BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

DDS No. CS0010923

OAH No. 2023120459

DECISION

Administrative Law Judge (Hearing Officer) Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter on June 7, 2024, in Simi Valley, California.

Father appeared on behalf of Claimant, who was not present. (Titles are used to protect the privacy of Claimant and her family.)

Alegandro Alvarez, Service and Supports Manager for Tri-Counties Regional Center (Service Agency), appeared on behalf of Service Agency.

Testimony, documents, and closing arguments were received in evidence. The record closed and the matter was submitted for decision on June 7, 2024.

On June 20, 2024, the Hearing Officer on her own motion reopened the record pursuant to Welfare and Institutions Code section 4712, subdivision (i), and continued the fair hearing for evidence only. (Statutory references are to the Welfare and Institutions Code unless otherwise designated.) The record was reopened for Claimant to submit new medical evidence regarding the recent and current state of her seizures and the impact Claimant's epilepsy has on Claimant's major life activities, and for Service Agency to submit new medical evidence in support of its claim that Claimant's epilepsy does not cause adaptive deficits constituting a substantial disability.

Within the time provided, Claimant submitted new medical evidence and Service Agency submitted a summary of its evidence presented at hearing. Claimant's documents were marked as Exhibit T and Service Agency's document was marked as Exhibit 19.

Claimant submitted a written objection to Exhibit 19 (marked as Exhibit U) and the objection was sustained. Service Agency did not object to Exhibit T and it was entered. The record closed and the matter was submitted on July 8, 2024.

Finally, in review of the record the Hearing Officer determined Service Agency did not submit a copy of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition's (DSM-5) chapter on Intellectual Disability (ID), though reference to the DSM-5's diagnostic criteria for ID is made throughout its exhibits and was the basis for Service Agency's determination Claimant is not eligible under the category of ID. As a thorough consideration of the DSM-5's diagnostic criteria for ID is necessary to address the issue presented, the Hearing Officer took official notice of the DSM-5's chapter on ID. The Hearing Officer has uploaded a courtesy copy of the chapter into the "OAH Documents" section of Case Center, and it can be found at Exhibit OAH3.

ISSUE

Whether Claimant has a developmental disability as defined by the Lanterman Developmental Disabilities Services Act (Lanterman Act) (§ 4500 et seq.).

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1 through 18; Claimant's Exhibits A, C, E through G, L, and N through T.

Testimony: Paulina Gluck, Psy.D.; Anne Little, M.D.; Father; Mother; Aunt.

SUMMARY

Claimant is six years old and lives with her parents and four-year-old sister. Claimant received Early Start services based on her diagnosis of unspecified Spina Bifida, with Hydrocephalus (SBH). However, upon age three, when transitioning out of Early Start services, Claimant was found not eligible for regional center services because she did not have a qualifying disability. Based on subsequent seizures, in May 2023 Claimant was diagnosed with epilepsy. In August 2023, Claimant applied for regional center services based on her epilepsy and underlying symptoms.

Between August and November 2023, Service Agency assessed Claimant for Lanterman Act eligibility under the conditions of ID, whether she has a disabling condition found to be closely related to ID or to require treatment similar to that required for individuals with ID (5th Category), and epilepsy. Service Agency concluded Claimant does not have ID or 5th Category and its conclusions were supported by the record. Regarding epilepsy, Service Agency agrees Claimant's epilepsy is a qualifying disability, but it concluded Claimant's epilepsy does not constitute a substantial disability for Claimant. Rather, Service Agency attributed any adaptive deficits to Claimant's SBH.

Service Agency's assessment of whether Claimant's epilepsy constitutes a substantial disability was incomplete and therefore flawed. Service Agency's position is that Claimant has a complex medical history based on her SBH and related surgeries and though she may have significant functional limitations in three or more major life activities, it could not be discerned the limitations result from her epilepsy. Based on Service Agency's purported inability to discern any limitations resulting from Claimant's epilepsy, Service Agency did not actually assess whether or to what extent Claimant's epilepsy constitutes a substantial disability for Claimant; rather, it presumed it does not.

Although Service Agency's team was not able to discern how Claimant's epilepsy impacts her major life activities, Claimant's doctors, teachers, and family were able to discern and articulate the impact. Claimant established her epilepsy results in significant functional limitations in five areas of major life activities: learning, self-care, mobility, self-direction, and capacity for independent living. Accordingly, Claimant's epilepsy constitutes a substantial disability for Claimant and she is eligible for regional center services under the Lanterman Act.

FACTUAL FINDINGS

Jurisdiction

1. Claimant is six years old and resides with Mother, Father, and her four-year-old sister.

2. Claimant received Early Start services from Service Agency between May 2018 and September 2020 based on her diagnosis of SBH.

3. In August 2020, and at the conclusion of Claimant's Early Start services, Lani Ashley, a Service Agency Staff Psychologist, assessed Claimant for eligibility for regional center services. Service Agency concluded Claimant did not have a developmental disability. On September 1, 2020, Service Agency denied Claimant's eligibility for regional center services.

4. In August 2023, Claimant requested regional center services from Service Agency based on a recent medical diagnosis of epilepsy.

5. On November 1, 2023, Service Agency issued a Notice of Action (NOA) denying Claimant's eligibility for regional center services.

6. On November 30, 2023, Claimant requested a Fair Hearing.

7. All jurisdictional requirements have been met.

Evidentiary Matters

8. On June 20, 2024, the Hearing Officer issued the Order Reopening the Record; Continuance Order for Evidence Only (Order). The Order provided Claimant the opportunity to submit new medical evidence in support of her claims regarding

her recent and current state of seizures and the impact Claimant's epilepsy has on Claimant's major life activities. As an example of what Claimant could submit, the Order provided (Exh. OAH3, p. OAH9):

> Specifically, Claimant may submit a letter from Claimant's treating neurologist(s) which provides specific information regarding the following: Claimant's epilepsy; any increased seizure activity since July 2023, including any absent [sic] seizures; how and to what extent Claimant's epilepsy impacts any of her major life activities; and how and to what extent Claimant's epilepsy, independent of her spina bifida, with hydrocephalus, causes Claimant to have adaptive deficits.

The Order also provided Service Agency the opportunity to submit new medical evidence in support of its claim that Claimant's epilepsy does not cause adaptive deficits constituting a substantial disability. Finally, the Order allowed either party to request an additional hearing day to allow for the testimony of a medical witness regarding the issues presented in the Order. Neither party requested an additional hearing date.

9. Claimant timely submitted Exhibit T, consisting of a June 24, 2024 Medical Note from Andrew Ng, M.D., one of Claimant's treating neurologists, which provides current information regarding Claimant's epilepsy, and a letter from January Ornellas, Claimant's paraeducator during the 2023 through 2024 academic year, describing Claimant's day-to-day struggles with lapses in consciousness. Service Agency did not object to Exhibit T.

10. Service agency timely submitted Exhibit 19, Service Agency's "Summary of Tri-Counties Regional Center Evidence" (Summary of Evidence). Exhibit 19 consists of a general summary of Service Agency's evidence presented at the fair hearing, followed by a summary of each witnesses' testimony and a summary of its exhibits, and concluding with additional closing argument. Exhibit 19 did not include new medical evidence or new evidence in support of its claim that Claimant's epilepsy does not cause adaptive deficits constituting a substantial disability.

11. Claimant objected to the admission of Exhibit 19 on three grounds: (1) the nature of the submission; (2) the lack of clear author, or declarant; and (3) because it contains information requiring a response and cross-examination. Claimant's first objection is sustained and Claimant's second and third objections are overruled.

12. Claimant first objects to the nature of Exhibit 19, claiming Service Agency's Summary of Evidence does not include new medical evidence and therefore exceeds the parameters of the Order. Claimant is correct. Exhibit 19 consists of a general summary of Service Agency's evidence, followed by a summary of its exhibits and testimony presented, and concluding with additional closing argument. Exhibit 19 exceeds the parameters set by the Order. Claimant's objection is sustained and Exhibit 19 is excluded from the record.

13. Claimant's second objection to Exhibit 19 is that Service Agency's Summary of Evidence provides no author, or declarant. Claimant's objection is overruled. A plain reading of Exhibit 19 shows it to be a summary of Service Agency's evidence already presented at the fair hearing, a summary submitted by Service Agency and on behalf of Service Agency. Exhibit 19 does not include new evidence, and the fact that an individual is not named as the individual summarizing Service

Agency's evidence is immaterial. Accordingly, Claimant's second objection to Exhibit 19 is overruled.

14. Claimant's third objection to Exhibit 19 is that it contains information requiring a response and cross-examination. Although, for the reasons provided above, Exhibit 19 exceeded the parameters of the Order, nonetheless Claimant was provided an opportunity to request an additional hearing date to question any potential witnesses identified in Service Agency's submission and Claimant did not make such a request. Accordingly, Claimant's third objection to Exhibit 19 is overruled.

