

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Claimant,

and

Inland Regional Center,

Service Agency.

OAH No. 2014041069

**DECISION**

This matter came on regularly for hearing on August 5, 2014, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, in San Bernardino, California.

Judith A. Enright, of Enright & Ocheltree, LLP, represented Inland Regional Center (IRC).

Matthew M. Pope, Attorney at Law, represented claimant, who was present during the hearing.

The matter was submitted on August 5, 2014.

**ISSUES**

1. Does claimant have a developmental disability resulting from autism, mental retardation,<sup>1</sup> or a disabling condition closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation?<sup>2</sup>

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<sup>1</sup> The Lanterman Act requires regional centers to provide services for individuals who have a developmental disability, including “mental retardation.” The term “mental retardation” was recently replaced in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-V)*, with the term “intellectual disability.” However, in keeping with the language of the Lanterman Act, the term mental retardation will be used in this decision.

2. Is IRC required to provide intake services, including an assessment of claimant, to determine if she is eligible for regional center services under the Lanterman Act based on autism, mental retardation, or a disabling condition closely related to mental retardation or that requires treatment similar to that required for individuals with mental retardation?

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. Claimant is a 49-year-old woman who, with help from a caretaker and a group of community members, lives alone in a rental home.

2. By letter dated April 2, 2014, IRC advised claimant that it reviewed her records and determined that “no ‘intake’ services can be provided” because she did not have a disability that qualified her for regional center services.

3. On April 18, 2014, claimant signed a Fair Hearing Request appealing IRC’s decision. In her hearing request she stated that she disagreed with IRC because it made its decision that she was not eligible for services without first providing intake and evaluation services.

### *Claimant’s School Records*

4. Some of claimant’s high school records were admitted into evidence. They are of poor quality and some parts are not legible at all. Those parts that are legible state that claimant was placed in “learning handicapped” special education classes some time prior to 1978. A letter from claimant’s school district dated April 28, 2014, confirmed that she received Special Education services.

5. Claimant was evaluated by the school district on March 4, 1982, when she was 17 years old and in the 11th grade. The report of that evaluation indicated that it was a “3-year evaluation.” The report noted that claimant was the remaining sibling who lived with her mother and that her sister was deceased.<sup>3</sup> The evaluation concluded that claimant’s “overall intellectual functioning is in the ‘borderline’ range . . .” Handwritten notes indicate that her full scale IQ score was 75; she obtained an 83 verbal IQ and a 69 Performance IQ.

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<sup>2</sup> During the hearing claimant’s counsel withdrew the claim that claimant had a developmental disability resulting from epilepsy.

<sup>3</sup> Parts of the March 4, 1982, report are illegible; however, it appears to state that claimant’s father and brothers were living elsewhere.

The report suggests that there were more detailed reports from other professionals in a confidential folder. These other reports were not offered at the hearing.

The 1982 report describes claimant as demonstrating “babyish behavior.” A portion of the school records states that “A history of emotional problems appear to stem [from environmental] factors which have been demonstrated in rather severe [illegible] and social regression in her early teen years (see report of [illegible] Mental Health Center, dated 11/3/80).” The referenced report was not produced at the hearing, and there was no evidence that this report was obtained and reviewed by any medical professionals who performed psychological assessments of claimant.

Excerpts taken from a Vocational Assessment in 1981 state that claimant’s “programming level . . . is at the high sheltered workshop level.” It was determined that claimant “could be expected to earn 41% of minimum wage after introduced to a task. After one year of training and experience in that task, this student should be able to earn 58% of minimum wage.”

#### *Claimant’s Prior Involvement with IRC*

NOVEMBER 1984 TO JANUARY 1985

6. According to a 1985 report, claimant’s mother<sup>4</sup> requested services for claimant in a telephone call to IRC on November 8, 1984. Claimant was 19 years old and unmarried.<sup>5</sup> She had been referred to IRC by the Department of Rehabilitation (DOR). On November 26, 1984, claimant and her mother met with Lee Kiesz, Intake Counselor for IRC. Claimant’s mother sought to have a vocational training program established and implemented for claimant. She stated that claimant would not be receiving vocational training through DOR. This was the first time claimant sought services from IRC.

