the test of visual motor integration, claimant's scores were low and very low. Claimant had "difficulty with processing sensory input which may be affecting his coordination and attention in the classroom."

16. In an undated report, Charlotte Newman, O.D., an optometrist, of VIP Evaluations, documented the visual information processing evaluations she performed on November 16, 2020, and February 10, 2021, when claimant was four years old. Claimant had been referred by occupational therapy for binocular evaluation and tracking. Tests were performed which showed that claimant had numerous visual difficulties, including hyperopia, astigmatism, exophoria, binocular dysfunction,

accommodated infacility, and oculomotor dysfunction in pursuits and saccades. An individualized program of optometric vision therapy was recommended. It was also suggested that a comprehensive auditory processing evaluation may be advisable at the conclusion of the vision therapy program. Home therapy was also recommended.

17. A Transition Report from claimant's school district, dated March 4, 2021, noted that claimant was referred for an assessment as he would be entering Kindergarten next school year and the district wanted to determine his present levels, areas of strength/weakness, and proper placement. Most of claimant's developmental milestones were delayed. He was enrolled in a special education preschool. Claimant's cognitive skills were evaluated using various tests and resulted in scores in the average, low average, and deficient ranges. Claimant's verbal skills were in the low average range, qualifying him for speech/language services. Claimant's adaptive/developmental skills were in the borderline and deficient ranges. In general, he was functioning "at a delayed developmental level." His social emotional skills were in the low average range. His cognitive scale scores were in the deficient range. His communication skills were delayed. Overall, claimant demonstrated delayed development compared to peers his own age. On adaptive behavior assessments claimant's scores were almost all in the deficient range. Claimant had no stranger danger awareness and no social boundaries. He met eligibility for special education services under the Other Health Impaired category, but did not qualify under the intellectual disability or autism categories. He did qualify for speech language services because of his apraxia and communication difficulties.

18. The March 5, 2021, IRC Eligibility Determination/Team Review noted that claimant was not eligible for regional center services under any of the qualifying categories.

19. A July 2, 2021, Psychological and Educational Assessment Center, Psycho-Educational Report, was signed by Jeanette Morgan, Psy.D., a licensed psychologist, licensed educational psychologist, credentialed school psychologist and credentialed education specialist and by Brenda Tran Ed.S., a licensed educational psychologist, nationally certified school psychologist, and credentialed school psychologist. Claimant had been tested at age four years and eight months old, over four days - March 20, 2021, April 7, 22, and 29, 2021. Dr. Morgan and Ms. Tran reviewed numerous records, took an extensive history, and performed multiple tests. The report outlined claimant's lengthy history of difficulties and the various treatment and services he has received to address them.

During testing, claimant was observed to be hyperactive, fidgety, and demonstrated perseveration over materials in the testing setting. He persisted with tasks with significant prompting. Throughout testing, he displayed inattention and required significant prompting. When frustrated he would begin to whine and cry and would ask his father to help him; his father would then give claimant breathing exercises. Claimant was administered the Stanford-Binet Intelligence Scales, Fifth Edition, Standard Battery, to assess his cognitive abilities. Claimant's overall intelligence was within the deficit range and ranked at the first percentile. His scores appeared to have been impacted by his limited understanding of the verbal directions, even on nonverbal tasks.

Claimant was administered the Wechsler Nonverbal Scale of Ability to measure his nonverbal cognitive ability. He scored within the below average range which was considered the best measure of his cognitive potential and "should be used in any discrepancy formula for special education eligibility." Further, even though claimant's nonverbal cognitive abilities appeared to be in the below average range, "it is

important to note that language reasoning and language processing appears to be a significant inhibitor to [claimant's] cognitive ability and performance." Claimant's "educational performance is likely significantly impacted by the amount of verbal problem-solving and verbal expression required." Claimant's working memory was in the deficit range. Testing demonstrated concerns regarding his impulse control, ability to remember information, ability to monitor the quality and accuracy of his work, and overall executive functioning. Reported behaviors were consistent with Attention Deficit Hyperactivity Disorder (ADHD), combined type. Some tests were abandoned because claimant was unable to perform them. Claimant's visual processing skills were an area of relative strength for him, being in the average and low average ranges. His phonological processing was in the below average, borderline, and deficit ranges.