Claimant's Medical and Developmental History

MEDICAL HISTORY

15. In her June 3, 2024, Medical Note (Exhibit 17, pp. A61-A62), Anne Little, M.D., a medical consultant for Service Agency, summarized Claimant's medical history, including an explanation of Claimant's SBH and related surgeries. Dr. Little's summary was consistent with written information provided by Claimant's treating doctors and Claimant's medical records and it provides the following information regarding Claimant's medical history.

16. Claimant was born in Boston, Massachusetts, at 37-weeks' gestation following a prenatal diagnosis of spina bifida. Spina bifida is a congenital birth defect (also referred to as a 'neural tube defect') which results from a failure of the spinal cord to form correctly during fetal development. In spina bifida, the supporting structures that form the spinal tissues (meninges) and bones (vertebrae) that normally close over and encircle the spinal cord for protection in life fail to close somewhere along the length of the spine. Depending on the location of the open area along the

spine and the degree of exposure of the spinal cord, spina bifida may be more severe or less severe.

17. Claimant was born with the most severe form of spina bifida, called a lumbar 'myelomeningocele', which means that the spinal structures failed to close in the low back area ('lumbar') and that a sac ('cele') protruded through an opening in the skin containing the spinal cord itself ('myelo-'), as well as the protective tissues ('meningo-'), nerves and spinal fluid. Thus, the medical term lumbar myelomeningocele designates the location and the specific spinal anomaly in Claimant's form of spina bifida.

18. Claimant underwent surgical closure of the lumbar myelomeningocele at Boston Children's Hospital on the first day of life. However, surgery is incapable of repairing the disruption to the spinal cord and its attached nerves that have already been damaged during fetal development. Consequently, Claimant sustained permanent damage to the spinal cord and nerves below the level of her lumbar myelomeningocele which resulted in paraplegia (paralysis of the legs and lower body) and numerous medical consequences of the nerve damage. Claimant's medical complications include neurogenic bowel and bladder dysfunction (lack of bowel and bladder control due to spinal cord damage) and neuromuscular scoliosis (curvature of the spine due to impairment of muscles that support the spine).

19. Claimant's lumbar myelomeningocele occurred in association with Chiari II malformation which is a known complication in almost all cases of myelomeningocele. Chiari II malformation is a complex congenital anomaly that causes downward displacement of the cerebellar tonsils into the opening at the base of the skull. This constriction at the base of the skull can block the normal flow of cerebrospinal fluid, resulting in excessive fluid pressure in the brain called

'hydrocephalus'. Claimant's hydrocephalus was treated with placement of a VP shunt ("ventriculoperitoneal shunt"), which is a flexible tube placed to drain excess fluid from the brain to the abdomen in order to prevent excess cerebrospinal fluid buildup that could otherwise injure brain tissues.

DEVELOPMENTAL HISTORY

20. Claimant was enrolled in Service Agency's Early Start program at eight months of age.

21. To be eligible for Early Start services, infants and toddlers from birth to age 36 months must have a developmental delay of at least 33 percent in one or more of the five following areas of development: cognitive; physical and motor, including vision and hearing; communication; social or emotional; or adaptive. (20 U.S.C.A. § 1432, subds. (4) & (5); Gov. Code, § 95014, subd. (a); Cal. Code Regs., tit. 17, § 52022, subd. (a).)

22. Through Early Start, Claimant received early intervention services and speech therapy. She also began receiving physical therapy (PT) and occupational therapy (OT) services through California Childrens Services (CCS) at two years of age.

23. In August 2020, at 35 months of age, Claimant underwent a final developmental assessment in the Early Start program by completing a Developmental Assessment for Young Children (DAYC-2). Claimant's DAYC-2 assessment scores revealed a cognitive standard score of 100 (average range) and adaptive functioning standard score of 84 (low average range).

24. At the time of her final developmental assessment, Claimant functioned at her age level in the areas of cognitive, social, and receptive/expressive language

skills. Claimant's gross motor skills were severely delayed at a six-month age-equivalent level. On her PT evaluation, she was described as having decreased core strength and lower extremity strength with her right leg weaker than her left leg. She had difficulty getting into a sitting position, but when assisted into sitting, she could maintain the position independently. She was able to commando crawl by pulling with her arms and could stand briefly with support but could not side-step.

25. Claimant's fine motor and self-care skills were approximately 33 percent delayed, primarily due to motor deficits resulting from her spina bifida. For example, she was described in her OT evaluation as using both hands with a pincer and functional grasp, able to use a spoon and fork to feed, able to wash hands and brush teeth, and able to remove her socks and shoes. However, she was not yet able to dress or undress, and was dependent on others for toileting needs due to her neurogenic bladder and bowel.

26. Service Agency staff psychologist, Lani Ashley, Ph.D., documented Service Agency’s eligibility team’s conclusions in an August 13, 2020, clinical note. The eligibility team concluded that despite Claimant's diagnosis of spina bifida with severe mobility impairment, she did not meet any of the qualifying criteria for Lanterman Act eligibility because she did not have an eligible condition or substantial handicap in at least three areas of functioning. The eligibility team recommended Claimant access educational services and that her progress be monitored, with a referral back to Service Agency if additional developmental concerns arose.

Claimant’s Medical Care and Records

CLAIMANT’S MEDICAL CARE

27. Claimant’s current medical care was also summarized by Dr. Little in her June 3, 2024 Medical Note (Exhibit 17, pp. A62-A63). Dr. Little’s medical care summary was consistent with written information provided by Claimant’s treating doctors and Claimant’s medical records and it provides the following information regarding Claimant’s medical care.

28. Claimant's medical care is currently provided by Gerald Berkman, M.D., a pediatrician in Westlake Village, and by appropriate subspecialists at Childrens Hospital Los Angeles (CHLA), including specialists in neurosurgery, neurology, orthopedics, gastroenterology, and urology, along with coordination and monitoring by the CHLA Spina Bifida Program.

Neurosurgery

29. Claimant is followed by Susan Durham, M.D., a pediatric neurosurgeon at CHLA. In addition to the VP Shunt placement in July 2018 Claimant also has a syrinx (a fluid-filled cyst of the spinal cord) which has been stable and is not felt to be affecting her neurological function. Several reevaluations of Claimant's VP Shunt function have shown it to be functional and stable. Similarly, a brain and spinal cord MRI repeated at CHLA in November 2022 also showed stable brain ventricle size and syrinx size.

Neurology

30. In February 2022, at four and one-half years of age, Claimant had an initial lifetime seizure. She underwent extensive evaluation with normal bloodwork, normal lumbar puncture, stable VP Shunt imaging series, and a stable brain and spinal

cord MRI. She was then seizure-free until she experienced a second seizure in May 2023 and was started on an antiepileptic medication, Keppra, which she tolerated well. Claimant was followed as an outpatient by Virginia Lin, Certified Pediatric Nurse Practitioner (CPNP), in the Division of Pediatric Neurology at CHLA. As of CPNP Lin's June 2023 progress note, Claimant had had no further seizures and an electroencephalogram (EEG) was being scheduled to identify a seizure focus.

Orthopedics

31. Claimant is followed by Lindsay Andras, M.D., a pediatric orthopedic surgeon, for early-onset scoliosis due to her spina bifida. She underwent placement of "MAGEC rods" (magnetically controlled spinal growing rods) to stabilize her scoliosis in January 2023 with successful lengthening adjustment of the rods in June 2023.

Gastroenterology

32. Claimant was evaluated by Pediatric Gastroenterologist Anita Sicolo, M.D., in June 2023 for neurogenic bowel dysfunction, a known complication of spina bifida, which manifests in Claimant by chronic constipation and fecal incontinence. She is maintained on a bowel regimen and was being scheduled last year for additional testing and consideration of a possible Peristeen rectal irrigation system with the goal of eventual fecal continence.

Urology

33. No urology records were provided for review; however, it is stated in the 2023 Spina Bifida Clinic records from CHLA that Claimant is followed by CHLA's Division of Urology for her neurogenic bladder and was last evaluated there in 2020. It is known that Claimant requires Clean Intermittent Catheterization (CIC) every three

hours to empty her bladder regularly and that she takes a prophylactic antibiotic (Nitrofurantoin) to minimize urinary tract infections.

Spina Bifida Clinic

34. Claimant is followed by Patricia Castillo, M.D., of the Spina Bifida program at CHLA. Dr. Castillo's May 2023 progress note summarized Claimant's care by the various specialty departments at CHLA and indicated Claimant was receiving all necessary specialty services for her SBH.

California Childrens Services

35. Although records were not provided, the CHLA Spina Bifida clinic and educational records from Conejo Valley Unified School District (CVUSD) stated Claimant receives regular PT and OT services, as well as durable medical equipment through CCS's Conejo Valley Medical Therapy Unit. Claimant uses a wheelchair for most mobility and has bilateral ankle-foot orthosis (AFO) braces. Further details were not available describing Claimant's CCS therapies.

