BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019041050

DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 16, 2019, in San Bernardino, California.

Stephanie Zermeño, Fair Hearings Representative, Inland Regional Center (IRC), represented IRC.

Sasha Stern, Attorney at Law, represented claimant.

The record was closed and the matter was submitted for decision on December 16, 2019.

SUMMARY

Claimant's social worker filed an application for regional center services for claimant. An IRC eligibility intake team reviewed claimant's records, including medical, educational, and cognitive testing records, and determined that claimant's records show that there is no reason to believe she has a developmental disability that entitles her to reginal center services and that, therefore, she is not entitled to intake assessment services. Based on the team's determination, IRC refused to perform an intake assessment and denied claimant's application. IRC sent claimant's social worker a notice of proposed action (NOPA) dated April 9, 2019.

By a fair hearing request that IRC received on April 22, 2019, claimant's foster mother appealed IRC's denial of the application.

Claimant has been diagnosed with a condition on the fetal alcohol syndrome disorders spectrum. She has numerous, serious problems. However, claimant failed to prove that she has an intellectual disability that qualifies her for reginal center services and failed to prove that she has a disabling condition similar to an intellectual disability.

With this noted, claimant did prove that she has a disabling condition that requires treatment similar to that required for individuals with intellectual disability. Therefore, claimant is eligible for regional center services pursuant to the, so called, fifth category.

Background

1. Claimant is a 16-year-old girl who lives with foster parents. Records show that she has six or seven older siblings, but there is no evidence that she has contact with them.

2. She has been diagnosed with post traumatic stress disorder, fetal alcohol syndrome, and cognitive developmental delay. She has had both medical hospitalizations and psychiatric hospitalizations. Claimant also has been diagnosed with alcohol related neurodevelopmental disorder (ARND), which is a condition on the fetal alcohol syndrome disorders (FASD) spectrum.

3. Before claimant was five years old, her mother abandoned her. She lived with her father, and he and his acquaintances sexually abused her. When claimant was five years old, she lived with her father's second cousin. At various times claimant lived with her maternal grandmother. When she was 10 years old, she began living with a foster family. She has lived in approximately 20 foster homes. On a previous occasion, claimant lived with her current foster parents. She first lived with them in 2014. She was placed in a group home residential care facility in Utah in October 2015. A February 1, 2016, Kaiser Permanente ("Kaiser"), California, medical record note based on a note by claimant's social worker in Utah reads as follows:

> [Claimant] is retaining stool; she needs to go to a facility with a higher level of care (not willing to use the restroom because it hurts and retaining stool, throwing up on staff, smearing feces on walls, making herself throw up on others, unwilling to take care of herself.)

4. Claimant was returned to California in 2016. Some time after claimant returned to California, officials asked claimant's current foster parents if they would take her again as a foster placement, and they agreed to do that. Claimant's foster mother attended the hearing, and it is obvious that the foster mother is devoted to claimant. It is difficult to think of claimant as lucky, but she is lucky to have this foster mother.

Kaiser Permanente Admission January 2016

5. Claimant was admitted to a Kaiser hospital on January 29, 2016. An inpatient psychiatry consult note for February 1, 2016, reads as follows:

> [Claimant] is a 12-year-old female with fetal alcohol syndrome, behavioral problems, PTSD is admitted for fecal impaction. S/P fecal disimpaction POD #1. Patient noted to have high blood pressure. Renal US is positive for bilateral hydronephrosis. Her psych home medication is Tenex and Thorazine.

6. Records regarding the January 29, 2016, hospitalization show Axis I diagnoses of: "mood disorder unspecified, enuresis/encopresis, hx of post traumatic stress disorder, hx of attention deficit hyperactivity disorder, r/o fetal alcohol syndrome, hx of intermittent explosive disorder, hx bipolar disorder unspecified."

Kaiser Permanente Admission March 2016

7. Claimant was admitted to a Kaiser hospital on March 25, 2016, because she told her foster mother that she would choke herself. At the hospital claimant said she wanted to talk with a social worker and go home. A hospital note says "Positive for

suicidal ideas. Negative for depression, hallucinations, memory loss, and substance abuse. The patient is not nervous/anxious and does not have insomnia."

Kaiser Permanente Admission October 2016

8. Claimant was admitted to a Kaiser hospital on October 9, 2016, because she said she wanted to kill her foster family and herself. A hospital note says "Positive for suicidal ideas." A further note reads as follows:

> Mom reports patient has been "acting out" over the last several weeks with uncontrollable anger and coming at her family members with knives. Patient then starts crying and flailing in the bed stating she doesn't want to stay here. Patient admits she has said she wanted to kill her family and herself and that she wants help. Mom and patient deny any physical complaints.