Dr. Morgan also observed claimant at his school setting. She noted his friendly demeanor. Although claimant appeared less coordinated/sturdy in his movement than his peers, he did climb the play structure independently and seemed confident doing so. When lining up to return to the classroom, claimant required more prompting than his peers and was distracted in the classroom, requiring repeated prompting. He watched but was unable to perform the dance moves during a lesson. Dr. Morgan wrote:

> [Claimant's] classroom participation appears significantly impacted by his verbal communication and attention deficits. He struggled to follow directions, follow classroom routines, and pay attention to the instruction which resulted in limited meaningful participation in his environment. He appears to require significant adult support in a structured learning environment. Recreationally, he participated well

> with peers on the playground, although he did not verbally communicate with them.

Other evaluations noted claimant's failure to engage in reciprocal social behavior. His adaptive behaviors were in the borderline deficit to deficit ranges.

The impressions and recommendations were developmental delay, global; ADHD, predominantly inattentive type, apraxia, sensory processing and integration disorder (provisional), dysmorphic facies, and mixed receptive-expressive language disorder. Claimant met special education eligibility criteria under the categories of Other Health Impairment and Speech/Language Impairment. Dr. Morgan opined:

> These deficits, in addition to his young age, also impact the ability to predict [claimant's] cognitive potential. [Claimant's] ability to complete tasks on standardized tests is impacted by his attention and ability to understand verbal directions. Even when nonverbal directions/tasks are presented, he demonstrates significant variability between his scores due to inattention. This type of inconsistency in performance is a hallmark of students with attention processing deficits. Given these considerations, the following statements are tentatively and cautiously made. [Claimant] demonstrates nonverbal cognitive potential, specially [*sic*] in the areas of fluid reasoning and visual processing, in the average range-when attentive, as demonstrated by his scores . . . . When impacted by attention and limited verbal comprehension, [claimant] demonstrates abilities in the deficit range . . . as

> demonstrated by his scores . . . . It is important to restate that language reasoning and language processing appears [*sic*] to be a significant inhibitor to [claimant's] cognitive ability and performance. Many social interactions and the majority of learning and school-based/community-based activities involve language processing. Therefore, [claimant's] educational performance (academic, behavioral, and social) is likely significantly impacted by the amount of verbal problem-solving and verbal expression required.
>
> In analyzing [claimant's] assessment data and conducting a thorough review of his records, it became clear that, among [claimant's] multiple areas of need, the areas of communication, independence skills, and behavior (whole body listening, following routines, following directions) appear to be critical "cornerstone" areas of need that, when addressed appropriately, will positively impact [claimant's] other areas of need. There is, of course, overlap between these areas, but they are discussed separately here for the purpose of conceptualizing how to address them separately. These recommendations are made with the acknowledgment that [claimant] demonstrates global delays, and an effective program for him will address all areas of unique need.

Dr. Morgan's report then set forth an extremely lengthy and detailed analysis of the types of services claimant requires to address his "multiple areas of need." Those

services included ones to address claimant's deficits in communication, motor skills, gross motor delays, visual information processing, social skills, independence skills, activities of daily living, attention, and safety awareness. Dr. Morgan further recommended that claimant be given assistive technology services, specialized academic instruction in a special day class setting including a modified curriculum, Applied Behavior Analysis (ABA), and "special instruction used for individuals with moderate disabilities," as well as be allowed to participate in social skills group opportunities offered by his local regional center. Dr. Morgan wrote:

> It is also important to note that [claimant] will likely demonstrate slow progress due to his difficulty with remembering information, even with best practices in place. [Claimant's] learning rate ability to acquire new knowledge and skills is below that of typically developing children. Given this, repetition and checking for his understanding as well as providing concise, single-step directions is essential. The number of practice or instructional trials needed before he can respond correctly without prompts or assistance may require 20 to 30 or more trials. [Claimant] has trouble attending to relevant features of a learning task and instead may focus on distracting irrelevant stimuli. His attention processing problems compound and contribute to his difficulties in acquiring, remembering, and generalizing new knowledge and skills. He should be prompted to attend before any instruction is given. [Claimant] often has trouble using his new knowledge and skills in settings or situations that differ from the context in which he first learned those

skills. Extensive practice in multiple settings is needed to address this deficit.

20. On September 10, 2021, IRC's Eligibility Determination/Team Review documented that, after reviewing additional documents, including claimant's expert's report, claimant was not eligible for regional center services under any of the qualifying categories. IRC's expert witness who testified in this hearing was the psychology member of IRC's eligibility determination team.