CLAIMANT'S MEDICAL RECORDS

36. Four members of Claimant's medical team submitted letters or medical notes on behalf of Claimant and in support of her request for regional center services. The letters and medical notes were written by CPNP Lin and Andrew Ng, M.D., Claimant's treating neurologist team; Patricia Castillo, M.D., Claimant's treating physician through CHLA's Spina Bifida Program; and Gerald Berkman, M.D., Claimant's pediatrician. Claimant's medical team provided consistent descriptions of Claimant's SBH and myelomeningocele, and her related surgeries and treatment.

37. Gerald Berkman, M.D., Claimant's pediatrician, authored a letter dated June 5, 2023. Dr. Berkman also summarized claimant's medical diagnoses as provided in Dr. Little's Medical Note. Dr. Berkman recommended Service Agency determine Claimant is eligible for regional center services. Dr. Berkman explained that Claimant's SBH, myelomeningocele, and neurogenic bladder significantly limit Claimants mobility, self-care and capacity for independence.

38. Patricia Castillo, M.D., Claimant's treating physician through CHLA's Spina Bifida Program, authored a May 30, 2023, letter on Claimant's behalf. Dr. Castillo's letter details Claimant's myelomeningocele and SBH and its treatment. Dr. Castillo focused on Claimant's need to have her intermittent catheter cleaned every three hours and her use of AFO braces or a wheelchair for ambulation. Finally, Dr. Castillo recommended Claimant be provided a one-to-one aide at school to assist her with her medical needs and to provide her with a safe school environment.

39. CPNP Lin submitted two letters on Claimant's behalf, the first dated June 8, 2023, and the second dated November 27, 2023. The information provided by CPNP Lin regarding the history of and treatment for Claimant's SBH is consistent with Dr. Little's Medical Note. Regarding Claimant's epilepsy, CPNP Lin initially reported Claimant had had two lifetime unprovoked seizures, qualifying for the diagnosis of epilepsy. Claimant's first seizure occurred on February 3, 2022, and the second occurred on May 25, 2023. CPNP Lin described Claimant's seizures as presenting with upper extremity flexion and stiffness with unresponsiveness and fixed gaze deviation superiorly and to the right, lasting 40 seconds to one minute, followed by postictal sleepiness. In her June 2023 letter, CPNP Lin further explained that while Claimant's seizures are consistent with generalized tonic epilepsy, there is suspicion for a focal onset due to her gaze deviation and known structural abnormalities in her brain. At

the time of her June 2023 letter, Claimant was pending an EEG for further clarification. Claimant's epilepsy was treated with Keppra 150 milligrams (mg) twice a day and 7.5 mg of Diastat for emergency seizure medication. (Diastat is a form of valium given rectally to individuals who have prolonged seizures.)

40. CPNP Lin's November 2023 letter documented Claimant's third breakthrough seizure which occurred in July 2023 and lasted for 10 minutes and required the use of emergency seizure-abortive medication (Diastat). CPNP Lin added that Claimant's October 2023 EEG results shows focal slowing in the right posterior region, placing her at risk of further seizures.

41. Finally, Dr. Ng authored two medical notes submitted on behalf of Claimant, the first dated October 5, 2023, and the second dated June 24, 2024. Dr. Ng's October 2023 medical note provided similar information as was included in CPNP Lin's November 2023 letter. For example, Dr. Ng affirmed Claimant's July 2023 seizure and increased dose of Keppra, as well as Claimant's October 2023 EEG results which showed right posterior slowing, and the ongoing prescription for Diastat.

42. Dr. Ng's June 2024 medical note (Exhibit T) provided additional information regarding Claimant's epilepsy not provided at hearing or previously to Service Agency. Dr. Ng had most recently seen Claimant on April 9, 2024. His June 2024 medical note provides the following update:

> [Claimant] will need supportive services as her epilepsy has been affecting her quality of life where she is at risk for injuring herself, impairing her mobility (instances at school where she zoned out and had collided with another child), affecting her cognitive ability to learn, and hindering her

from independent living (dependent on parents for daily activities e.g. bathing, dressing, toileting, hygiene). Her teachers are concerned about seizures impairing her ability to focus/learn. She requires a 1:1 aide while at school.

DEFINITION OF MEDICAL TERMS

43. Neither party provided medical definitions for a set of medical terms used frequently in the presentation of the case, including "absence seizures, "focal onset," or "focal slowing" or "right posterior slowing." (Although Claimant's evidence summarized the definitions of "absent [sic] seizure" and "general tonic seizure" in Exhibit P, her seizure log, the sources of the definitions were not provided and so the reliability of the definitions was uncertain.) Based on the lack of medical definitions, the Hearing Officer found it necessary to research the definitions of these medical terms to address the issue presented.

44. Official notice may be taken under Government Code section 11515 of matters which may be subject to judicial notice. Pursuant to Evidence Code section 451, subdivision (e), courts must take judicial notice of the true meaning of English words. Accordingly, the Hearing Officer takes official notice of the following Mayo Clinic's definitions of seizure types and National Institute of Health's (NIH) definition and explanation of focal slowing. The medical definitions provided by these sources of tonic-clonic seizures and absence seizures are consistent with Father's definitions provided for in Claimant's seizure log (Exh. P).

45. The Mayo Clinic website provides the following definition of seizure types, found at, at https://www.mayoclinic.org/diseases-conditions/epilepsy/symptoms-causes/syc-20350093:

When seizures appear to result from activity in just one area of the brain, they're called focal seizures. These seizures fall into two categories:

- Focal seizures without loss of consciousness. Once called simple partial seizures, these seizures don't cause a loss of awareness, also known as consciousness. They may alter emotions or change the way things look, smell, feel, taste or sound. Some people experience deja vu. This type of seizure also may result in involuntary jerking of a body part, such as an arm or a leg. And focal seizures may cause sensory symptoms such as tingling, dizziness and flashing lights.

- Focal seizures with impaired awareness. Once called complex partial seizures, these seizures involve a change or loss of consciousness. This type of seizure may seem like being in a dream. During a focal seizure with impaired awareness, people may stare into space and not respond in typical ways to the environment. They also may perform repetitive movements, such as hand rubbing, chewing, swallowing or walking in circles.

Symptoms of focal seizures may be confused with other neurological conditions, such as migraine, narcolepsy or mental illness. A thorough exam and testing are needed to tell if symptoms are the result of epilepsy or another condition. [¶] . . . [¶]

> Generalized seizures
>
> Seizures that appear to involve all areas of the brain are called generalized seizures. Generalized seizures include:
>
> Absence seizures. Absence seizures, previously known as petit mal seizures, typically occur in children. Symptoms include staring into space with or without subtle body movements. Movements may include eye blinking or lip smacking and only last 5 to 10 seconds. These seizures may occur in clusters, happening as often as 100 times a day, and cause a brief loss of awareness.
>
> Tonic seizures. Tonic seizures cause stiff muscles and may affect consciousness. These seizures usually affect muscles in the back, arms and legs and may cause the person to fall to the ground. [¶] . . . [¶]
>
> Tonic-clonic seizures. Tonic-clonic seizures, previously known as grand mal seizures, are the most dramatic type of epileptic seizure. They can cause a sudden loss of consciousness and body stiffening, twitching and shaking. They sometimes cause loss of bladder control or biting of the tongue.

46. The NIH’s National Library of Medication website provides the following definition of, and explanation for, focal slowing at https://www.ncbi.nlm.nih.gov/books/NBK390357/#:~:text=Focal%20slow%20wave%20

activity%20on%20the%20EEG%20is,generally%20indicating%20more%20severe%20underlying%20focal%20cerebral%20dysfunction:

Focal and Generalized Slowing and Significance

EEG can provide evidence for underlying diffuse or focal cerebral dysfunction through demonstration of background slowing. The two main types of slowing are focal and generalized slowing. As previously discussed, generalized background slowing in the theta and delta frequency ranges is a normal finding on EEG when it represents developmental slowing in children, adolescents, and some young adults or the evolution of drowsiness and sleep activity. However, when there is intermittent or persistent focal slowing seen consistently over one head region, or persistent, unvarying, and unreactive focal or generalized slow wave activity in a vigilant adult patient, this slow wave activity should be considered pathologic and indicates corresponding focal or generalized cerebral dysfunction or both.

Focal Slowing

Focal slow wave activity on the EEG is indicative of focal cerebral pathology of the underlying brain region. Slowing may be intermittent or persistent, with more persistent or consistently slower activity generally indicating more severe underlying focal cerebral dysfunction. A variety of etiologies

> for focal cerebral dysfunction may be seen. . . . The various causes are too numerous to be comprehensive, but common examples include . . . nonstructural focal cerebral dysfunction corresponding to a focal epileptic focus, ...