Ms. Kiesz performed a social assessment of claimant as part of the intake and assessment process to determine whether claimant was eligible for regional center services and supports. In the social assessment, Ms. Kiesz learned that claimant was involved in, and medically cleared to participate in Special Olympics in 1984.

Claimant’s mother reported that she had an uneventful pregnancy with, and delivery of, claimant. Claimant achieved developmental milestones when expected except that her speech was delayed. It was determined that claimant had hearing problems. After tubes were inserted in her ears and she received speech therapy, her speech improved.

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<sup>4</sup> Some records note that reference to claimant’s “mother” was to a foster or adoptive mother; however, significant personal information concerning claimant’s birth and early development suggest that claimant’s natural mother was involved in the request for services and subsequent IRC meeting in November 1984.

<sup>5</sup> Claimant later applied for IRC services under her married name.

Claimant's mother and father divorced. Claimant's mother stated that claimant had no contact with her natural father because he had been abusive to claimant before the divorce.

Claimant presented to Ms. Kiesz as "a very pleasant young adult." Ms. Kiesz noted that claimant's conversation was very appropriate in concept and content. She provided good eye contact. She seemed very straightforward or 'up front' regarding her needs and wishes."

Claimant said that she lived in a small trailer close to the mobile home that her mother and a friend lived in and that her mother supported her financially. Claimant was "capable" of doing necessary housework, but she admitted that she did housework only when she felt like it. Claimant ate her meals with her mother but said she was able to prepare simple foods. She made her bed and washed dishes when she wanted. Claimant walked independently to a grocery store for supplies and to a nearby restaurant to order meals.

Claimant was reported to be shy but able to interact with others and to form and maintain friendships. She stated that she used the telephone to connect with friends. Ms. Kiesz noted that claimant was not known to be physically aggressive or self-injurious.

Claimant was oriented to time and place and had basic academic skills; she was able to do basic math and was able to read and comprehend complex sentences and stories. Although Ms. Kiesz found her speech "somewhat difficult for a stranger to understand," claimant used a "fairly broad vocabulary and seems to understand the meaning of complex conversation without any serious difficulty." Ms. Kiesz described her as "a conversational person."

Ms. Kiesz concluded that claimant had "the capability of doing quite well in a structured situation where she understands what is expected of her. With guidance and assurance, she also seems to have the capability to function fairly independently in a stable situation." She also concluded that claimant had "a substantial deficit in the area of learning" and that she lacked "age-appropriate skills in the area of capacity."

7. On January 28, 1985, before a decision had been made by IRC, claimant's mother asked that the request for services she made on behalf of claimant be withdrawn.<sup>6</sup>

#### SEPTEMBER 1985 TO NOVEMBER 1985 – IRC FINDING OF INELIGIBILITY

8. According to an assessment update, claimant's mother-in-law initiated a request for IRC services on behalf of claimant on September 24, 1985, and claimant's file was re-opened. Claimant wanted help to train for, and find, employment.

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<sup>6</sup> This information was contained in an assessment update Ms. Kiesz prepared in November 1985.

9. On November 5, 1985, a Medical Consultant for IRC performed a medical assessment of claimant.<sup>7</sup> Claimant was twenty years old and married. The “presenting problem” on the assessment was described as “Slow learner.” No medical concerns were disclosed in the assessment report.

10. On November 5, 1985, an IRC staff psychologist<sup>8</sup> performed a psychological assessment of claimant. The copy of the report of the assessment is of poor quality, and some parts of the report are illegible. However, in the portions that could be read, it was reported that claimant advised the doctor that she was in special education classes the entire time she was in school. Claimant stated that she graduated from high school and remained at home with her foster mother.<sup>9</sup> Claimant denied a history of treatment for mental problems.

The examiner wrote that claimant “related to the examiner in a pleasant, friendly and cooperative manner. . . . Her speech was characterized by mild disarticulation. She behaved in an appropriate manner throughout the assessment, and the test results are thought to be accurate.”

