BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Eligibility of:

CLAIMANT

and

INLAND REGIONAL CENTER, Service Agency

DDS No. CS0012630

OAH No. 2024020484

DECISION

Alan R. Alvord, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on August 27, 2024.

Beverly Barrett, Deputy County Counsel, Imperial County, represented claimant. Claimant's foster mother was also present.

Stephanie Zermeño, Appeals & Resolutions Specialist, Inland Regional Center, (IRC) represented the service agency.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 27, 2024.

ISSUES

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Act (Lanterman Act) as a result of autism, an intellectual disability, or a fifth category condition that constitutes a substantial disability?

SUMMARY

Claimant, a nine-year-old male, has a history of early childhood trauma and significant behavior and medical issues. His foster mother sought eligibility for regional center services. After twice reviewing claimant's medical, educational, and psychological records, the service agency determined he was not eligible for regional center services. The evidence in this case supported the service agency's determination. Claimant is not eligible for regional center services.

FACTUAL FINDINGS

Jurisdiction

1. Claimant was initially assessed by the service agency in 2023. Based on a review of the provided records, in August 2023, the service agency determined that claimant was not eligible for regional center services and denied eligibility. Claimant did not appeal that decision. Claimant subsequently submitted additional records to the service agency, which performed a second review of all provided records, and again determined that claimant was not eligible for services. The service agency issued a Notice of Action dated January 16, 2024.

2. Claimant's authorized representative submitted a fair hearing request dated February 13, 2024; this hearing followed.

Diagnostic Criteria for Autism Spectrum Disorder

3. The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision*, (DSM-5-TR) contains the diagnostic criteria that must be met to make a diagnosis of autism. To be eligible for regional center services based on autism spectrum disorder, a claimant must meet those diagnostic criteria. The criteria include persistent deficits in social communication and social interaction across multiple contexts, as manifested by all of the following, currently or by history: (1) deficits in social-emotional reciprocity; (2) deficits in nonverbal communicative behaviors used for social interaction; and (3) deficits in developing, maintaining, and understanding relationships. In addition, the criteria require evidence of restricted, repetitive patterns of behavior, interests, or activities as manifested by at least two of the following, currently or by history: (1) stereotyped or repetitive motor movements, use of objects, or speech; (2) insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior; (3) highly restricted, fixated interests that are abnormal in intensity or focus; or (4) hyper-or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment. The symptoms must be present in the early developmental period and must cause clinically significant impairment in social, occupational, or other important areas of current functioning. In addition, the criteria require that the disturbances are not better explained by intellectual developmental disorder or global developmental delay.

Diagnostic Criteria for Intellectual Developmental Disorder (Intellectual Disability)

4. The DSM-5-TR defines intellectual developmental disorder (intellectual disability) as a disorder that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met: (a) deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standard intelligence testing; (b) deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility which limit, without ongoing support, functioning in one or more activities of daily life; (c) onset of intellectual and adaptive deficits during the developmental period.

Fifth Category Eligibility

5. Under the "fifth category" the Lanterman Act provides assistance to individuals with "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability" but does not provide services for "other handicapping conditions that are solely physical in nature." (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.

6. The fifth category is not defined in the DSM-5-TR. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129, the court held that the fifth

category was not unconstitutionally vague and set down a general standard: "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well." (Of note, the DSM-5-TR 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.)

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

8. 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.

Substantial Disability Requirement

9. In addition to meeting the diagnostic criteria for an identified Lanterman Act developmental disability, the disability must constitute a substantial disability for that individual. (Welf. & Inst. Code § 4512, subd. (a)(1).) Substantial disability is defined as significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person: (a) self-care; (b) receptive and expressive language; (c) learning; (d) mobility; (e) self-direction; (f) capacity for independent living; and (g) economic self-sufficiency. (Welf. & Inst. Code § 4512, subd. (l)(1).)

Claimant's History

10. Claimant is a nine-year-old male. His caregivers and medical providers believe that he was exposed to illegal drugs in utero. It was reported that he experienced emotional and sexual abuse in the biological family home. When claimant was three years old, a person was stabbed in front of claimant and his five-year-old brother in the family home. Claimant's biological mother took the stabbing victim, her boyfriend, to the hospital and left the children alone in the home. The children were removed from the home in 2020 and have remained in foster care.