Educational Records

47. Claimant's educational records submitted at the fair hearing consisted of her April 5, 2023 Individualized Education Plan (2023 IEP) (Exhibit G) and her June 16, 2023 CVUSD Special Circumstances Educational Support (SCES) assessment (Exhibit 13). Claimant initially attended a CVUSD preschool and received IEP services. During the 2022-2023 and 2023-2024 academic years, Claimant attended Ladera STARS Academy (Ladera) in transitional kindergarten and kindergarten general education classes, respectively.

ELIGIBILITY FOR IEP SERVICES

48. Based on her educational records, Claimant initially qualified for special education services in September 2021 at four years of age with an eligibility of Orthopedic Impairment. A secondary qualifying eligibility of Other Health Impairment was later added.

49. The following diagnoses and treatments were documented by the Ladera School Nurse. Claimant has been diagnosed with Spina Bifida, myelomeningocele, Hydrocephalus, Neurogenic bladder, constipation/incontinence, Epilepsy, and Scoliosis. Claimant takes medication to control seizures (Keppra at home and Diastat as rescue medication for seizures at school). She has a VP shunt and requires catheterization daily at school. She requires frequent diaper checks and changes, as

she may be unaware of a soiled diaper, putting her at higher risk of urinary tract and skin infection.

ADAPTIVE FUNCTIONING AND FOCUS

50. Mother and teacher completed the Adaptive Behavior Assessment System – Third Edition (ABAS-3) in April 2022. The ABAS-3 results suggested Claimant has overall Average and Below Average adaptive skills. Average skills were indicated in the conceptual and social adaptive skills across settings. In the area of practical adaptive skills, ratings varied from Average to Low. Within this domain both parents and teacher indicated Extremely Low skills in the domain of self-care. Claimant's ratings also fell in the Extremely Low range on the motor skills subscale, primarily due to gross motor impairments. (Exh. 13, p. A38; Exh. G, pp. B13-B14.)

51. At the time of Claimant's IEP, it was noted Claimant has difficulty with on-task behavior. (Exh. G, p. B15.) More detailed information regarding Claimant's focus and need for direction was included in the interview section of the CVUSD SCES assessment. During his June 9, 2023, interview, special education teacher Robert Stone explained Claimant requires frequent prompts and redirection and her attention can vary. (Exh. 13, p. A40.) Similarly, school psychologist Payam Beheshti reported during her June 2, 2023, interview that "[Claimant] occasionally seemed to lose focus and stared in front of her but generally participated in the activity by responding to story comprehension questions appropriately." (Exh. 13, p. A47.) Finally, Claimant's general education teacher, Lisa Brown, provided more information during her June 6 and 7, 2023, interviews. Ms. Brown explained she has observed Claimant drift or lose focus. Ms. Brown also observed Claimant tends to leave the learning area to ask the aide a question and tends to lose track of what is happening to her. Ms. Brown believes

Claimant would benefit from adult assistance to help her maintain her focus and redirect her attention.

52. Claimant's kindergarten teacher, Julie Nerland, and Claimant's kindergarten paraeducator, January Ornellas, wrote letters in June 2024, explaining their experience with Claimant's struggles with focus. Ms. Nerland explained she frequently observed Claimant speaking, working, or playing and then suddenly stop and look up and stare and be nonresponsive. In response, Claimant requires frequent redirection to return to task. Ms. Nerland's own daughter has absence seizures and she finds Claimant's frequent loss of focus and need for redirection to be similar to her own daughter's loss of focus and awareness during absence seizures. Ms. Nerland believes Claimant is experiencing absence seizures and that these momentary losses of awareness interrupt Claimant's learning both because of the time loss and because they cause Claimant to have headaches and dizziness, requiring her to leave class and go to the Health Office.

53. Ms. Ornellas was Claimant's paraeducator from August 2023 through June 2024. During the 2023-2024 academic year, Ms. Ornellas worked with Claimant Mondays through Fridays for five and one-half hours each day. Ms. Ornellas had similar observations of Claimant as Ms. Nerland. Ms. Ornellas observed Claimant frequently lose focus and become nonresponsive and require redirection. In addition, Ms. Ornellas observed Claimant have a seizure on April 25, 2024, when she began staring off into space, became unresponsive to her voice, and then began jerking her body and then suddenly regained alertness. Following this episode, Claimant was dazed for a few minutes after. In addition, on June 5, 2024, Claimant became dazed and nonresponsive, nodded off, had a jerking body, and then became alert. Ms. Ornellas believes a one-to-one aide is necessary for Claimant to access her learning

and help with completion of assignments based on these periods of lost focus, and that a one-to-one aide is vital for her learning and safety in class and on the playground.

IEP SERVICES

54. Claimant's 2023 IEP provided for the following services for Claimant: specialized academic instruction (SAI) 30 minutes monthly consult and collaboration; SAI 30 minutes push-in monthly; PT 120 minutes monthly, individual; OT 30 minutes weekly small group, pull out; OT consultation collaboration 15 minutes monthly; and Health and Nursing specialized physical health care services 40 minutes daily (including catheterization).

55. At the time of Claimant's 2023 IEP, she had only had one seizure and was not yet diagnosed with epilepsy. However, by May 2023, Claimant had experienced a second seizure and was diagnosed with epilepsy. At the 2023 IEP meeting, Parents requested a one-to-one aide to support Claimant generally, and to support her with her epilepsy symptoms. In response to this request, CVUSD conducted the CVUSD SCES assessment to provide more detailed information to Claimant's IEP team regarding Claimant's need for supports. The CVUSD SCES assessment provides for the implementation of a Health Plan to address Claimant's epilepsy and possible seizure activity and, per Parents' testimony, in response to the CVUSD SCES assessment Claimant's IEP services now include a one-to-one aide.

56. Claimant's 2023 IEP and CVUSD assessment also described Claimant's academic achievement and functional performance. Claimant continued to have strengths in the areas of cognitive, academic, communication, and social skills. The following educational supports were identified as necessary for Claimant:

Mobility and Environmental Supports:

A wheelchair is Claimant’s primary means of mobility. Claimant propels her wheelchair independently but needs assistance going over thresholds and ramps, opening and closing doors, and keeping the physical environment safe and free from hazards. Claimant needs adaptive furniture and seating options, and assistance with transfers and transitions and navigating safely around the school campus.

Health and Nursing Supports:

A CVUSD "Health and/or Emergency Plan" for Claimant was written by the school nurse on June 12, 2023, which formalizes Claimant’s health supports as they relate to specific health needs or emergencies for Claimant’s SBH, neurogenic bladder and urinary retention (secondary to spina bifida), epilepsy, and VP Shunt. Included in this plan is the provision of changes to Claimant’s urinary catheterizations throughout the school day (a specialized nursing procedure) due to her incontinence, and, due to her epilepsy, seizure monitoring and emergency support during a seizure with administration of seizure rescue medication. Claimant may need monitoring for potential signs or symptoms of VP Shunt infection or increased intracranial pressure with observation and an action plan.

Activities of Daily Living and Fine Motor Skill Supports

Claimant needs assistance with obtaining meals and snacks, opening and setting up food, and access to the sink and soap for personal hygiene. In addition, Claimant needs assistance with fine motor school activities such as writing, coloring, and cutting with adaptive scissors.

Service Agency Assessments and Evaluations

57. Service Agency conducted an Intake Assessment and Psychological Evaluation of Claimant. In addition, Drs. Gluck and Little provided notes summarizing their review of Claimant's records and their opinions regarding Claimant's eligibility for regional center services.

INTAKE ASSESSMENT

58. On August 10, 2023, Vanessa Ruiz, LMFT, Service Agency's Intake Service Coordinator, conducted an Intake Assessment of Claimant. Claimant was referred to Service Agency by her pediatrician and neurologist to assess for eligibility based on her epilepsy or 5th Category. Parents sought to receive help with obtaining In-Home Supportive Services (IHSS), respite, and a Medicaid Waiver. Ms. Ruiz obtained medical, educational, and developmental documents and information from Parents. At the conclusion of the Intake Assessment, Ms. Ruiz referred Claimant to Kathy Khoie, Ph.D., for a psychological evaluation, and referred the review of Claimant's medical records to Robert Nopar, M.D., Service Agency staff physician.

MEDICAL REVIEW - DR. NOPAR'S ASSESSMENT

59. In the fall of 2023, Dr. Nopar conducted the initial review of Claimant's medical records and spoke with Dr. Ng. At that time, Dr. Ng had not met Claimant, but rather spoke to Dr. Nopar on CPNC Lin's behalf while CPNC Lin, Claimant's then primary neurology treatment provider, was out on leave.

60. Service Agency's exhibits do not include a written note completed by Dr. Nopar documenting his review of Claimant's medical records or supporting his conclusions regarding whether Claimant's epilepsy constitutes a substantial disability.

Rather, Dr. Nopar's conclusions are only found summarized in Dr. Gluck's October 2024 Psychological Review and Dr. Little's June 2024 Medical ID Note.