21. On November 12, 2021, Dr. Morgan authored a "Letter of referral for Regional Center," addressed to the regional center intake coordinator. Dr. Morgan noted that IRC had denied eligibility "*because the records did not show that [claimant] has a disability that qualifies him to receive IRC services. Rather, the records indicate that [claimant] does not currently have a 'substantial disability' as a result of Intellectual Disability, Autism, Cerebral Palsy, Epilepsy or disability condition found to be closely related to intellectual disability, or to require treatment similar to that required for individuals with an intellectual disability.*" (Emphases in original.) Dr. Morgan wrote further:

> At the time of our evaluation, [claimant] was not yet 5 years old and previous diagnosis [*sic*] of Global Developmental Delay continued to be an appropriate description of his presentation given that his severe language, motor, and attention deficits significantly impacted his ability to participate in a standardized assessment in a manner that allowed for certainty regarding his cognitive potential. However, as noted in the previously provided psychoeducational evaluation, [claimant] is cognitively and

adaptively functioning in the deficit range. Because of his associated profound attention and language deficits related to his neurodevelopmental disorders (ADHD . . . and Apraxia . . .), The degree of intellectual disability and/or impairment is unable to be definitively assessed. In my opinion his neurodevelopmental disorders are so severe that they cause substantial disability and meet your criteria of "*a disability condition found to be closely related to intellectual disability, or to require treatment similar to that required for individuals with an intellectual disability.*"

Furthermore, as [claimant] is now 5 years of age and the diagnosis of Global Developmental Delay . . . is no longer appropriate, he now meets criteria for an Unspecified Intellectual Disability . . . . Unspecified Intellectual Disability is diagnosed when a child is over 5 years old with associated impairments, such as severe problem behaviors and locomotor delays, that interfere with accurate assessment. This category requires reassessment after a period of time.

Given his history of global developmental delays in the severity and impact of his neurodevelopmental disorders on his functioning, [claimant] requires a significant and substantial amount of intervention (including ABA, speech/language, physical, and occupational therapies) and supports within his school day and within his community

> that are consistent with the needs of a child with an intellectual disability. While my report was primarily written to offer guidance to a school team regarding [claimant's] needs, I also recommended, and continue to recommend, he receive Regional Center supports as well due to the impact of his neurodevelopmental disorders on his learning and adaptive functioning. (Emphases in original.)

22. Dr. Fribourg authored a letter on November 12, 2021, noting that claimant is a patient in the UCLA Developmental Behavioral Pediatrics Clinic who has been diagnosed with language disorder, mixed expressive and receptive language and ADHD, combined type. Claimant has difficulties following instructions, elopes, and has a poor understanding of stranger danger. He has low cognitive skills and communicating his needs remains challenging. Claimant is active and impulsive and puts non-edible food items in his mouth, putting him at risk for choking. Dr. Fribourg recommended that claimant's parents receive behavioral therapy support in the home to address claimant's safety and noncompliance behaviors and that it "would be to [claimant's] benefit if he is considered eligible under the fifth category for regional center services."

Claimant's Parents' Testimony

23. Claimant's parents testified regarding claimant's many deficits including issues with self-care, dressing himself, feeding himself, and safety awareness, none of which are related to his speech/language issues. He also has comprehension issues which affect his learning and following instructions. He has fine and gross motor issues, causing falls and coordination issues, and he has vision difficulties. Claimant

also has difficulty forming friendships. Claimant's parents have been told claimant's deficits will be lifelong issues that must be addressed.

Expert Witness Testimony

CLAIMANT'S EXPERT WITNESS

24. Jeannette Morgan, Psy.D., has a bachelor's degree in communication sciences and disorders, a master's degree in special education, a second master's degree in clinical psychology, a doctorate in clinical psychology, and is a credentialed mild/moderate special education teacher. She was a special education teacher for 10 years, a school psychologist for "a number of years," is a licensed and clinical psychologist, and has worked with school districts for 15 years. Dr. Morgan tested claimant and authored a written report, referenced above. Her testimony was consistent with her report.

Dr. Morgan explained her testing performed, the results obtained, how claimant's deficits impacted his scores, and described the records she reviewed. There are many tasks claimant cannot perform and he requires much assistance. When asked if claimant's behaviors were due to his ADHD, she explained that they were also consistent with the behaviors seen in children with intellectual disability. All of claimant's behaviors require treatment similar to the treatment given to one with intellectual disability. Dr. Morgan explained that claimant has "global developmental delay," a category used when an individual is delayed in multiple areas of development and is five years old or younger.