11. Claimant has been placed in eight different foster care settings, including two years in a short-term residential therapeutic group home program. He successfully completed that program and has been with foster mother since February 2023.

2021 and 2022 Child Assessments and Psychiatric Evaluation

12. On April 27, 2021, while claimant was six years old in the group home, Kimberly Meghann Cortes, LMFT, conducted an assessment and issued a report. The report noted frequent worry, difficulty with sleep, irritable, physical and verbal aggressive behavior, elopement, encopresis, including hiding feces throughout the home, and reports of seeing images of knives, blood, and fear of harm from others. Although claimant denied visual hallucinations, Ms. Cortes recommended a psychiatric team continue to monitor hallucinations. The report noted claimant responded well to structure and natural consequences.

13. On May 1, 2021, Joshua Masih, MS, NP, authored a psychiatric evaluation. The report was consistent with other reports at the time. Claimant's diagnosis was posttraumatic stress disorder (PTSD); he was prescribed medication for impulsivity and sleep. Mr. Masih authored another evaluation on July 3, 2021, with the same findings.

14. Another assessment in the group home was performed on March 29, 2022, by Charlene Cheng, Registered Associate Professional Clinical Counselor. Claimant's impulsive and aggressive behavior continued to be a concern, along with his encopresis. He reported having nightmares, flashbacks of past trauma, and daytime hallucinations. In October 2021, claimant was determined ready for a lower level of care after improvement in behaviors, "however, regression in behaviors were observed after several failed meet and greets with potential caregivers."

May 2022 Psycho-Educational Assessment

15. A psycho-educational assessment by a school psychologist conducted in March and April 2022 addressed claimant's present levels of academic and social/emotional needs for the purpose of determining if he was eligible for special education services and to make recommendations about the level of services.

16. The psychologist observed claimant in his first grade class on two occasions. Claimant was well-behaved and his attention to classroom tasks was acceptable. Claimant scored in the average range in all subscales on the Wechsler Intelligence Scale for Children – Fifth Edition.

17. On the Woodcock-Johnson IV Test of Achievement, claimant scored within the average range on most subscales. He scored low average in reading comprehension and decoding. Several measures found clinically significant problems with defiance, aggression, hyperactivity, conduct problems, withdrawal, and peer relations.

18. The assessment concluded that claimant met the eligibility criteria for special education services based on educational emotional disturbance.

Individualized Education Programs

19. Claimant receives special education services at school. His Individualized Education Program (IEP) dated May 19, 2022, indicates his primary disability was emotional disturbance. The IEP noted his overall verbal memory functions, verbal comprehension, and processing speed tasks were areas of strength, and visual-motor integration was measured in the average range. His reading skills ranged from low average to average. His written language and mathematics skills were in the average range. In communication development, the IEP noted that he was "able to effectively communicate his feelings and emotions. He participates in class discussions and activities." In the area of social/emotional/behavioral the IEP incorporated a report from claimant's general education teacher, which stated:

> [Claimant] has good days and difficult days. On good days, he is cooperative, friendly and completes work on time. On difficult days he is disrespectful to students and staff. He does not follow directions, he is distracted and out of his seat, gets physical and is aggressive with students, uses foul language, flips his middle finger and/or walks out of the classroom without permission. He likes to be in control when working with others and sometimes students avoid working with him.

Claimant has a history of encopresis and enuresis. He has a toileting care plan in place as school. The IEP report identified self-regulation and peer interaction as his areas of need.

20. On February 17, 2023, the IEP was amended after foster mother took over claimant's care that same month. She indicated an additional area of concern related to claimant's inappropriate behaviors and refusal to be toileted. A comment was added to the IEP report under the social/emotional/behavioral heading:

> 2/17/23: [Claimant] struggles with making good choices at times. He will say inappropriate things to his peers or touch them and say inappropriate things making them feel uncomfortable. He can be aggressive towards his peers when playing games outside. [Claimant] can be defiant on getting toileted and elope from the classroom or nurse's office. If there is something he does not want to do he will not do it. He will either use inappropriate language towards an adult or gesture a "L" if he is refusing to do what is being asked of him and elope. When he says he is not going to do something he gets very upset if an adult keeps asking him if he will do it. He will reiterate that he is not going to do it in a very angry tone.