61. Dr. Gluck summarized Dr. Nopar's conversation with Dr. Ng and Dr. Nopar's findings as follows:

> [Dr. Ng] noted [Claimant] has only had 2-3 seizures and has been well controlled with one medication – Keppra, and so her seizures are not intractable. Her brain MRI shows structural pathology. The seizures add a layer of complexity to her adaptive deficits but cannot be discerned how this would specifically add to the deficits caused by her spina bifida and structural brain abnormalities. Dr. Nopar opined that in [Claimant's] case, it appears that her adaptive deficits are much more due to her spina bifida than to her epilepsy.

(Exh. 10, p. A15; see also, Dr. Little's Medical ID Note at Exh. 17, p. A65.) In reviewing Dr. Gluck's summary, it is not clear which portion of the summary is attributable to Dr. Ng's statements to Dr. Nopar, and which are Dr. Nopar's opinions.

62. Although incapable of discerning the effects Claimant's epilepsy has on her major life activities, Dr. Nopar formed an opinion Claimant's adaptive deficits were "much more" caused by Claimant's SBH. (Exh. 10, p. A15.) However, the evidence does not show that either Dr. Nopar, or Service Agency's eligibility team, completed an assessment of whether Claimant's epilepsy constitutes a substantial disability for Claimant. Rather, Service Agency's substantial disability assessment was conducted by Dr. Khoie in consideration of Claimant's eligibility assessment under ID and 5th

Category (Exh. 11, p A23); Dr. Gluck deferred to Dr. Nopar’s conclusion Claimant’s epilepsy does not constitute a substantial disability for Claimant (Exh. 10, p. A15).

63. Based on Dr. Nopar’s inability to discern how, if at all, Claimant’s epilepsy effects Claimant’s major life activities, and his resulting failure to make such an assessment, Dr. Nopar’s conclusion is unreliable and is given little weight. Nonetheless, Dr. Nopar’s conclusion was adopted by Service Agency’s eligibility team, and resulted in the November 2, 2023, NOA denying eligibility under the category of epilepsy.

64. Dr. Nopar retired in March 2024. Service Agency asked Dr. Little, a vendored medical consultant for Service Agency, to review Claimant’s medical records and to testify at the fair hearing on behalf of Service Agency.

PSYCHOLOGICAL EVALUATION

65. On September 5, 2023, Dr. Khoie conducted a psychological evaluation on Claimant to evaluate whether Claimant is eligible for regional center services under the qualifying conditions of ID or 5th Category. Dr. Khoie administered Claimant the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV), the Wide Range Achievement Test - Fifth Edition (WRAT-5), the Developmental Profile-4 (DP-4), and the ABAS-3.

WPPSI-IV

66. Claimant’s WPPSI-IV provided the following scores:

> The [WPPSI-IV], was administered. Claimant's Full-Scale IQ score was in the average range (FSIQ 91). Her Verbal Comprehension, Fluid Reasoning and Working Memory Index scores were in the average range (VCI 99, FRI 103,

> WMI 94). Her Visual Spatial Index score was in the below average range (VSI 89). Her Processing Speed Index score was in the borderline range (PSI 77). There were significant differences between Claimant's FRI and PSI (26 points). On the subtests, her scores ranged from the below average range on block design, bug search, cancellations to the average range on information, matrix reasoning, picture memory, similarities, picture concepts, zoo locations and object assembly.

(Exh. 10, p. A20.)

DP-4

67. On the DP-4, Claimant’s overall General Development Score was Below Average compared to other children of similar age. Dr. Khoie noted the General Development Score can be helpful when determining Lanterman Act eligibility.

68. Claimant scored in the Average range on the Intellectual Functioning cognitive Scale, which measures perception, concept development, number relations, reasoning, memory, classification, time concepts, and related mental acuity tasks. On the Social-Emotional Scale and the Communication Scale Claimant also scored in the Average range. The Social-Emotional Scale measures skills related to interpersonal behaviors and the demonstration of social and emotional competence. The Communication Scale score reflects the ability to understand spoken and written language as well as to use both verbal and nonverbal skills to communicate.

69. Claimant scored in the Delayed range on the Physical and on the Adaptive Behavior Scale. The Physical Scale includes items measuring gross- and fine-

motor skills, coordination, strength, stamina, and flexibility. The Adaptive Behavior Scale measures age-appropriate independent functioning, which includes the ability to use current technology.

ABAS-3

70. The General Adaptive Composite (GAC) summarizes performance across all adaptive skill areas excluding work. Claimant obtained a GAC score of 78 which places Claimant's current overall level of adaptive behavior in the Low range. Dr. Khoie noted, "[b]ecause the GAC provides the most complete measure of adaptive behavior, it is likely to be the most reliable and accurate estimate of overall adaptive functioning." (Exh. 10, p. A22.) Dr. Khoie explained that nonetheless, when determining Claimant's underlying adaptive functioning strengths and deficits it is necessary to review her performance within adaptive domains and skill areas, i.e., the conceptual domain, social domain, and practical domain.

71. The Conceptual domain standard score summarizes performance across the Communication, Functional Academics, and Self-Direction skill areas. Claimant's Conceptual domain standard score of 86 (95 percent confidence interval of 81-91) is in the Below Average range, as high as or higher than 18 percent of individuals of the same age. Adaptive skill areas within the Conceptual domain provide a more detailed view of Claimant's functioning. Claimant's communication abilities, including speech, vocabulary, listening, conversation, and nonverbal communication skills, are in the Average range. Claimant functions in the Below Average range when performing basic academic skills such as reading, writing, and mathematics, as well as functional skills such as taking measurements and telling time. Claimant's self-direction, such as her ability to make independent choices, exhibit self-control, and take responsibility when appropriate, is also in the Below Average range.

72. The Social domain standard score summarizes performance across the Leisure and Social skill areas. Claimant's Social domain standard score of 87 (95 percent confidence interval of 82-92) is in the Below Average range, as high as or higher than 19 percent of individuals of the same age. Claimant’s leisure skills needed for engaging in play and planning recreational activities are in the Below Average range. Claimant's ability to interact socially, initiate and maintain friendships, express and recognize emotions, and assist others when needed is in the Average range.

73. The Practical domain standard score summarizes performance across the Community Use, Home Living, Health and Safety, and Self-Care skill areas. Claimant's Practical domain standard score of 71 (95 percent confidence interval of 66-76) is in the Low range, as high as or higher than 3 percent of individuals of the same age. Adaptive skill areas within the Practical domain offer a more specific picture of Claimant's capabilities. Claimant's ability to function and navigate in the community, including shopping and using community resources, is in the Average range. Claimant's level of functioning inside the home, including cleaning, food preparation, performing chores and taking care of personal possessions, is in the Low range. Claimant's ability to protect her physical well-being and prevent and respond to injuries, including following safety rules, showing caution, and using medicine when appropriate, is in the Low range. Claimant's ability to perform self-care activities such as eating, dressing, and taking care of personal hygiene is in the Extremely Low range.

74. Claimant’s ABAS-3 scores organized by range show the following: (1) Claimant scored in the Average range in communication, social interactions, and community use; (2) Claimant scored in the Below Average range in the Conceptual domain and Social domain, generally, and in functional academics, self-direction, and leisure skills; (3) Claimant’s overall GAC score was in the Low range; Claimant also

scored in the Low range in the Practical domain, and in home living and health and safety; (4) finally, Claimant scored in the Extremely Low range in self-care.

Dr. Khoie's Conclusions

75. Dr. Khoie reviewed Claimant's assessment scores and concluded Claimant does not meet the diagnostic criteria for ID or 5th Category. In summary, Claimant's Full Scale Intelligence Quotient score on the WPPSI-IV was 91 (average range), and her results on the WRAT-4 showed Claimant's academic functioning skills to be in the kindergarten range which were appropriate to her age. Dr. Khoie's conclusions that Claimant is not eligible under ID or 5th Category is supported by the evidence and consideration of the DSM-5 criteria for ID (see Legal Conclusion 4-6) and the ARCA 5th Category Guidelines (see Legal Conclusion 7-11).

76. Dr. Khoie also reviewed Claimant's DP-4 and ABAS-3 scores and concluded substantial disabilities in areas, such as, learning, communication, social and self-direction skills were not noted. However, Dr. Khoie's conclusion that Claimant is not substantially disabled, or that she does not have significant impairments in three or more major life activities, is not supported by Claimant's scores on the DP-4 or ABAS-3, or by her psychological review on whole. Rather, Dr. Khoie seems to dismiss the apparent significant limitations Claimant experiences in major life activities, possibly because she attributes them to Claimant's SBH. Further, Dr. Khoie does not mention Claimant's epilepsy or make any assessment of how Claimant's epilepsy may constitute a substantial disability for Claimant. Accordingly, Dr. Khoie's substantial disability assessment process was flawed and is given little weight.