The examiner administered the Weschler Adult Intelligence Scale – Revised (WAIS-R). The results of the WAIS determined that claimant’s verbal IQ was 77; her performance IQ was 70; and her Full scale IQ was 73. The scores obtained placed claimant in the borderline range of ability.

In an achievement test, the name of which is illegible, claimant scored 96 (Grade 8.3) in reading; 87 (Grade 6.9) in spelling; and 77 (Grade 4.3) in math. The examiner concluded that claimant’s reading and spelling skills were in the low average to average range and that her arithmetic skills fell within the borderline range. In the summary, the examiner stated, “The assessment results place her general intellectual functioning within the borderline range of ability.” The examiner recommended that claimant not be considered eligible for regional center services, and that she be referred to the DOR for evaluation for vocational training. Other than reporting the results of the testing, the examiner did not explain the recommendation. There was no indication in the report that that the examiner detected any mental disorders or that he considered whether claimant was eligible for IRC services under the “fifth category.”

11. On November 5, 1985, an interdisciplinary team described in the records as including claimant, her husband and father-in-law, a medical consultant, a staff psychologist and Ms. Kiesz, met at IRC to discuss claimant’s eligibility for regional center services and

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<sup>7</sup> The name of the medical doctor who performed the assessment is not legible in the report of the assessment.

<sup>8</sup> The name of the staff psychologist who performed the assessment is not legible in the report of the assessment.

<sup>9</sup> This report asserts that claimant was placed with a foster mother shortly after birth.

supports. The team determined that claimant was not eligible for regional center services “based on ‘no developmental disability.’” The team recommended that claimant contact DOR “for help with job needs.”

12. On or about November 20, 1985, Ms. Kiesz prepared a social assessment update report that summarized claimant’s 1985 request for services from IRC. Ms. Kiesz noted that claimant was almost 21 years old and had been married for over one year. She and her husband lived with her husband’s parents and brother. Her husband did not finish high school and had been diagnosed and treated for schizophrenia. Claimant reported being pleased in her marriage. She stated that her husband’s mother did most of the housework but that she and her husband were required to care for their room.

Ms. Kiesz documented that claimant had not been found to be eligible for regional center services because she had borderline intellectual functioning. She also noted that claimant had been referred to DOR.

#### MAY 1986 - RIVERSIDE COUNTY DEPARTMENT OF HEALTH

13. In May 1986, claimant went to the Riverside County Department of Health and advised them that she needed help. She told the examining therapist<sup>10</sup> that she had left her husband because he and his parents were abusive. She moved to a board and care facility and had been living there for one week before meeting with personnel from the Department of Health. Claimant reported that her “real father” left when she was three years old and that she lived with her mother and stepfather until her marriage in October 1985. She stated that her older brother was adopted when she was two years old.

Claimant told the examiner that she saw a counselor in school for emotional concerns and that she cut her wrists when she was twelve years old because she felt depressed. She reported that there were no other instances of self-inflicted injury. She denied any psychiatric hospitalizations.

The examiner diagnosed claimant with “schizophrenia – chronic” and “borderline intellectual functioning.” The evaluation indicates that a mental status exam was performed by interviewing claimant, but it does not indicate that additional standardized testing was administered.

Claimant continued to be seen by the Riverside County Department of Health at least until November 2012, primarily for medication monitoring and counseling when needed.

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<sup>10</sup> The name of the “examining therapist” is not legible in the records.

FEBRUARY 1990 TO APRIL 1990

14. On February 9, 1990, when claimant was 25 years old,<sup>11</sup> George Kopiloff, M.D., performed a “Comprehensive Psychiatric Evaluation” of claimant. The report of the evaluation noted that claimant had obtained an annulment of her marriage after four months because she said that she was being abused by her husband’s parents. Claimant moved to a board and care facility and had been living there for 4 and one-half years at the time of the evaluation.