The following was added to the report as an amendment:

> August 2022: Student has been observed to work well with a token chart and earning rewards in both his general education classroom and SAI classroom. Student also has access to snacks when he is hungry. Student receives lots of positive praise throughout the day for positive behavior. Student has been observed to transition well within

activities in both his general education classroom and SAI classroom.

21. The IEP amendment added new areas of need for physical aggression and elopement, and added new areas of specialized instruction and supports, including individual counseling for 60 minutes monthly, behavior intervention services for 30 minutes monthly, a reward system for toileting, and parent contact any time claimant refused to toilet and any time he eloped and was missing for more than five minutes.

22. The annual IEP dated April 22, 2024, noted:

> [Claimant] has significant diagnoses of PTSD and ODD. Past traumatic events and incomplete prenatal medical history may have some impact on his ability to emotionally regulate and result in varied levels of alertness and heightened responsiveness to stimuli in the classroom setting.

23. The IEP report noted he was reading at grade level and retelling the story at below grade level. Because writing was not a preferred subject for him, he struggled to add detail to writing. He was noted as fluent in 55 percent of his multiplication and division facts. Under communication development, the IEP stated claimant is able to advocate his wants and needs with peers and adults and is considered age appropriate.

24. A comment under social/emotional/behavior noted he complies on a good day with "no issues" and can express what he likes and dislikes appropriately. If he is angry, he will "mentally shut down" and sit until he wants to return to what he is

supposed to be doing if he is left alone. "He will lash out at adults through physical aggression or verbal aggression (e.g. punching, kicking, using profanity) when he is not left alone." A note also stated:

> [Claimant] participates in both individual and group counseling sessions. [He] is eager to participate in individual counseling sessions practicing coping skills, appropriate behaviors, and responses to challenges. [He] exhibits age-appropriate insight about his behaviors, takes responsibility, and can discuss what can be done differently with some guidance. [He] is showing emotional regulation most of the time and weeks at a time, however, he is still working on managing some external triggers such as bullying or others behaviors. [He]has benefitted from learning about his medical condition of encopresis, in order to process embarrassment and build self-confidence. It is recommended that [he] continue to participate in counseling sessions to focus on increasing self-awareness and self-management. [He] is highly motivated to start pushing out to a less restrictive environment.

25. The April 2024 IEP noted, "Per Medical Diagnosis received in April 2024 active problems are attention deficit hyperactivity disorder, autistic disorder, intellectual disability, posttraumatic stress disorder, secondary functional encopresis, and screening for mental health and behavioral disorders. Medications taken include risperidone and clonidine." In addition, the report noted his independent and self-help/adaptive skills are age appropriate and he is toileting without defiance

independently. The 2024 IEP continued individual counseling but did not include behavioral intervention services.

Diagnostic Evaluation May 2023

26. On May 23, 2023, Lisa French, Psy.D., BCBA-D, Licensed Clinical Psychologist, performed an autism evaluation at the request of foster mother due to concerns regarding sensory issues, social deficits, and behavioral issues. Foster mother reported that claimant engages in limited reciprocal conversations with others, has difficulty transitioning to different activities, a short attention span, impulsivity, is easily frustrated, frequently screams, cries, tantrums, kicks, punches, destroys property and objects, elopes and/or bangs his head if he does not get his way or if given any feedback about his behavior. Foster mother reported some sensory seeking behaviors such as jumping up and down, likes to touch other people but dislikes being touched, has food sensitivities, and toileting and soiling issues. He was prescribed Clonidine and Risperidone at night for behavior and to help with sleep.

27. Dr. French consulted with two providers who work with claimant: a mental health counselor through Riverside Mental Health, and a provider of therapeutic behavioral support services. The mental health counselor reported that she worked with claimant across environments. He has been respectful to her and shares sometimes but is avoidant when discussing toileting issues. She described claimant as very intelligent and social with others. She told Dr. French she did not identify any symptoms of autism.