Kaiser Permanente Admission July 2017

9. Claimant was admitted to a Kaiser hospital on July 3, 2017, on a mental health hold for aggressive and threatening behavior. A hospital note states:

> Patient was brought in on a PD 5585 hold for DTS and DTO after threatening to kill family members and herself. . . . Patient admitted she threatened her younger cousin because she was mad at her but denied any suicidal ideation or plan. Patient stated, "I always get in trouble because of that little girl." Patient became agitated while talking about this.

10. A note concerning the July 3, 2017, admission listed claimant's active problems as follows:

> Chronic posttraumatic stress disorder, hx of psychological trauma, hydronephrosis, fetal alcohol syndrome, chronic constipation, encopresis, mood disorder, developmental delay, acute renal insufficiency, hypertension, obesity peds BMI 95-99 percentile, adjustment disorder, anemia, acquired renal cyst.

11. A note concerning the July 3, 2017, admission stated that claimant has a significant impairment in an important area of life functioning. In the past three months, she has had a mild impairment regarding self care, a severe impairment regarding interpersonal relationships, a severe impairment regarding school tasks, and a severe impairment regarding participation in social and community activities. Further, the note concludes that there is a reasonable probability of significant deterioration in an important area of life functioning.

Special Education IEP August 2017

12. A Special Education Individualized Education Plan (IEP) dated August 15, 2017, provides that claimant qualifies for special education services because of "emotional disturbance (ED)." Regarding academic skills, claimant's IEP provides:

> Reading: [Claimant] is reading at the upper middle school to lower high school range. Math: [Claimant], during informal testing, was at the upper primary levels. She can do some multiple digit addition. In the classroom, she is working on integrated math, a common core standards

> math program incorporating aspects of algebra and geometry. Spelling, [claimant]can spell at the high school level. Her writing is at the upper elementary/lower middle school levels. She can express a complete thought in a sentence, and she can write up to a two-page paper. She continues to have difficulties with punctuation, syntax, and grammar.

Kaiser Permanente Admission September 2017

13. Claimant was admitted to a Kaiser hospital on September 13, 2017, because of violent behavior and attempted suicide. A note concerning the reason for the admission provides:

> [Claimant] is a 14 year old female presenting with violent behavior. The patient had an aggressive outburst at school becoming severely physically aggressive toward the teacher and a classmate at school this afternoon. Exacerbated by getting angry at the teacher. The foster mother picked her up from school, and the patient became violent toward the other foster kids and the foster mother. The patient tried to jump out of a moving car in an attempt to kill herself.

14. A note concerning a physical examination in connection with the September 13, 2017, admission says "Intellectually delayed." And a note concerning differential diagnosis says "Symptoms consistent with danger to herself and danger to others. Patient has a history of post-traumatic stress disorder related to sexual assault."

Claimant Continues to Struggle

15. Today, at 16 years old, claimant wears a diaper. She cannot change her diaper. To take a shower, she needs direction and help. She struggles to get along at school and at home. At school, she has a one-on-one aide and receives special education services. Claimant also receives wrap-around services from a team that includes a therapist, a behavioral specialist, and a parent partner. Cognitive testing has shown that her cognitive skills range form very low to average.

Record of Testing in 2008; Claimant Was Five Years Old

16. A December 1, 2008, school district psycho-educational report provides records concerning observations, tests, and a review of records. Claimant was five years old; attending kindergarten; and living with her father's second cousin, who was claimant's guardian. Claimant's mother had abandoned her and her father was incarcerated.

17. A Vinland Adaptive Behavior Scales – 2nd Edition was scored based on a questionnaire completed by claimant's guardian. It showed adaptive skill levels ranging from low to adequate. The combination of scores for the Communication Domain produced a level of moderately low. The combination of scores for the daily Living Skills Domain produced a level of moderately low. The combination of scores for the Socialization Domain produced a level of adequate. The combination of scores for the Motor Skills Domain produced a level of moderately low. This resulted in an Adaptive Behavior Composite of moderately low.

18. Scores on the Kaufman Test of Educational Achievement -2nd Edition, reflect the following: Letter-Word Identification, 100; Math Concepts and Application, 89; Math Computation, 97; Written Expression, 104; Listening Comprehension, 86; and

Oral Expression, 75. The Oral Expression score is borderline. In every other category, the score is in the average to low-average range.