The evaluation was necessitated after claimant began “exhibiting an increasingly more inappropriate and at times bizarre and agitated behavior” at the board and care. On the day of the examination, claimant had become violent and destroyed most of the objects in her room. She reported to Dr. Kopiloff, “I almost did suicide. I tore my room apart because I was very angry.” She told Dr. Kopiloff that she experienced an increase in thoughts that other people and the radio and television were talking about her and an increase in auditory hallucinations talking to her. She reported that she became depressed; that she had death wishes and suicidal ideation; and that she cut herself with an object and scratched both arms with her hand.

Dr. Kopiloff’s report recited claimant’s past history and noted that claimant had “a quite long history of psychiatric disturbances which have been diagnosed as chronic schizophrenia and borderline intellectual functioning . . . .”<sup>12</sup> He wrote that claimant had been receiving outpatient treatment, including psychotropic medication, from a mental health clinic since May 1986. The report stated that claimant had cut herself on the wrist in a suicide attempt four or five months earlier, but she was not admitted to a psychiatric facility. Claimant held a large teddy bear in her arms during her interview with Dr. Kopiloff. Dr. Kopiloff’s Axis I diagnosis of claimant was “major psychiatric disorders: schizophrenia, undifferentiated type, chronic, with acute exacerbation and suicidal plans.” The Axis II diagnosis was developmental disorders, personality disorders, and borderline intellectual functions. Dr. Kopiloff performed mental status and physical examinations; he did not administer standardized testing.

15. As a result of claimant’s depression and suicidal ideation, she was admitted to a psychiatric unit at a local hospital. She was discharged four days later on February 13, 1990.

16. A Physician’s Report from an examination of claimant that was performed on April 26, 1990, when she lived at a residential hotel, listed her “Major” diagnosis as “Developmentally disabled with mental illness.” There is no indication in the report that the

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<sup>11</sup> The report incorrectly states that claimant was 22 years old; she was born in February 1965 and was 25 in 1990.

<sup>12</sup> The records in this case do not show a diagnosis of schizophrenia before 1986.

physician administered standardized tests, nor is there any reference to how he arrived at his diagnosis.

#### SEPTEMBER 1990 TO NOVEMBER 1990 – IRC FINDING OF INELIGIBILITY

17. Claimant applied for IRC supports and services in September 1990. She used her married name and incorrectly reported that she had not had prior contact with IRC.

18. On October 10, 1990, IRC Staff Psychologist Bob Chang, Ph.D., performed a psychological assessment of claimant. Claimant was 25 years old and lived in a group home with clients having mental health needs. She was reported to be receiving services from County Mental Health. Dr. Chang administered the WAIS-R, the Wide Range Achievement Test-Revised (WRAT-R) and conducted a client interview.

On the WAIS-R, claimant obtained a score of 64 in verbal IQ, 64 in Performance IQ and had a Full Scale IQ of 62. In the WRAT-R test, claimant scored “below norms” in reading and arithmetic and obtained a score of 49 in spelling. Dr. Chang determined that claimant functioned in the mild range of mental retardation. He found that she had

basic common sense, perception of simple visual details, and assembly skill. Her perceptual-motor speed is slow. She has limited long and short-term memory skills. Her retention of information is poor. She has very limited academic ability. She recognizes numbers and most letters of the alphabet. She reads and spells only a few words. She can write her name. She cannot perform basic addition and subtraction.

Claimant reported to Dr. Chang that she could perform basic housekeeping, cooking and self-care tasks. She could not cook a full meal. She recognized some coins and paper money, but she was unable to manage money independently. Claimant reported that she had never lived alone, and Dr. Chang opined that she did not appear to have the skills to do so. He noted that claimant had never had a job or been in a work training program.

Dr. Chang found that, although claimant functioned in the mild mentally retarded range at age 25, she had functioned above that range before she turned 18 years old. He based this opinion solely upon the IQ scores claimant obtained when she was 17 years old (Verbal IQ 83, Performance IQ 69, Full Scale IQ 75). Dr. Chang concluded that claimant did not have a developmental disability that manifested before her 18th birthday and that her psychiatric conditions impaired her intellectual functioning such that she was not eligible for IRC services and supports.

At the time Dr. Chang performed his assessment, he and IRC were unaware that claimant had been assessed and denied services in 1985. After the assessment was completed, but before his evaluation report was written, Dr. Chang learned of claimant’s prior contact with IRC.