28. The therapeutic behavior support clinician reported that he worked with claimant for four hours per week for two years, in the home environment, and previously at the group home. He described claimant as a very smart boy who was

working on expressing his emotions effectively, accepting feedback without engaging in physical aggression, and tolerating frustration. The clinician told Dr. French he did not identify any symptoms of autism and stated that many of his behaviors were likely due to early traumatic experiences and inconsistencies in living and school environments.

29. Dr. French noted that claimant engaged in conversations, made appropriate eye contact, answered questions in full sentences with normal voice tone and cadence. Dr. French administered two standardized measures for autism, the Autism Diagnostic Observation Schedule, 2nd Edition (ADOS-2) and the Gilliam Autism Rating Scale – Third Edition (GARS-3).

30. On the ADOS-2 test, Dr. French found that claimant earned points on the communication scale because of some deficits in conversation skills and reciprocal social communication. However, he spoke more and seemed more comfortable as the evaluation went on. He commented, elaborated, adding details to his comments or replies, responded to statements, and answered questions, but he did not direct many questions toward the evaluator to maintain a conversation. He tended to elaborate more when the topic was of high interest to him. Although Dr. French stated that she could modify the discussion to keep it flowing, she found this conversation style would likely impede on day-to-day conversations with peers and others in the community. He also displayed limited shared enjoyment at times, as he tended to prefer only to engage in tasks that were of interest to him and declined more structured tasks. But with prompts and encouragement, he joined in on the task. He displayed strengths in social interaction skills, such as making appropriate eye contact, responding to social smiles and humor, using gestures as he communicated, displaying social overtures when he wanted Dr. French's attention to ask a question or request a toy, and he

displayed perspective taking skills when discussing social events or when looking at pictures of social scenarios. Overall, the interaction was pleasurable, and Dr. French was able to build rapport with him.

31. Claimant did not demonstrate any restricted and repetitive behaviors, excessive interest in highly specific or unusual topics, his interests were age appropriate, and he did not display any stereotypical behaviors. His speech did not show any idiosyncratic or stereotyped use of words or phrases and showed a typical pace and tone patterns. He did not show any unusual sensory interests in materials and did not display any odd hand or finger movements.

32. Dr. French concluded claimant did not fall within the ADOS-2 classification for an autism spectrum disorder, as very little autism spectrum-related symptoms were observed. His overall classification score on the ADOS-2 was three. The cutoff for autism spectrum disorder is seven in his age group.

33. The GARS-3 is based on reports from teachers, parents, and clinicians. In this case, Dr. French used reports from his foster parents to score the GARS-3. The report noted that claimant's foster father accompanied him to the session. His foster mother was not present. However, the report consistently referred to "foster parents" in the plural, suggesting that foster mother's input was also incorporated.

34. Claimant's scores on the GARS-3 fell into the elevated range for social interaction, emotional responses, cognitive style, and maladaptive speech. Claimant's foster parents reported that claimant does not initiate conversations with peers or others, pays little attention to what peers are doing, fails to imitate other people in games or learning activities, does not follow other's gestures or cues to look at something, seems indifferent to people's attention, shows minimal expressed pleasure

when interacting with others, displays little excitement in showing toys or objects to others, seems unwilling or reluctant to get others to interact with him, shows minimal or no response when others attempt to interact with him, displays little reciprocal communication, does not try to make friends with other people, and shows little interest in other people. He needs an excessive amount of reassurance if things are changed or go wrong, becomes frustrated quickly when he cannot do something, tantrums when frustrated, becomes upset when routines are changed, responds negatively when given commands, requests, or directions, has extreme reactions to loud noises, and tantrums when he does not get his way or when told to stop doing something he enjoys doing. He uses exceptionally precise speech, attaches very concrete meanings to words, talks about single subjects excessively, displays superior knowledge or skill in specific subjects, displays excellent memory, shows intense, obsessive interest in specific intellectual subjects, and makes naïve remarks without being aware of reactions produced in others.

35. The GARS-3 autism index score was 106, which Dr. French noted indicates a probability of autism spectrum disorder as "very likely."

36. Dr. French also administered the Vineland Adaptive Behavior Scales, 3rd Edition (Vineland-3). His sub score for socialization was in the low range. Communication and daily living skills sub scores were in the moderately low range. Motor skills were in the adequate range. Claimant's composite score was in the moderately low range relative to same age range peers, indicating moderate deficits.