19. Scores on the Test of Early Reading Ability – Third Edition, place claimant at the 4-year, nine-month level in all three categories, alphabet, conventions, and meaning.

20. Claimant's guardian and her teacher responded to the Emotional Disturbance Decision Tree, which is used in evaluations of students with possible emotional disturbance. In the area of attention deficit hyperactivity disorder, claimant's guardian rated claimant as "high clinical" and her teacher rated her as "moderate clinical."

Record of Testing in 2016; Claimant was 12 Years Old

21. An April 29, 2016, school district psycho-educational report provides records concerning observations, tests, and a review of records. Claimant was 12 years old.

22. In 1986, based on judicial decisions holding IQ tests to be biased and invalid for African-American children, the California State Superintendent of Public Instruction, expanded the prohibition of using standard IQ tests for placement of African-American children to apply to all special education services. Therefore, standardized measures of cognition were not used in assessing claimant for this report.

23. On April 7, 2016, claimant was given the Woodcock-Johnson Test of Achievement – Third Edition. In the reading section, claimant's overall composite score was within the average range. In the written section, her overall composite score was

within the average range. In the math section, she received a standard score of 56, which falls in the deficient range. In comparison to her estimated cognitive functioning, it appears as though she demonstrates academic delays in the areas of math calculations and numerical reasoning.

24. In a summary of the results of interviews, record review, and testing, the psycho-educational report concludes:

> [Claimant's] academic skills appear to fall in the deficient to average ranges. Her estimated cognitive potential appears to fall in the low average to average range of functioning. She demonstrates adaptive delays, and her social/emotional functioning appears to impair her ability to learn.

25. Michael Suchanek, School Psychologist, concluded that claimant was not eligible for special education services due to intellectual disability because her estimated cognitive functioning falls in the low average to average range and her adaptive skills appear to be "delayed." Mr. Suchanek, however, concluded that claimant was eligible for special education services due to emotional disturbance.

Record of Testing in 2017; Claimant was 14 Years Old

26. A Kaiser note provides that, on June 26, 2017, Johanna C. Walthall, PhD, administered selected subtests of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-5). Dr. Walthall reported the following summary and recommendations:

> [Claimant] is a 14 years, 0 months, female, who was referred for diagnostic testing by Dr. Zucker for diagnostic clarification. Current testing and review of records suggest

> that [claimant] has variable cognitive skills that likely fall in the Low Average to Average range. Her academic skills range from the Extremely Low to Average range; a diagnosis of Intellectual Disability is not appropriate at this time.

Record of Testing by Finger in 2019; Claimant was 15 Years Old

27. On February 25, 2019, Iris P. Finger, PhD, administered the WISC-V in connection with a medical/psychiatric hospitalization at UCLA Medical Center. Claimant earned a full-scale IQ score of 76, which is classified as low. Dr. Finger reported that there was little scatter among the subtest scores, with eight of ten ranging from a scaled score of 6 to a scaled score of 8. Her working memory subtest scores were the outliers and claimant's apparent strength. Verbal comprehension was 78, which is low. Visual spatial was 81, which is below average. Fluid reasoning was 79, which is at the upper limit of low. Working memory was 103, which is average. And processing speed was 83 which is below average.

Record of Testing by Hackett in 2019; Claimant was 15 Years Old

28. An April 18, 2019, school district psycho-educational report provides records concerning observations, tests, and a review of records. Claimant was 15 years old.

29. School records indicated previous diagnosis of post traumatic stress disorder, mood disorder not otherwise specified, and intermittent explosive disorder. Claimant takes the following medications: Lithium, Abilify, and Guanfacine.

30. The Oral and Written Language Scales, 2nd Edition (OWLS-II) were administered to claimant. The OWLS-II is a set of interrelated scales that, together, provide a comprehensive assessment of language. Three subtests were administered – Listening Comprehension, on which claimant scored in the low classification; Oral Expression, on which claimant scored in the very low classification; and Oral Language Composite, on which claimant scored in the very low classification.

31. The Comprehensive Test of Phonological Processing, 2nd Edition, (CTOPP-2) was administered. The CTOPP-2 is made up of seven core subtests and two supplemental subtests. It analyzes an individual's phonological processing abilities. Claimant's score on the phonological awareness subtests was in the very low classification. Her score on the phonological memory subtests was in the low average classification. And her score on the rapid symbolic naming subtests was in the average classification.