19. On October 10, 1990, an interdisciplinary team, described in the records as including claimant, a medical consultant, Dr. Chang, the owner and the director of the residential hotel, and an intake counselor, held a conference at IRC to determine whether claimant was eligible for regional center supports and services. Because the team had just learned that claimant had sought IRC services in 1985, they deferred making a decision so that they could gather claimant's past medical, psychological, educational and psychiatric assessments and records.

20. On November 8, 1990, the diagnostic team reconvened and, after reviewing and considering additional records, determined that claimant was ineligible for IRC supports and services, including further assessment or case management services, because she did not have a developmental disability as defined in the Lanterman Act. She was referred to the DOR for vocational training.

#### 2009 TO 2012 - RIVERSIDE COUNTY DEPARTMENT OF MENTAL HEALTH

21. Records from the Riverside County Department of Mental Health (DMH) dated June 28, 2009, indicate that claimant was diagnosed with schizoaffective disorder, attention deficit/hyperactivity, and "Rett's Disorder, Asperger's Disorder, or Pervasive Developmental Disorder NOS." There are no assessment records in the DMH files that document how the diagnosis was determined. The diagnosis was referenced in subsequent records with no indication of additional assessments or evaluations. The DMH services provided to claimant appear to have been primarily medication maintenance and a resource when she required counseling or emotional support.

22. DMH records from October 19, 2010, note that medications were working to control claimant's hyperactivity, impulsivity and irritability. Claimant stated that she could focus better due to the medications. Claimant admitted to an episode of purging to lose weight, but told DMH staff that her caretaker and foster mother told her not to "do the bad thing anymore," so she agreed not to purge anymore.

23. In April 2011, claimant initiated contact with DMH several times because her caretaker, Linda Collins, was hospitalized and a temporary caretaker was assigned. The change in caretakers was difficult for claimant; however, she was able to obtain another temporary caretaker when the first one did not work out. The records note that claimant used "positive coping skills" to work through issues she was having with the changes in her routine due to the change in caretakers.

24. In or about October 2011, claimant moved to a two bedroom home that she shared with two dogs and a guinea pig. She continued to receive substantial assistance from Ms. Collins.

25. File notes from Hemet Mental Health Clinic in November 2012, list agitation, impatience, irritability, anger outbursts with paranoia, hyperactivity, inattention and concentration as "target symptoms." Claimant's mental status was described as "childish

behavior, pleasant.” Claimant’s symptoms were reported as controlled with medication. The notes state that claimant had an “onset of emotional problem[s] since young age.”

#### DECEMBER 2012 - IRC FINDING OF INELIGIBILITY

26. In late 2012, claimant applied for IRC services. On December 12, 2012, IRC determined that claimant was not eligible for services or supports based on mental retardation, autism, or 5th category. IRC made the determination without performing a psychological evaluation of claimant. Claimant was denied services despite the fact that some psychiatric records indicated that claimant had borderline intellectual functioning and had Asperger’s. IRC arrived at this conclusion because it found “no testing to support the diagnoses” and “no diagnosis of a [developmental disability] before age 18.”

#### EXCEED EVALUATION AND WORK EXPERIENCE

27. In or about September 2013, DOR referred claimant to EXCEED<sup>13</sup> to perform a Situational Assessment. DOR asked EXCEED to evaluate claimant’s “strengths and limitations regarding work skills, work tolerances, vocational interests and readiness for competitive employment.” The EXCEED assessment report contains the first reference to claimant’s assertion that her biological mother was incarcerated years prior for murdering claimant’s baby sister.

The EXCEED report lists claimant’s “disability” as “Asperger’s Syndrome; Epilepsy; Cognitive/Intellectual Disability; ADHD, Scoliosis and Asthma.” The report does not provide the source of the diagnoses it listed. The report states that IRC denied claimant’s “numerous” applications for services because there was no record of claimant’s disability prior to age eighteen; however, the report noted that “records [were] lost in [a] fire.”