37. Dr. French found that claimant presented with mild deficits in reciprocal communication and engaging in play but was compliant with encouragement and prompts. He demonstrated appropriate play and imagination skills. Dr. French concluded:

> Based on this evaluation assessment, as well as consultations with [claimant's] current therapist and social worker, [claimant] is presenting with some developmental delays and social emotional deficits, but ***does not meet criteria for an Autism Spectrum Disorder diagnosis.*** His behaviors are more characteristic of Oppositional Defiant Disorder, possible Sensory Processing Disorder, and Post-Traumatic Stress Disorder. (Bold and italics original.)

38. Dr. French recommended applied behavior analysis in the home to address communication skill deficits and decrease maladaptive behavior, as well as educate the family on behavior modification strategies. She also recommended an assessment by a credentialed occupational therapist for sensory processing disorder, individual counseling, play therapy and/or cognitive behavior therapy services, and regular consultations with a pediatric psychiatrist.

October 2023 Psychiatric Visit and Diagnosis

39. On October 25, 2023, claimant was seen at Inland Psychiatric Medical Group by Adam Brasket, PMHNP, for an initial evaluation. Mr. Brasket's assessment included diagnoses for posttraumatic stress disorder, attention deficit hyperactivity disorder, predominantly hyperactive impulsive type, secondary functional encopresis, autistic disorder, and intellectual disability.

40. There was no evidence Mr. Brasket performed any standardized psychological testing to reach the evaluations of autistic disorder and intellectual disability.

41. On January 25, 2024, Mr. Brasket signed a letter stating claimant has been under his care since October 2023 and has been diagnosed with intellectual disability disorder, attention deficit hyperactivity disorder, encopresis, and autistic disorder.

42. On May 14, 2024, Mr. Brasket signed a Physician's Statement (Form JV-220(A)), stating that claimant's mood, sleep, hyperactivity "have all improved and are currently stable and manageable," and has had a "poor-limited response to IEP at school and ABA therapy in the past." Mr. Brasket listed claimant's diagnoses as posttraumatic stress disorder, attention deficit hyperactivity disorder, autistic disorder, and unspecified intellectual disabilities.

February 2024 Functional Behavioral Assessment and Intervention Plan

43. On February 29, 2024, Stephanie Garkow, MA, BCBA, with Come Together ABA Services, issued a report. Her assessment procedures included a clinical interview with foster mother in September 2023, an observation in claimant's third grade classroom with free operant observations in October 2023, a records review of Dr. French's report and a Functional Assessment Screening Tool in November 2023, and administering the Adaptive Behavior Assessment System, 3rd Edition (ABAS-3), in January 2024. Claimant scored in the extremely low range on communication, health and safety, leisure, self-care, and social. He scored in the low range on functional academics, home living, and self-direction. He scored in the average range on community use.

44. The report established baselines, identified antecedents, reinforcers, and set goals for applied behavioral analysis services to improve communication, reciprocal

conversation, empathy/emotions, bullying/kindness, flexibility, safety, transitioning, and tantrums.

Foster Mother's Testimony

45. Claimant's foster mother testified that one of her four children is diagnosed with autism spectrum disorder and receives services from the regional center. She is unmarried and has been fostering for 28 years. She has adopted five children. She has had claimant for one and one-half years.

46. In a typical day she must constantly redirect claimant. He has difficulty with self-care and problems with clothing textures. When he has a "meltdown" it takes 45 minutes to an hour to bring him back to baseline because he has no emotional regulation. He has to be redirected when cleaning up. He resists washing his hand. He does not like to shower or bathe. He will use water but resists using soap. He has to be monitored "hand over hand." He resists washing his hair and brushing his teeth. He still wears a pullup. In the morning it is usually filled with urine or stool or both. He does not do anything to change his pullup; he waits for her to do it for him. He hides his pullups and smears feces.

47. Claimant also has food sensitivities; he dislikes food touching and saucy foods. He eats single item foods only. He does not like to be hugged and will scream if someone tries to hug him.