Dr. Morgan incorrectly believed "global developmental delay" was a regional center qualifying diagnosis. She acknowledged she was not familiar with eligibility criteria, incorrectly assuming an individual needed a significant disability that

substantially impacts his ability to learn from life and that an individual with a neuro-developmental disorder qualified. She was not familiar with the ARCA Guidelines regarding fifth category. However, because the fifth category has two parts, and because satisfying either part is sufficient, Dr. Morgan's incorrect opinion regarding a qualifying diagnosis was not dispositive of the eligibility issue presented here.

An individual satisfies fifth category criteria if the individual requires treatment similar to that required for individuals with an intellectual disability. Here, Dr. Morgan's detailed and persuasive opinions regarding the treatment/services claimant requires, and how his deficits constitute a substantial disability for him, established that claimant was eligible for regional center services under the fifth category. Dr. Morgan's opinions regarding the treatment claimant requires were more persuasive than IRC's expert's opinions to the contrary. In addition, as noted in detail below, because IRC's expert's opinions regarding fifth category criteria were incorrect, it detracted from his opinions, making them less persuasive than Dr. Morgan's. Further, Dr. Morgan's opinions regarding's the services claimant requires were more persuasive than IRC's expert's opinions.

IRC'S EXPERT WITNESS

25. Paul Greenwald, Ph.D., is employed by IRC as a staff psychologist and has held that position since October 2008. Dr. Greenwald received his Ph.D. in Psychology from California School of Professional Psychology in 1987. His responsibilities at IRC include performing psychological assessments of individuals to determine whether those individuals are eligible for services at IRC on the basis of a diagnosis of Intellectual Disability, Autism Spectrum Disorder, or under the Fifth Category. Dr. Greenwald's assessments consist of reviewing available records and interpreting test data, and he is a member of IRC's eligibility team.

Dr. Greenwald reviewed all of the documents received into evidence and testified at the hearing. Dr. Greenwald did not perform any psychological testing on claimant or prepare a report. Instead, Dr. Greenwald relied upon documents submitted by claimant for a record review to determine claimant's eligibility. During IRC's examination of Dr. Greenwald, most of the questions directed to him were little more than asking him to read from the documents without asking him whether he relied on those documents when formulating his opinions, and if he did, how so. As such, much of his testimony was of little worth.

More importantly, Dr. Greenwald incorrectly interpreted the applicable law and guidelines regarding how the fifth category is determined. Dr. Greenwald testified that determining fifth category eligibility requires consideration of a diagnosis that is functionally equivalent to intellectual disability but has not been formally diagnosed as intellectual disability, then stated: "that is the first part, the second part is it also requires treatment similar to intellectual disability." Dr. Greenwald's testimony that the diagnosis requires these two parts is incorrect.

The Lanterman Act uses the word "or" not the word "and," meaning either part is sufficient to meet the criteria; an individual does not have to satisfy both parts. Given this testimony, IRC required claimant to meet both parts in order to be eligible under the fifth category and that is an erroneous reading of the Lanterman Act and ARCA Guidelines. In fact, even IRC's own Eligibility Determination/Team Review document states that an individual is **eligible** for regional center services under the fifth category if the condition is "closely related to intellectual disability or requires treatment similar to individuals with an intellectual disability." (Emphases in original.)

Further, Dr. Greenwald's testimony regarding whether claimant required treatment similar to that given to one with an intellectual disability was also

concerning. He testified that the speech/language treatment claimant was receiving was not similar to the treatment that would be offered to one with intellectual disability and that his ADHD, which is not a qualifying diagnosis, accounted for most of his issues and test scores/results. He noted that the services offered by claimant's school district were consistent with those offered for speech/language disorders and other health impairments, claimant's two special education qualifying categories, and he did not require services for someone with an intellectual disability. He further testified that when looking at the treatment for individuals with a fifth category determination, "you have to look at the purpose of what the treatment is based on the records." Here, claimant's treatment was for his delays, deficiencies, and impairments that had been identified, none of which was for an intellectual disability.