32. The Conners Comprehensive Behavior Rating Scales is an assessment tool used to obtain a teacher's and parent's observations about a child's behaviors. Regarding "adaptive skills" claimant's foster mother answered "yes" to each of the following statements: "Student is able to feed self. Student is able to care for personal hygiene. Student is able to dress self."[1]

33. The Adaptive Behavior Assessment System, 3rd Edition (ABAS-3) was administered. The ABAS-3 is a comprehensive, norm-referenced assessment of adaptive skills needed to effectively and independently care for oneself, respond to

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[1] As noted below, in claimant's foster mother's testimony, she qualified her response to each of these statements.

others, and meet environmental demands at home, school, work, and in the community. The ABAS reflects responses by claimant's teacher and claimant's parent. In each of 12 skill domains, the teacher's responses placed claimant in the low or extremely low classification. In six skill domains, the parent's responses placed claimant in the average classification. In the other six skill domains, the parent's responses placed claimant in the extremely low to high classification. Nevertheless, based on the teacher's responses, claimant does present with adaptive skill deficiencies, and based on the parent's responses, claimant does present with adaptive skill deficiencies.

34. Colin Hackett, M.A.Ed., Ed.S., concluded that claimant met the eligibility requirements for special education under the classification requirements of emotional disturbance and other health impairments.

Examination and Report on a Review of Claimant's Records by Laboriel – 2019; Claimant was 15 Years Old

35. Lyn Laboriel, M.D., Director, Violence Intervention Program, Fetal Alcohol Spectrum Disorders Clinic, reviewed claimant's records, performed a physical examination, and wrote a report dated June 13, 2019. Dr. Laboriel wrote:

> [Claimant] is currently enrolled in . . . Academy in . . . , an NPS that works with both intellectually disabled and emotionally disturbed young people. She is officially enrolled in 11th grade but is functioning much closer to 3rd or 4th grade academically. She had extensive psychoeducational testing done through . . . Unified School District SELPA in April 2019. She also had WISC-V

administered during a medical/psychiatric hospitalization at UCLA Medical Center in February 2019. . . .

[Claimant scored a] WISC-V FSIQ[2] 76 . . . Relatively little scatter in subset scores. FSIQ, Verbal Comprehension, and Fluid reasoning all in Very Low Range.

[There is an] 4/2019 . . . School District Psychoeducational Assessment. [On the] ABAS (Adaptive Behavior Assessment Scale), [claimant scored] Global Adaptive Behavior Scale: 57 . . . [On the]   OWLS 2 (Oral and written language Scales), claimant scored] . . . Listening Comprehension: 70 [and] Oral Expression: 58. [On the] Beery Test of Visual Motor Integration [claimant scored] VMI: 0.5%ile.

These tests reflect serious neurodevelopmental deficits across the board and despite very low borderline FSIQ scores, point to a diagnosis of Intellectual Disability.

[¶] . . . [¶]

Recent notes from [claimant's primary therapist] that indicate ongoing issues of possible Intellectual Disability were also reviewed as part of this assessment. Concerns were raised about overall academic function at 3rd or 4th grade, poor adaptive skills, and emotional development

[2] Full scale IQ.

nearer to age 7 or 8 with very low capacity for independent living.

[¶] . . . [¶]

I administered a few language-based tasks meant for 9 or 10 year olds. [Claimant] found most of them very challenging. She answered the easier questions readily and happily. When presented with more difficult items, she often retreated emotionally and started to cry quietly. She needed lots of positive encouragement to proceed. Language processing tasks seemed a challenge for her.

[¶] . . . [¶]

[Claimant should be diagnosed with Intellectual Disability. Review of testing scores noted above include low cognitive and adaptive skills as well as low language, visual motor, and academic scores, all pointing to a child functioning overall closer to a 6 or 7 year old child.

[Claimant] should be accepted as a client of the Regional Center. Her formal cognitive scores are a bit above the usual cut-off score used by the Regional Center for the category of Intellectual Disability. Nevertheless, she should be qualified under the so-called "Fifth Option." [The] DSM-5 definition of Intellectual Disability emphasizes the importance of including assessment of adaptive skills in making this diagnosis. Her adaptive scores as measured by

the school district are very low (SS: 57, 0.2%ile) and reflect her very limited capacity to function at age level in practical matters. Her academic skills are similarly limited to 3rd or 4th grade level. Her disability is likely the result of serious brain injury caused by documented prenatal exposure to high levels of alcohol and other drugs.