48. Foster mother has been called to assist many times to school for claimant's "meltdowns" and when he runs away. She believes he does not appear to be processing the safety concerns with running away. He has not run away from her home. He has difficulty keeping friends because his play does not look like normal play. His play is aggressive with other kids and he does not like to share. He also rarely

sleeps through the night; he gets up and walks around the house whining and getting into things. He has nightmares and sees monsters under his bed.

49. Foster mother sees claimant's behavior as similar to her other child with autism spectrum disorder. That child benefits from regional center services, including respite, tutoring, and ABA therapy. ABA companies have tried to work with claimant but it has not been successful. She believes claimant would benefit from regional center services.

50. It was clear from her testimony and records that foster mother is doing an excellent job caring for claimant and advocating on his behalf for services. At her urging, the school district amended his IEP and added additional important services with her involvement. Claimant appears to have a strong bond with her and has shown improvement with her support.

Expert Witness Testimony

51. Holly Miller-Sabouhi, Psy.D. is a staff psychologist at IRC. Dr. Miller-Sabouhi received a Bachelor of Arts degree in psychology from the University of California, Riverside. She received both a Master of Science in Psychology in 2006 and a Doctor of Psychology in 2009 from the University of La Verne. She was licensed as a clinical psychologist in 2013. She has published articles and received the Student Diversity Award from the University of La Verne and the Educational Award for Clinical Psychologists from the County of Los Angeles Department of Mental Health. She has been a staff psychologist at IRC for eight years. She previously worked for mental health services in Riverside and Los Angeles Counties, providing treatment to court-referred youth and families. Her curriculum vitae set forth her training, licensing, post-doctoral and clinical experience.

52. Dr. Miller-Sabouhi did not participate in the first eligibility determination that the service agency made in 2023. After additional records were submitted, Dr. Miller-Sabouhi reviewed all available records and participated on the interdisciplinary team that made the eligibility determination that is the subject of this appeal.

53. Dr. Miller-Sabouhi testified that to meet eligibility requirements for regional center services, a person must meet two prongs. They must have a clinical diagnosis of one of the five qualifying conditions: cerebral palsy, epilepsy, autism spectrum disorder, intellectual disability, or a fifth category that involves a condition similar to intellectual disability or requiring similar treatment. In addition, the person's disability must cause significant functional limitations in three or more areas of daily life. Both prongs must be met in order to qualify for services.

54. Dr. Miller-Sabouhi testified that based on the available records, claimant did not meet the criteria for eligibility. There was no evidence of a clinical diagnosis of autism spectrum disorder, intellectual disability, or a condition similar to intellectual disability or that requires similar treatment. In addition, there was no evidence that any conditions caused claimant to be substantially disabled as defined in the Lanterman Act.

55. Dr. Miller-Sabouhi testified that records from 2021 and 2022 are consistent with posttraumatic stress disorder and oppositional defiant disorder. Dr. French's report showed that claimant does not meet the DSM-5-TR criteria for autism spectrum disorder. On cross-examination, Dr. Miller-Sabouhi was asked about Dr. French's findings from the GARS-3 that show the probability of autism spectrum disorder is "very likely." She explained that the GARS-3 is based on parent reports. This shows that the parents are reporting behaviors consistent with autism. The probability of autism does not mean the probability that claimant will develop autism; it does not

predict a future diagnosis. Dr. Miller-Sabouhi gave the finding on the GARS-3 less weight because it was based on parent reports while Dr. French's ADOS-2 finding that claimant does not fall within the classification for autism spectrum disorder was based on her own observations and testing of claimant.

56. The psycho-educational assessment from 2022 and the IEP from 2022 showed average to low average academic ability and no evidence of autism. Claimant's qualification category for special education remained emotional disturbance through 2023. In 2024, the IEP added posttraumatic stress disorder and oppositional defiant disorder as secondary disabilities. The social/behavioral comments on the 2024 IEP report show claimant's behavior is influenced by his mood. He has good days and bad days and exhibited different behaviors when angry. The descriptions show he has insight, takes responsibility, reflects on his own behavior, is able to regulate emotions some of the time, and works on managing his response to external triggers. Although the 2024 IEP mentions a "medical diagnosis" of autistic disorder and intellectual disability, there was no support for this diagnosis provided.