However, when asked what services IRC would offer (fund) for a child with an intellectual disability, Dr. Greenwald testified that such "treatment is limited and must be tied to the purpose," explaining how claimant's test results on cognitive tests were tied to his speech and language deficits and were not scores one would expect from an individual with an intellectual disability. Again, his opinions focused primarily on the first part of the fifth category and not the second part. In fact, when pressed regarding the services that would be offered for one with an intellectual disability, Dr. Greenwald testified that he could not answer that question because, "I am not an expert in the field of educational psychology." That answer made no sense and cast doubt on his competency to offer expert opinions in this matter. Claimant did not ask what services schools provide, claimant asked what services IRC provides. As IRC's expert, it was unclear why Dr. Greenwald could not answer the question regarding what services IRC would authorize for individuals with intellectual disabilities or why, as a psychologist, he could not answer what treatment would be provided for a person with intellectual disability. Moreover, his testimony did not specifically address, nor persuasively refute,

Dr. Morgan's thoughtful and detailed opinions regarding the treatment claimant required because of his pervasive global condition.

While Dr. Greenwald correctly explained how many of claimant's diagnoses, ADHD, apraxia, fine motor delay, and developmental language disorder, were not regional center qualifying diagnoses, that missed the point regarding fifth category eligibility and misread the Lanterman Act and the ARCA Guidelines, both of which use the word "or" and establishes eligibility if one requires treatment similar to the treatment given to one with an intellectual disability, which claimant so requires.

Evaluation of the Experts

26. In determining the weight of each expert's testimony, the expert's qualifications, credibility and basis for his opinions were considered. California courts repeatedly underscore that an expert's opinion is only as good as the facts and reason upon which that opinion is based: "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.)

Dr. Morgan spent four days evaluating and testing claimant, including observing him in his school setting. Dr. Greenwald only performed a records review. Moreover, his testimony regarding the fifth category was incorrect. It does not require that both parts be satisfied, it only requires claimant to satisfy either part. Also, for most of his testimony Dr. Greenwald merely read from the reports of others which was not helpful. Finally, his testimony regarding the services claimant needs was not as detailed or extensive as Dr. Morgan's opinions. More importantly, he testified that he could not answer questions regarding services an individual with an intellectual disability may need as he was not an educational psychologist, an answer that made

little sense given the questions posed to him and undercut the value of his opinion as an expert. Thus, his opinions were given little weight.

In sum, no reliable or persuasive evidence disputed that the treatment Dr. Morgan recommended was the type of treatment that one with an intellectual disability would receive. Overall, Dr. Morgan made a much more persuasive and reliable witness than Dr. Greenwald and her opinions are accepted over his to the contrary.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Authority

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

3. Welfare and Institutions Code section 4501 states:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole

communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as follows:

"Developmental disability" means a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an

intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

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

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

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

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

disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

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

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

(a) "Substantial disability" means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

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

deliberations and to the extent that the appropriate consent is obtained.

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

Evaluation

7. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. To satisfy fifth category requirements, an individual needs either a disabling condition closely related to intellectual disability or one that requires treatment similar to that required for individuals with an intellectual disability. If either part is satisfied, claimant must then demonstrate the condition constitutes a substantial disability in order to be eligible for regional center services.

IRC misread the fifth category qualifying criteria, focusing on the first part of the fifth category, having a condition similar to an intellectual disability, but not properly considering the second part. IRC incorrectly required claimant to have both parts – a similar condition and similar treatment – which is a misreading of the law and ARCA guidelines. Where, as here, the evidence established that claimant requires treatment similar to the treatment given to one with an intellectual disability, he satisfied the requisite criteria for the fifth category.

Having satisfied the criteria under the fifth category, claimant was next required to demonstrate he is "substantially handicapped," defined as "a condition which results in major impairment of cognitive and/or social functioning" because of the fifth category. It requires an assessment of claimant's "communication skills, learning, self-

care, mobility, self-direction, and capacity for independent living." Given his age, his capacity for "independent living" and "economic self-sufficiency" were not considered. The persuasive evidence presented here demonstrated that claimant's condition has resulted in major impairments of his receptive and expressive language, learning, self-care, mobility, and self-direction. Thus, claimant's condition constitutes a substantial disability for him.

Having met the qualifying criteria, claimant is eligible for regional center services and his appeal is granted.

ORDER

Claimant's appeal from IRC's determination that he is not eligible for regional center services is granted. IRC's determination that he is not eligible for regional center services is overruled. Claimant is eligible for regional center services and supports under the Lanterman Developmental Disabilities Services Act under the Fifth Category because he requires treatment similar to the treatment given to one with an intellectual disability and this condition constitutes a substantial disability for him.

Within 15 days from the date of this decision, the parties are ordered to convene an Interdisciplinary Team meeting to discuss providing services for claimant as it deems appropriate, and to include but not be limited to case management.

DATE: December 8, 2021

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.