In addition, [claimant] should be accepted as a client of Regional Center because she so clearly needs and would benefit from the services that are provided to other Intellectually Disabled clients of Regional Center. She is functioning in the bottom 10% of all the patients I have seen with fetal alcohol Syndrome over the years, and [she] needs help. . . . She needs much patience and repetition in order to learn. She needs direct mentoring services in addition to her school-based education. She requires stepwise instruction with considerable repetition in order to learn. She needs things broken down in and taught in a systematic and repetitive manner. This is a particularly pressing matter for [claimant] b/c of her medically based issues with enuresis and encopresis. She needs to learn several steps to manage her medical needs. At this point she requires intensive, continual adult supervision and still often fails to do what is needed. Services like those provided by regional center for medically vulnerable consumers could help her with properly designed

> instruction programs from which she can learn to improve her heath and quality of life.
>
> She also needs access to social skills groups. She is fast becoming more aware and curious about her own sexuality and has begun to act out inappropriately. E.g., "twerking" in front of classmates, stalking some of them, as she tries to understand her sexual interests and impulses. She needs the instruction and repetitive training as well as the supervised interpersonal experiences available from social skills groups at the Regional Center. They are crucial for her safety and well-being. She would also benefit from the exercise and camaraderie available thru Special Olympics.

Letter from Tam, October 2019; Claimant was 16 Years Old

36. Amy Tam, LCSW, is a member of claimant's Wraparound Services team and claimant's primary therapist. Ms. Tam wrote a letter dated October 16, 2019, in which she discussed claimant's need for additional services. Ms. Tam wrote as follows: The Wraparound team has become concerned that claimant's needs cannot be appropriately addressed through mental health services alone. Claimant has needs that relate to adaptive functioning and basic functioning. She needs help to get through her daily routine. During the past two years, there has been little progress around her overall wellbeing. After extensive testing, the Wraparound team agrees with the report by Dr. Laboriel that a diagnosis of FASD helps to explain the gaps in claimant's functioning. Claimant has been provided ongoing levels of assistance with toileting since an early age with minimal improvement. At age 16, claimant struggles with her basic daily hygiene and is unable to complete her daily care without

supervision, prompting, and guidance. She is unable to dress appropriately for school. She is unable to cook and only recently learned how to use a microwave. Claimant struggles with fine motor skills. The Wraparound team has worked with claimant two to four times per week for two years, but progress has been limited due to claimant's difficulty in retaining information and inability to implement interventions. Claimant is at risk due to her naiveté and hypersexuality. Claimant is unable to care for herself independently, and she poses a risk to herself if left unsupervised.

Record of Testing by Mattson in 2019; Claimant was 16 Years Old

37. On November 21 and 22, 2019, Sarah N. Mattson, PhD, Program Director of San Diego State University Center for Behavioral Teratology, supervised Gemma Bernes, a student in a master's degree program, in administering the WISC-V. Claimant earned a full-scale IQ score of 67.

38. Dr. Mattson wrote a letter dated December 9, 2019, in which she reviewed the results of the WISC. She said the test results were used to determine whether claimant met criteria for a diagnosis of alcohol-related neurodevelopmental disorder, (ARND), which is a diagnosis on the spectrum of effects known as fetal alcohol spectrum disorders. ARND requires a history of prenatal alcohol exposure and is characterized by cognitive impairment or behavioral impairment. Cognitive impairment is defined as at least 1.5 standard deviations below the norm on a measure of global ability or on tests of two other cognitive domains. As noted, claimant has a full-scale IQ of 67, which is more than 2 standard deviations below the norm. Dr. Mattson wrote that Claimant meets the criteria for a diagnosis of ARND with cognitive impairment.

Letter From Director of Claimant's School, December 2019; Claimant Was 16 Years Old

39. The director of claimant's school wrote a letter dated December 4, 2019, in which she reported on claimant's lack of progress. The director wrote:

> Claimant has attended the school since January 2016. She has shown an inability to retain the vast majority of academic work. Thus, her academic level has remained largely the same for nearly three years. She seems to grasp a new concept while working on it, but there is no retention from day to day. She struggles intently with a great number of adaptive skills that should come naturally to her at her age. She has been diagnosed with enuresis and encopresis, and she struggles with the ability to maintain her hygiene. Claimant struggles to make and retain friends due, in large part, to her inability to see her part in social conflict.

Ruth Stacy's Testimony

40. Ruth Stacy, Psy.D., is a staff psychologist with IRC. Dr. Stacy holds master's degrees in sociology and in counseling psychology. In 2008, she completed a doctorate degree in psychology at Trinity College of Graduate Studies in Anaheim, California. She is licensed as a psychologist in California. She began working with individuals with developmental disabilities in 1985. She has worked at IRC from 1991 to the present. From 1991 to 2000, Dr. Stacy provided case management services for individuals with a duel diagnosis and facilitated services for children who were at high risk of out-of-home placement. From 2000 to 2015, she conducted assessments and

screenings for developmental disabilities and collaborated with doctors and became a staff psychologist in 2015, she has, among other things, administered and interpreted psychological assessments.