77. As summarized in Factual Finding 70, Claimant's General Adaptive Composite, or GAC, is in the low range, as is her Practical Domain score, her scores

placing her in the low range in self-care and health and safety. Dr. Khoie noted these are reliable scores. (Factual Findings 70 and 73.) In addition, Claimant's ability to perform self-care activities such as eating, dressing, and taking care of personal hygiene is in the extremely low range. Based on this set of Claimant' scores, Claimant demonstrates significant limitations in at least the major life activities of self-care, self-direction, and capacity for independent living. Dr. Khoie failed to provide an explanation or analysis supporting her conclusion that these low range and extremely low range scores support a finding that Claimant does not have significant limitations in any of the seven areas of major life activities provided for in section 4712, subdivision (*l*)(1).

78. Finally, further evidence that Dr. Khoie's assessment was misguided was her recommendation that Claimant be evaluated for Attention Deficit Hyperactivity Disorder (ADHD) due to concerns with Claimant's focus and attention. Notably, none of Claimant's treating physicians have recommended Claimant be assessed for ADHD. More importantly, Dr. Khoie's psychological evaluation did not consider Claimant's epilepsy, or how it may impact Claimant's focus and attention or her major life activities. Based on the evidence presented at hearing, Dr. Khoie presents as having limited, if any, understanding of epilepsy and Claimant's types of seizures and their impact on Claimant's focus, or how to assess the impact of Claimant's epilepsy on Claimant's major life activities. For the foregoing reasons provided for in Factual Findings 65 through 78, Dr. Khoie's conclusion that Claimant does not experience significant limitations in at least three major life activities is given little weight.

Dr. Gluck's Psychological Review

79. Dr. Gluck reviewed Dr. Khoie's psychological evaluation and Claimant's records submitted to Service Agency and summarized these records in her October 18,

2023 Psychological Review. Dr. Gluck also testified at hearing. Dr. Gluck had not met Claimant and her review and opinion are based solely on her review of Dr. Khoie's psychological evaluation and Claimant's records.

80. Dr. Gluck agreed with Dr. Khoie's conclusion that Claimant is not eligible for services under the Lanterman Act. Specifically, Dr. Gluck agreed with Dr. Khoie's conclusion that Claimant does not have ID nor is she eligible under 5th Category.

81. In her testimony, Dr. Gluck acknowledged she is not a medical doctor and could not speak to Claimant's epilepsy or if it was a qualifying diagnosis, and made no assessment as to whether Claimant's epilepsy constitutes a substantial disability. However, Dr. Gluck included in her psychological review and testimony at hearing that Dr. Nopar determined Claimant's epilepsy was a relatively new diagnosis and appeared well controlled with medication. She added further that she was not competent to speak to whether Claimant's epilepsy was a qualifying condition.

DR. LITTLE'S EVALUATION

82. As with Dr. Nopar, Dr. Little has not met or personally assessed Claimant. Dr. Little reviewed Claimant's medical, educational, and Service Agency records and on June 3, 2024, wrote a comprehensive medical note, Dr. Little's Medical ID Note (Exhibit 17), summarizing Claimant's medical conditions and her conclusion that Claimant's epilepsy does not constitute a substantial disability for Claimant.

83. Dr. Little acknowledged she is not a specialist in epilepsy and her opinion was based on her review of the medical records and on Drs. Nopar, Khoie, and Gluck's assessments. Dr. Little's summary of Service Agency's assessment of whether Claimant's epilepsy constitutes a substantial disability is inaccurate and flawed.

84. In reaching her conclusion that Claimant's epilepsy does not constitute a substantial disability for Claimant, Dr. Little relied on Dr. Nopar's conclusion that Claimant's epilepsy is well controlled. Dr. Little wrote:

> Although spina bifida is not an eligible condition under the Lanterman Act, there is no question that it is a permanent and lifelong disabling physical condition that will require specialized medical, nursing, and PT/OT services for [Claimant] in the years to come. The records confirmed that [Claimant] appears to be receiving all appropriate medical, therapeutic, and educational services for this disability. Fortunately, [Claimant's] epilepsy appears to be currently well-controlled and not causing substantial disability for her at this time. . . . If [Claimant's] epilepsy were to worsen in the future, especially to the degree that it causes other impairment in her developmental functioning, her family and doctors are strongly encouraged to refer her back to [Service Agency] for reevaluation.

(Exh. 17, p. A70.) However, as is evident from CPNP Lin and Dr. Ng's recent medical information, Claimant's epilepsy is not well controlled.

85. In the section of her medical note where Dr. Little summarized Service Agency's assessment of whether Claimant has a substantial disability, she inaccurately summarized Service Agency's assessment, proffering that Drs. Khoie and Gluck had made a substantial disability assessment regarding Claimant's epilepsy, though they had not. (See Exhibits 10 & 11; Factual Findings 65-81.)

> Review of [Claimant's] educational records, medical records, psychological evaluation by Dr. Khoie, as well as Dr. Gluck's summary of cognitive and adaptive functioning did not find any definite areas of substantial handicap that could be discerned as resulting from [Claimant’s] epilepsy.

(Exh. 17, p. A67.)

86. Contrary to Dr. Little’s representation, Dr. Khoie did not consider Claimant’s epilepsy and Dr. Gluck deferred to Dr. Nopar’s conclusion that such a determination was not possible. (See Exhs. 10 & 11.) Because Drs. Khoie and Gluck did not independently consider whether Claimant’s epilepsy constitutes a substantial disability, it is a misstatement of their evaluation and summary, respectively, to state neither doctor found any definite area of “substantial handicap that could be discerned as resulting from Claimant’s epilepsy.” (Exh. 17, p. A67.)

87. In her own analysis of whether Claimant’s epilepsy constitutes a substantial disability, Dr. Little improperly limited her analysis, considering only some of the major life activities provided by the Lanterman Act. Dr. Little explained she limited her consideration of the seven major life activities provided for in section 4517, subdivision (*l*)(1), to a consideration of only the first five major life activities provided for in this subdivision, excluding the consideration of capacity for independent living and economic self-sufficiency. Dr. Little explained the following:

> The areas of possible substantial disability that were reviewed for [Claimant] included the first 5 areas listed [in section 4517, subdivision (*l*)(1)] - self-care, receptive and expressive language, learning, mobility, and self-direction -

> since these are the applicable areas of life activity for a young child. The remaining two areas - capacity for independent living and economic self-sufficiency - cannot be assessed or projected for a 6-year-old child, as those pertain to late adolescence and young adulthood.

(Exh. 17, p. A67.)

88. At the fair hearing, the ALJ asked Dr. Little about the basis for her determination that independent living could not be assessed for a six-year-old child. In response, Dr. Little referenced the "Association of Regional Center Agencies (ARCA) Clinical Recommendations for Defining "Substantial Disability" for the California Regional Centers" (ARCA SD Recommendations) (Exhibit 18), and testified the ARCA SD Recommendations provide that a child needs to be 13 years of age or older to consider the last two major life activities, the capacity for independent living and economic self-sufficiency, when assessing whether a child has a substantial disability. However, contrary to Dr. Little's assertion, the ARCA SD Recommendations have no such limitation. Rather, they only provide that, "[a]ge and cultural norms should be considered for all areas . . . ." (Exh. 18, p. A71.)

89. Not only do the ARCA SD Recommendations not limit the consideration of capacity for independent living to individuals 13 years or older, for some areas of suggested consideration, they provide guidance on how to assess a younger child's capacity for independent living:

> Guidelines for selecting Capacity for Independent Living as an area of substantial disability:

> The individual is unable to perform age-appropriate independent living skills without the assistance of another person.
>
> Consider:
>
> Significant difficulty performing age-appropriate, simple household tasks
>
> Significant difficulty managing multiple-step domestic activities (e.g., grocery shopping, meal planning and preparation, laundry, care and selection of clothing, home repair and maintenance)
>
> Does not have age-appropriate capacity to be left unsupervised (e.g., lack of safety awareness)
>
> Significant difficulty with money management (e.g., using bank accounts, making small purchases independently) and budgeting
>
> Significant difficulty taking the basic steps necessary to obtain appropriate health care (e.g., obtaining medication refills, obtaining medical attention when needed)

(*Id.* at p. A73.)

90. Although some of the suggested areas of independent living considerations are not applicable to a six-year-old child, such as obtaining medical refills or using a bank account, the ARCA SD Recommendations do not provide an age

requirement when assessing a child's capacity for independent living and specifically direct the assessor to consider age-appropriate areas of independent living, such as when considering the child's ability to perform independent living skills, generally, and the child's ability to perform household tasks, select clothing, or be left alone. Basic knowledge of a six-year-old's development would therefor mean an assessment of, for example, a six-year-old child's ability to wash a dish, assist with clearing and cleaning off a table, choose clothing, and be left alone in a room to play independently.