57. Dr. Miller-Sabouhi testified that the functional behavioral assessment report appears to have been prepared as part of claimant's applied behavioral analysis (ABA) treatment. ABA is not used exclusively for children with autism spectrum disorder. It is also used to treat a lot of different behavioral conditions and appears appropriate for claimant to treat his behaviors. A functional behavioral assessment is not a diagnostic tool. There were no details in the functional behavioral assessment that suggested autism spectrum disorder.

58. Dr. Miller-Sabouhi disagreed with Mr. Brasket's letter and completed a court form stating claimant has autism spectrum disorder and intellectual disability. There was nothing in the record that shows Mr. Brasket performed or reviewed any

clinical diagnostic reports that support these conditions. On cross-examination, Dr. Miller-Sabouhi was asked why she did not contact Mr. Brasket to inquire about the basis for his diagnosis. She testified that nurse practitioners do not perform psychological assessments and the service agency did not receive any records supporting the diagnoses, so she did not see a reason to contact him.

59. Dr. Miller-Sabouhi testified that, although the regional center has the option to order a further assessment of a person applying for eligibility if the records show some uncertainty, the records in claimant's case consistently supported the absence of either intellectual disability or autism spectrum disorder.

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 and Regulatory Authority

2. The State of California accepts responsibility for persons with developmental disabilities. Developmental disabilities present social, medical, economic, and legal problems of extreme importance. An array of services should be established that is sufficiently complete to meet the needs and choices of each person with developmental disabilities at each stage of life and to support their integration into the mainstream life of the community. (Welf. & Inst. Code § 4501.)

3. 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.

4. 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.

5. 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.

Applicable Case Law

6. The Lanterman Act and implementing regulations clearly defer to the expertise of the Department of Developmental Services and regional center professionals and their determination as to whether an individual is developmentally disabled. General, as well as specific guidelines are provided in the Lanterman Act and regulations to assist regional center professionals in making this difficult, complex determination. (*Ronald F. v. State Department of Developmental Services* (2017) 8 Cal.App. 5th 84, 94–95, citations omitted.)

Evaluation

7. The Lanterman Act and regulations establish criteria that a claimant must meet to qualify for regional center services. The documents reviewed by the regional center and introduced in this case do not demonstrate that claimant has a diagnosis of either autism spectrum disorder or intellectual disability that constitutes a substantial disability.

8. While claimant's foster family has reported some behaviors that may be consistent with autism, those behaviors were not identified to a significant degree by school personnel or by other professionals working with claimant over an extended period of time. A diagnostic evaluation in 2023 by Dr. French, a licensed clinical psychologist, that was specifically requested by foster mother to evaluate claimant for autism, found that he did not meet the diagnostic criteria for autism spectrum disorder. Dr. Miller-Sabouhi's testimony that the GARS-3 autism scale result of "very likely" was given less weight because it was based on parent reports and the behaviors and symptoms parents reported were not found elsewhere in the record. Claimant's counsel attempted to assert that claimant was "very highly likely" to develop autism; that was a misstatement of the GARS-3 result and reflected a misunderstanding of how to interpret the result. While some evidence of autistic-like behaviors was present, Dr. Miller-Sabouhi testified persuasively that those behaviors are also explained by other conditions that are supported by the diagnostic evaluation and other documents.

9. Claimant's position statement suggested that claimant qualifies for regional center services under the fifth category because his condition is similar to intellectual disability or requires similar treatment. That assertion was not established by the evidence. Intelligence testing showed claimant has average intelligence and

academic testing shows he performs at low average to average levels. And there was no evidence that claimant has significant functional limitations in three or more areas of major life activity; his scores on the Vineland-3 show low to moderately low in all areas of adaptive function. As Dr. Miller-Sabouhi testified, this does not qualify as a substantial disability under the Lanterman Act.

10. Dr. Miller-Sabouhi testified that claimant's symptoms are more appropriately characterized as relating to posttraumatic stress disorder and oppositional defiant disorder. While the regional center had the discretion to order additional evaluations, it is not required to do so. In cases like this one, where the records do not indicate the individual has a qualifying developmental disability, a records review is sufficient to support its determination.

ORDER

Claimant's appeal from the service agency's determination that he is not eligible for regional center services is denied. The regional center's determination is affirmed.

DATE: September 5, 2024

ALAN R. ALVORD
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.