41. Dr. Stacy testified about the WISC-V that Dr. Finger administered on February 25, 2019, and the WISC-V that Dr. Mattson administered on November 21 and 22, 2019. Dr. Stacy testified that, ordinarily, the WISC-V should not be administered within 12 months of having been administered. There is a risk that the subject will do artificially better on the second administration because of being familiar with the test. Obviously, that did not happen here; claimant's full-scale IQ score in February was 76, and in November it was 67.

42. Dr. Stacy testified that the essential consideration in deciding how to use these scores is to recognize that, unless one has become familiar with the test, one cannot achieve an artificially high score, i.e., one cannot do better than one is capable of doing. For a number of reasons, one can score lower than one is capable of scoring. For example, one might be ill at the time the test was administered, one might be distracted by some serious problem, one might not be motivated to do well. There are many other things that might cause one to score lower than one is capable of scoring. But one cannot do better than one is capable of doing. Therefore, claimant has an IQ of, at least, approximately 76.

43. Dr. Stacy testified that there is significant scatter in the subtest scores on Dr. Mattson's administration of the WISC-V. In order to see that, one needs to calculate index scores for visual/spatial and working memory. From the scores for block design and visual puzzles, one can calculate a visual/spatial score of 75. And from the scores for digit span and picture span, one can calculate a working memory index of 88. Therefore, the subtest scores are as follows: Verbal comprehension, 65;

fluid reasoning, 69; processing speed, 83; visual/spatial, 75; and working memory, 88. Thus, the subtest scores range from 65 to 88, a difference of 23 points. And two scores are in the 60s, and two are in the 80s. There is significant scatter, i.e., there are significant differences in the subtest scores. Dr. Stacy testified that when there is significant scatter, the full-scale score is less useful, and one should focus more on the subtest scores. And two of the subtest scores are in the below average classification and one is in the low classification. These scores are inconsistent with a diagnosis of intellectual disability.

44. Dr. Stacy testified that claimant's struggles with adaptive skills relate to trauma, a medical issue.

45. Dr. Stacy testified that, because of claimant's IQ of approximately 76, she cannot be diagnosed as intellectually disabled.

46. Dr. Stacy testified that claimant does not qualify for regional center services under the fifth category because she does not require the same treatment as that required by an individual with an intellectual disability.

Kenneth Jones's Testimony

47. Claimant called Kenneth Lyons Jones, M.D., as an expert witness. Dr. Jones is board certified by the American Board of Pediatrics. In 1974, Dr. Jones was appointed to the position of assistant professor of pediatrics at the University of California San Diego School of Medicine (UCSDSM). He has continued to teach there to the present. He currently holds the title of Distinguished Professor of Pediatrics. He has held leadership positions in numerous professional and academic organizations, including President, Organization of Teratology Information Specialists; President, Teratology Society; Medical Director, MotherToBaby California; Chief, Division of

Dysmorphology and Teratology, UCSDSM; and Director, Pediatric Residency Program UCSDSM. Dr. Jones has received numerous awards and honors. He is a member of numerous professional associations and societies. He has been a mentor to 13 physicians doing fellowships. On 58 occasions, Dr. Jones has been an invited lecturer. He has over 300 publications and review articles. Dr. Jones has collaborated with doctors all over the world.

48. Dr. Jones testified as follows: He met with claimant in his office in San Diego and performed a physical examination. He reviewed all of the Kaiser Permanente records and all of the school records. He reviewed Dr. Mattson's neurodevelopmental evaluation, including her December 9, 2019, letter and her November test results. Based on Dr. Jones's physical examination and the records he reviewed, he is of the opinion that claimant is eligible for regional center services.

49. Claimant was prenatally exposed to alcohol, and she was affected by the alcohol. She is within the spectrum of prenatal alcohol exposure. Fetal alcohol syndrome (FAS) can be characterized by a small head, growth deficiencies, and neurobehavioral abnormalities. In 1996, the American Society of Human Genetics determined that FAS is an alcohol related neurodevelopmental disorder. FAS is on the fetal alcohol disorders spectrum. Not all children on the fetal alcohol disorders spectrum have a condition that is sufficiently severe to support a diagnosis of FAS.

50. Dr. Jones is of the opinion that claimant is entitled to regional center services based on two categories – intellectual disability and the fifth category.