91. Finally, although the ARCA SD Recommendations do not provide an age threshold for when consideration for capacity for independent living or economic self-sufficiency must be made, the ARCA Guidelines for Determining 5th Category Eligibility for Regional Center (ARCA 5th Category Guidelines) (Exhibit S) provide some age-based guidance. The ARCA 5th Category Guidelines provide that when determining whether a child from 6 to 18 years of age is substantially disabled, all six areas should be included. Only for children under five years of age should the assessment be limited to communication skills; learning, self-care, mobility, and self-direction. (Exh. S, pp. B91-B92.)

92. Service Agency did not present evidence to establish that ARCA guidelines provide for different age limitations or guidance when assessing a child for different Lanterman Act qualifying conditions. In this case, Claimant turned six years old in September 2023, before Service Agency's NOA and, accordingly, based on section 4712, subdivision (*l*)(1), and the ARCA SD Recommendations and ARCA 5th Category Guidelines, all seven areas of major life activities provided for in section 4712, subdivision (*l*)(1), should have been assessed by Service Agency when determining whether any qualifying condition constitutes a substantial disability for Claimant.

93. Ultimately, Dr. Little concluded Claimant’s epilepsy does not constitute a substantial disability for Claimant.

> [Claimant] does have substantial handicap in the domain of mobility, and possibly self-care skills, to the extent that her self-care and hygiene are impacted by [Claimant's] motor deficits from her spina bifida. However, these functional limitations were due to [Claimant's] spina bifida, not to the developmental disability under which she might otherwise qualify, her epilepsy.

(Exh. 17, p. A67.)

94. At hearing, and after reviewing Dr. Ng’s October 2023 Medical Note (Exhibit E) and hearing Parents’ and Aunt’s testimony, Dr. Little testified the additional information did not change her opinion. She acknowledged that based on the additional information she agreed Claimant’s epilepsy is not well controlled, but regardless she determined that any impact on Claimant’s major life activities was due more to Claimant’s SBH rather than her epilepsy. Dr. Little added that based on her unstable epilepsy, Claimant’s epilepsy would need to be stable before assessing whether it constitutes a substantial disability. Dr. Little did not provide any support for this assertion.

Testimony of Parents and Aunt

95. Claimant’s Father, Mother, and Aunt testified at hearing. Claimant’s epilepsy, and its symptoms and seizures, are still relatively new for Claimant and her family. Parents have, over the past year, attended trainings regarding epilepsy and now better understand that Claimant’s recurring headaches, vomiting, and dizziness,

which often occur before or after lapses in awareness or consciousness, are symptoms related to epilepsy and what they believe are absence seizures. Over the past year, Parents repeatedly received input from Claimant's school team that she loses consciousness and experiences headaches and dizziness and must leave the classroom, and associated instruction, and go to the Health Office due to her symptoms. At home, these symptoms have become common to the point that parents alternate nights sleeping in Claimant's room to monitor her breathing because they are worried she will, based on her earlier symptoms of headaches or dizziness or lapses in awareness, have a seizure and aspirate and die.

96. In regard to Parents' worry regarding Claimant's safety, Father explained that he built a wheelchair for Claimant which she has been successfully using since approximately two years of age. However, since the onset of Claimant's lapses in awareness, she has lost control of her wheelchair and on one occasion rolled into a tether ball in active play, and on another occasion rolled in front of a swing and was struck by the child on the swing. Not only are these collisions cause for safety concerns, but because of Claimant's VP Shunt and other SBH related medical treatments, Claimant's recurring lapses of awareness constitute significant limitations in her major life activities and risk of harm for Claimant.

97. Aunt also testified at hearing. Aunt is a nurse who worked at Cedars Sinai and has work experience with seizures and how they present before, during, and after the seizure. Aunt has observed Claimant's lapses in awareness, including her staring off into space and needing recovery time to reorientate to the present, and believes Claimant's symptoms are absence seizures. Aunt is also familiar with treating Claimant after a generalized tonic seizure and explained that two people are required to lift Claimant out of her wheelchair and place her on the ground, ensure her airway is clear

and that any of Claimant’s body movements do not cause harm to Claimant, and then administer the rectal Diastat treatment. Based on Aunt’s personal experience with Claimant and Parents, she believes Claimant’s health and life are at risk if Claimant and Parents to not receive some level of respite or medical support from regional center.

LEGAL CONCLUSIONS

Jurisdiction

1. The Lanterman Act governs this case. An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) (Factual Findings 1-7.)

Burden and Standard of Proof

2. The party asserting a condition that would make the individual eligible for a benefit or service has the burden of proof to establish they have the condition. (*Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 160-161.) In this case, Claimant bears the burden of proving by a preponderance of the evidence Claimant has a developmental disability as defined by the Lanterman Act and is eligible for regional center services. (Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”].) A preponderance of the evidence means "'evidence that has more convincing force than that opposed to it.' [Citation.]" (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Lanterman Act Eligibility Requirements

3. A developmental disability is a disability that originates before an individual turns 18 years old. This disability must be expected to continue indefinitely and must constitute a substantial disability for the individual. Developmental disabilities are limited to cerebral palsy, epilepsy, autism spectrum disorder, ID, or 5th category. Developmental disabilities do not include other handicapping conditions that are solely physical in nature, or which are solely psychiatric disorders or learning disabilities. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000.)

DSM-5 DEFINITION OF INTELLECTUAL DISABILITY

4. The DSM-5 provides that the following three diagnostic criteria must be met to be diagnosed with ID. (Exh. OAH3, p. OAH15):

First, an individual must have deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing (Criterion A). Individuals with ID have Full-Scale Intelligence Quotient (IQ) scores between 65 to 75, including a five-point margin for measurement error. The DSM-5 cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. The DSM-5 explains that a person with an IQ score above 70 may have such severe challenges in adaptive behavior, such as problems with social judgment or social understanding, that the individual’s actual functioning is comparable to that of individuals with a lower IQ score.

Second, the DSM-5 definition of ID requires individuals with ID to have deficits in adaptive functioning that fail to meet developmental and socio-cultural standards for personal independence and social responsibility, and which, without ongoing support, limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community (Criterion B). This criterion is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired such that the individual requires ongoing support to perform adequately in one or more life settings at school, at work, at home, or in the community. The levels of severity of ID are defined based on adaptive functioning, and not IQ scores, because adaptive functioning determines the level of supports required. (Exh. OAH3, p. OAH19.)

Third, individuals with ID must experience the onset of these symptoms during the developmental period (before reaching 18 years of age) (Criterion C). (Exh. OAH3, p. OAH15.)

5. The DSM-5 includes descriptions of the three severity levels of ID, mild, moderate, and severe. Mild ID presents as follows (Exh. OAH3, p. OAH16):

Conceptual Domain: For school-aged children and adults there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed to meet age expectations.

Social Domain: Compared with typically developing agemates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in an age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility).

Practical Domain: The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organization, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. Individuals generally need support to make health care decisions and legal decisions and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

6. The evaluations, assessments, and other evidence presented at the fair hearing did not establish Claimant has ID. Initially, Claimant's FSIQ score is 91, above the five-point margin for error allowed by the DSM-5 to meet the criterion for ID. Further, although Claimant demonstrates with adaptive deficits, her adaptive deficits are not consistent with the markers for even Mild ID. (Factual Findings 15-97.)

FIFTH CATEGORY

7. To be eligible under the qualifying condition of 5th Category, an individual must have "disabling conditions found to be closely related to [ID] or to require treatment similar to that required for [individuals with ID]," but does "not include other handicapping conditions that are solely physical in nature." (§ 4512, subd. (a); see *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129 (*Mason*).) The 5th category is not defined in the DSM-5.

8. On March 16, 2002, in response to the *Mason* case, ARCA developed and approved the ARCA 5th Category Guidelines. These Guidelines list the following factors to be considered when determining eligibility under the 5th category: whether the individual functions in a manner similar to that of a person with ID; whether the individual requires treatment similar to that required by an individual who has ID; whether the individual is substantially handicapped; and whether the disability originated before the individual was 18 years old and is it likely to continue indefinitely. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 (*Samantha C.*), the court cited with approval to the ARCA 5th Category Guidelines and recommended their application to those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)" for 5th category eligibility. (*Id.* at p. 1477.)

9. The ARCA 5th Category Guidelines provide guidance on how to determine if an individual is eligible under the 5th Category, identifying five factors for consideration. When considering the first factor, whether an individual functions in a manner similar that of person with ID, the ARCA 5th Category Guidelines provide the following.

> An individual can be considered to be functioning in a manner that is similar to a person with [ID] if:
>
> A. The general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74). Factors that the eligibility team should consider include:

> 1. Cognitive skills as defined in the California Code of Regulations, Title 17, Section 54002: " ... the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience."
>
> 2. The higher an individual's IQ is above 70, then the less similar to a person with mental retardation is the individual likely to appear. For example, an individual with an IQ of 79 is more similar to a person with low average intelligence and more dissimilar to a person with mild mental retardation.
>
> 3. As an individual's intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that: a. there are substantial adaptive deficits, and b. such substantial adaptive deficits are clearly related to cognitive limitations. [¶] . . . [¶]
>
> 5. Borderline intellectual functioning needs to show stability over time. Young children may not yet demonstrate consistent rates and patterns of development. For this reason, eligibility for young children in the 5th category should be viewed with great caution.

(Exh. S, p. B89.)

10. The ARCA 5th Category Guidelines also provide guidance on how to assess subfactor B of this consideration, whether the individual demonstrate significant

deficits in adaptive skills, and how to assess the remaining four areas for consideration, i.e., does the individual require treatment similar to that required by an individual who has ID, is the individual substantially disabled, and did the disability originate before the individual was 18 and is it likely to continue throughout the individual's life.

11. The evidence does not establish Claimant is eligible for services under the 5th Category. Initially, Claimant's FSIQ does not fall within the range provided by the court in *Samantha C*. as her FSIQ score was 91, well above the *Samantha C.* 5th Category FSIQ cut off of 74. (Factual Finding 72.) Because Claimant's FSIQ is well above 70, it becomes more necessary to demonstrate she has substantial adaptive deficits related to her cognitive limitations. However, the evidence did not demonstrate Claimant's adaptive deficits are due to cognitive limitations. (Factual Findings 15-97.) Because the evidence did not establish Claimant met the first requirements of the ARCA 5th Category Guidelines, the remaining four factors will not be considered.

EPILEPSY

12. Service Agency agrees Claimant's epilepsy is a qualifying disability under the Lanterman Act. However, Service Agency asserts Claimant's epilepsy does not constitute a substantial disability for Claimant and so, therefore, she is not eligible for regional center services under the Lanterman Act. Service Agency's assessment of Claimant's epilepsy and whether it constitutes a substantial disability for Claimant was incomplete and flawed. In contrast to Service Agency's assessment and conclusion, Claimant established by a preponderance of the evidence Claimant's epilepsy constitutes a substantial disability for Claimant.

Substantial Disability

13. "Substantial disability" means:

> (a) (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. [¶] . . . [¶]

(Cal. Code Regs., tit. 17, § 54001; see § 4512 (*l*)(1).)

Analysis

14. Claimant is a six-year-old girl. She has lived with SBH since birth, and similarly with its resulting physical limitations. However, Claimant's preexisting SBH does not preclude a complete assessment of whether Claimant's epilepsy constitutes a

substantial disability. Rather, Claimant established by a preponderance of the evidence Claimant's epilepsy constitutes a substantial disability, resulting in significant limitations in the five major life activities of learning, self-care, mobility, self-direction, and capacity for independent learning. (Factual Findings 15-97.)

15. Before Claimant's epilepsy, Claimant engaged in school, self-care, self-direction, and age-appropriate independent living activities. For example, she maintained control of her wheelchair; when in the classroom, she focused on the lesson presented and did not leave the classroom for seizure related symptoms, such as headaches and nausea; and she ate and brushed her teeth. Claimant received assistance with these activities, such as assistance navigating her wheelchair over thresholds or transitioning out of her wheelchair for floor time, with intermittent catheterization, or with the mechanics of teeth brushing. However, these supports were based on Claimant's limitations and needs related to her SBH.

16. Based on the medical notes written by CPNP Lin and Dr. Ng, coupled with the review of applicable medical definitions, and the descriptions of Claimant's lapses in awareness witnessed by Parents, Aunt, Ms. Nerland, and Ms. Ornellas, Claimant has tonic-clonic epilepsy and has experienced, and is at risk of future, tonic-clonic seizures (see Factual Finding 39); in addition, Claimant experiences seizures which are not tonic-clonic seizures which cause her to experience changed or impaired awareness, during which time Claimant stares into space and is, for a period of time, non-responsive, and after which she requires a period of time to reorientate herself to her surroundings and activities.

17. The evidence was not conclusive as to whether Claimant's non-tonic-clonic seizures were absence seizures or focal seizures (or focal seizures with impaired awareness), or if they can otherwise be defined by another medical name. Because

neither CPNP Lin nor Dr. Ng used the term absence seizure, and in consideration of the medical definitions reviewed, it was not certain they had diagnosed Claimant with absence seizures. Rather, because they tended to use the terms related to focal seizures with impaired awareness, such as their confirmation the October 2023 EEG showed right posterior (or focal) slowing (Factual Findings 39 through 42), it seems more likely that CPNP Lin and Dr. Ng were denoting Claimant has been experiencing focal seizures or focal seizures with impaired awareness.

18. The Hearing Officer need not diagnose the type of non-tonic-clonic seizures identified in CPNP Lin's and Dr. Ng's medical notes. However, the proper medical name for Claimant's non-tonic-clonic seizures is immaterial. What is material is Claimant's medical team, and specifically CPNP Lin and Dr. Ng, Claimant's neurological medical team, have affirmed Claimant's EEG results show focal slowing and, consistent with this result, Claimant has experienced frequent and often daily changes in, or impaired, awareness, or lapses in consciousness, which are directly related to her epilepsy. These episodes of impaired awareness have placed, and continue to place, Claimant at risk of injury and definitively impede her learning and other major life activities in ways unrelated to her SBH. Claimant's neurological team are obviously aware of Claimant's SBH and do not attribute these more recent impacts on Claimant's major life activities to Claimant's SBH.

19. Since the diagnosis of her epilepsy, and more frequently since her July 2023 tonic-clonic seizure, Claimant experiences seizures frequently, often times throughout the day, which cause her to lose awareness of her surroundings and to stare off, which sometimes result in body jerking movements, and after which she must reorientate herself to her surroundings. These seizures also cause Claimant to

experience headaches and nausea, causing her to leave the classroom or disengage in major life activities other than learning.

20. Claimant's epilepsy causes her to be unable to control her wheelchair which, if it is in motion, significantly limits her ability to control her mobility. Claimant's epilepsy also causes Claimant to cease her engagement in age-appropriate self-care, self-direction, or household tasks, which then requires teachers, paraeducators, and Parents and Aunt to frequently care for Claimant during her periods of loss of awareness or consciousness and periods of reorientation to her surroundings, and to prompt Claimant to assist her with the completion of whatever major life activity she had been engaged. In addition, these seizures significantly impact her ability to be left alone in an age-appropriate way, such as how a six-year-old might be left alone, for example, in her bedroom to play independently.

21. Finally, and contrary to Service Agency's implications, the assessment of whether Claimant's epilepsy causes a substantial disability for Claimant does not need to be determined by conceiving of a hypothetical Claimant who does not have SBH. Rather, Claimant has SBH and because of it, Claimant's epilepsy poses even more significant functional limitations on Claimant's major life activities. For example, a six-year-old child who does not have SBH may be standing on the school yard and have a seizure which may cause the child to fall to the ground. In this example, the epilepsy significantly impacts the hypothetical Claimant's mobility and places her generally at risk of injury. However, for Claimant these seizures pose a more significant impact on Claimant's mobility. For Claimant such seizures have caused, and could in the future cause, her to lose control of her wheelchair and to roll into an active tether ball or swing because she uses a wheelchair; further, these seizures place Claimant at greater

risk of significantly limiting her mobility because she is at risk of a greater injury because of the VP Shunt in her head.

22. As a second example, if Claimant did not have SBH, her trips to the Health Office due to seizure related headaches and nausea would significantly limit her learning. However, because of Claimant's SBH, Claimant's learning is already interrupted daily for her intermittent catheterization changes, which occur every three hours. Accordingly, Claimant's epilepsy more significantly limits Claimant's learning.

23. As a third example, if a six-year-old child has a tonic-clonic seizure significant enough to require laying the child on the ground, while doing so could be difficult, it would generally have no other obstacles or safety risks. However, for Claimant laying her down requires at least two individuals to remove Claimant from her wheelchair while she is having a seizure and secure her in a safe position, while ensuring Claimant's airway remains clear and, again, that her VP Shunt is not impacted. Accordingly, Claimant's epilepsy significantly limits her daily major life activities as greater and constant care must be provided to her to ensure her safety during tonic-clonic seizures.

24. These are just three additional examples of why for Claimant her epilepsy constitutes a substantial disability. These examples of impacts are not impacts caused by Claimant's SBH, and are not caused by her VP Shunt, rather, they are caused by Claimant's epilepsy and are examples of how Claimant's epilepsy constitutes a substantial disability for Claimant, a child with SBH.

25. Claimant established she is eligible for services under the Lanterman Act under the category of epilepsy. Claimant's epilepsy constitutes a substantial disability

for Claimant in five major life activities, learning, self-care, mobility, self-direction, and the capacity for independent living. Claimant's appeal is granted.

ORDER

Claimant is eligible for regional center services under the Lanterman Act under the category of epilepsy. Claimant's appeal is granted.

DATE:

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration under Welfare and Institutions Code section 4713, subdivision (b), within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.