51. Dr. Jones is of the opinion that claimant comes within the category of intellectual disability because Dr. Mattson's administration of the WISC-V resulted in a full-scale IQ score of 67. Dr. Jones testified that children with a diagnosis of ARED or

FASD frequently have scatter in subtest scores. The implication of that testimony was that, for children with these diagnoses, the presence of scatter does not call into question the usefulness of the full-scale IQ score.[3] Dr. Jones acknowledged that claimant also has a mental health diagnosis. But he said this is not surprising because a large number of children who have been prenatally exposed to alcohol ultimately develop mental health problems. Alcohol has an effect on brain development, and that tends to result in mental health problems.

52. Dr. Jones is of the opinion that claimant comes within the fifth category because of her diagnosis of alcohol related neurodevelopmental disorder (ARND), which is a specific diagnostic category. It is seen in children who are prenatally exposed to alcohol and who also have neurodevelopmental abnormalities. An ARND diagnosis can be with cognitive abnormalities, with behavior abnormalities, or with both cognitive and behavior abnormalities. It is rare for a child to have ARND with both cognitive and behavior abnormalities. In order to be diagnosed with cognitive abnormalities, a child must display problems in two of the following four areas: executive functioning, learning, visual/spatial impairment, or memory impairment. In order to be diagnosed with behavior abnormalities, a child must display problems in two of the following three areas: self regulation, attention deficit, or impulse control.

53. In order to diagnose ARND with cognitive abnormalities or with behavior abnormalities, one needs a physical examination and a neurodevelopmental evaluation. Dr. Jones often collaborates with Dr. Mattson in determining whether to

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[3] However, a different conclusion might be that for children with these diagnoses, the full-scale IQ score often is not very useful.

make a diagnosis of ARND with cognitive abnormalities or with behavior abnormalities.

54. Dr. Jones observed that Dr. Mattson found that claimant has features that are consistent with ARND. And Dr. Mattson's tests strongly suggest that claimant has both types of ARND – i.e., with cognitive abnormalities and with behavior abnormalities.

55. Dr. Jones said all of the Kaiser Permanente records and all of the school records fit a diagnosis of ARND with cognitive abnormalities and with behavior abnormalities.

56. Dr. Jones testified that claimant's ARND with cognitive abnormalities and with behavior abnormalities is, within the terms of the fifth category, similar to intellectual disability.

57. Dr. Jones testified that claimant's ARND with cognitive abnormalities and with behavior abnormalities is, within the terms of the fifth category, a condition that requires treatment similar to the treatment required by individuals with intellectual disability. Dr. Jones testified that claimant would benefit from speech therapy, occupational therapy, respite care, social skills training, and case management. He said, also, that there is very little treatment for children with intellectual disability.

58. Dr. Jones acknowledged that ARND is not a diagnosis recognized in the Diagnostic and Statistical Manual, Fifth Edition (DSM-5). However, in an appendix to the DSM-5 concerning conditions for further study, there is an entry for neurobehavioral disorder associated with prenatal alcohol exposure.

Claimant's Testimony

59. Claimant testified that she does not get ready for school by herself. She said that, when she changes her diaper, she needs help, and that when she takes a shower, she needs help. Claimant said she can fix cereal. Claimant testified that, at school, she has one friend.

Claimant's Foster Mother's Testimony

60. Claimant's foster mother testified that she has been claimant's foster mother for a total of six years. There was a break in her having claimant because there was a period when claimant needed a higher level of care.

61. Claimant's foster mother testified as follows: She gets up at 6:45 a.m. to drain claimant's catheter, administer her psychotropic medications and laxative, and change her bedding. She helps claimant with her shower and cleans feces and urine. She makes sure claimant has chosen appropriate clothes. Claimant can dress herself, but she often does not choose appropriate items of clothing. She prepares claimant's breakfast. Claimant can feed herself, but she can not prepare food. Claimant goes to school on a school bus. At school, claimant receives special education services and has a one-on-one aide to provide redirection.

62. Claimant gets home from school at 3:00 p.m. Two days per week claimant's therapist is waiting for her at home. Claimant's foster mother changes claimant's diaper. Claimant needs help with personal hygiene, and she cannot change her diaper without help. Claimant goes to bed between 8:00 p.m. and 9:00 p.m.. She cannot get ready for bed without help.

63. Claimant's foster mother testified that claimant cannot empty her catheter and cannot take public transportation. Claimant gets an allowance of $20 per week, but other children often take her money. Claimant has limited social skills. She does not get along well with other children. Claimant's foster mother testified that she cannot leave claimant alone at home because of safety concerns and concerns about claimant's suicidal ideations. Claimant needs training regarding daily tasks, but she does not know how to follow directions.

64. Children and Family Services provides Wraparound services because claimant is a foster child.

LEGAL CONCLUSIONS

Applicable Law

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

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

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

> The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .
>
> An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

4. Welfare and Institutions Code section 4512, subdivision (a), defines developmental disability as a disability that “originates before an individual attains 18

years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual." A developmental disability includes "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability." (*Ibid.*) Handicapping conditions that are "solely physical in nature" do not qualify as developmental disabilities under the Lanterman Act. (*Ibid.*)

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

> (a) "Developmental Disability" means a disability that is attributable to intellectual disability[4], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with 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.

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

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

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

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

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

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

(a) "Substantial disability" means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

> group shall include as a minimum a program coordinator, a physician, and a psychologist.
>
> (c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

Analysis

7. The evidence does not support a finding that claimant has intellectual disability. On the WISC-V that Dr. Finger administered on February 25, 2019, claimant's full-scale IQ score was 76, and on the WISC-V that Dr. Mattson administered on November 21 and 22, 2019, it was 67. There is no evidence to explain how someone with an IQ of 67 could score 76 on the WISC-V. And there is no evidence that Dr. Finger's administration of the test was defective in any way. That, plus the fact that claimant scored 81, 83, and 103 on three subtests in Dr. Finger's administration and 83 and 88 on two subtests in Dr. Mattson's administration, rule out a finding of intellectual disability.

8. Claimant has a disabling condition. She has been diagnosed with post traumatic stress disorder, fetal alcohol syndrome, and cognitive developmental delay. Claimant also has been diagnosed with ARND, which is a condition on the FASD spectrum.

9. There is compelling evidence that, within the terms of California Code of Regulations, title 17, section 54001, these conditions constitute a substantial disability

for claimant. The evidence shows that claimant has a major impairment of cognitive and social functioning that requires interdisciplinary planning and coordination of special services to assist her in achieving her maximum potential. The evidence shows that claimant has significant functional limitations in learning, self-care, self-direction, and capacity for independent living.

10. There was no evidence that claimant's condition was solely physical in nature.

11. That leaves the question as to whether claimant requires "treatment" similar to that required by individuals with intellectual disability. Regional center services and supports targeted at improving or alleviating a developmental disability may be considered "treatment" of developmental disabilities. Welfare and Institutions section 4512 elaborates further upon the services and supports as including "diagnoses, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services. . . . "(Welf. & Inst. Code, § 4512, subd. (b).) The designation of "treatment" as a separate item is clear indication that it is not merely a synonym for services and supports.

12. Dr. Stacy testified that claimant does not require treatment similar to that required by individuals with intellectual disability. However, she did not discuss what treatment is required by an individual with intellectual disability, and she did not discuss how claimant's treatment needs differ from the needs of an individual with intellectual disability.

13. On the other hand, claimant introduced in evidence a copy of *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, which

contains a list of treatments that individuals with mental retardation need. The list is as follows:

> 1) self-help and independent living skill training, including cooking, cleaning, money management, and public transportation use; (2) service coordination and management; (3) information and referral services; (4) special education and related services for those under age 21; (4) generic or special social or recreational services; (5) generic or special rehabilitative or vocational training; (6) specialized residential care or supported living services for those not living with family; (7) supported employment; (8) supported or semi-independent living arrangements; (9) day activity program services for those who do not work; (10) mobility training, including transportation education; (11) specialized skill development teaching methods; (12) behavioral training and behavior modification programs; (13) financial oversight, reading, and writing support services; and (14) publications that translate complex information into manageable units. (*Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, 1478.)

14. Claimant also introduced Dr. Laboriel's June 13, 2019, report in which she discusses claimant's treatment needs that are the same as those of an individual with intellectual disability. She specifically notes claimant's, low capacity for independent living, her need for repetition in order to learn, and her need for social skills groups.

15. Other evidence showed that claimant needs self-help and independent living skill training, including cooking, money management, and public transportation use. She needs special social or recreational services. She needs behavioral training and behavior modification programs. She needs financial oversight.

Conclusion

16. Claimant established by a preponderance of the evidence that she is eligible for regional center services under the fifth category.

ORDER

1. Claimant's appeal from Inland Regional Center's decision is granted.

2. Claimant is eligible for regional center services under the fifth category.

DATE: January 2, 2020

ROBERT WALKER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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