In October 2013, claimant worked for four days at a Thrift Store run by EXCEED. Her supervisors and EXCEED staff reported that she was a hard worker who was very good at some tasks and had difficulty with others. It was noted that she required one-on-one supervision for some assignments to keep her on track. Claimant had a positive attitude and enjoyed working in the thrift store.

Claimant worked for one day at a local Dollar Tree store. Claimant became overwhelmed and distracted by the environment and did not finish the day there. The EXCEED staff determined that claimant worked better when she was uninterrupted by customers and co-workers. EXCEED concluded that claimant required “repetitive tasks, simple instructions, a regular schedule, and a supportive environment.”

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<sup>13</sup> EXCEED is an organization that, among other things, provides vocational training and job matching and placement services for disabled adults. Its mission statement is “To provide service and advocacy, which creates choices and opportunities, for adults with disabilities to reach their maximum potential.”

## 2014 BICKFORD EVALUATION

28. Claimant continued to want vocational training and employment. She went again to DOR and asked for help to get employment. DOR referred claimant to Kurt R. Bickford, Ph.D., to obtain an updated psychological evaluation of her cognitive levels and academic skills and to receive an updated psychodiagnostic impression.

29. On January 15, 2014, Dr. Bickford performed a psychological evaluation. He observed that claimant initially presented as stressed, overwhelmed and emotionally unresponsive, but she became more comfortable and responsive as the evaluation progressed.

Claimant and Ms. Collins provided claimant's history to Dr. Bickford. Dr. Bickford wrote that claimant was diagnosed with Autism, Asperger's Syndrome, mental retardation ADD and Learning Disabilities as a child; he did not state that he reviewed records to confirm or validate these diagnoses or the age at which claimant was diagnosed.

Claimant and Ms. Collins told Dr. Bickford that claimant's biological mother gave up two of claimant's siblings for adoption but kept claimant so that she could receive federal assistance. They also told Dr. Bickford that claimant's mother killed claimant's baby sister by suffocating her in front of claimant and that claimant's mother was incarcerated for the crime. Claimant said that she lived with her mother for a period of time after her mother was released from prison and had remarried. Claimant asserted that she suffered physical, verbal and sexual trauma during the time she lived with her mother. Ms. Collins told Dr. Bickford that claimant was raped and impregnated by her step-father at age thirteen.<sup>14</sup> Claimant reported that she went from her mother's home to foster care and to board and care facilities until she moved to her rental home.

Dr. Bickford administered the Neurobehavioral Mental Status Exam, WASI, Woodcock-Johnson Tests of Achievement-Revised (WJ-R), Trail Making A & B (TM), and Developmental Test of Visual Motor Integration (VMI). He did not administer the Autism Diagnostic Observation Schedule (ADOS) or other assessments specifically designed to detect and diagnose autism.

On the WASI, claimant obtained a verbal score of 60 (mentally deficient), a performance score of 80 (low average) and a full scale score of 71 (borderline). Dr. Bickford concluded that, after consideration of the standard deviation, claimant's level of intellectual functioning was in the mentally deficient to borderline range.

Dr. Bickford concluded that claimant's scores on the VMI test were in the impaired range and were "below expectancies." On the TM test, claimant's performance was slower than normal, but she made no errors of sequence. Dr. Bickford found her to be "slow but accurate." On the WJ-R, claimant scored "within expectancies" in math calculations (62) and written expression (72). She scored significantly lower (31) in reading vocabulary. Dr.

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<sup>14</sup> This is the only reference to this assertion.

Bickford opined that claimant had “no true learning disabilities” in math and written expression, but that her “sight vocabulary is very poorly developed and indicative of learning disability.”

Based upon the tests administered to claimant, Dr. Bickford concluded that claimant was most appropriately diagnosed with “Autism Spectrum Disorder asso. w/Asperger’s w/ accompanying intellectual impairment & language impairment” and moderate depression. He wrote that she was a “fair to good candidate for the [IRC]” and “a poor candidate for DOR due to her level of functioning.” Dr. Bickford found “no indications of tangential thought processes.” He also found that, “There are no other indicators of psychotic processes such as hallucinations, contaminated elements, distorted thought processes, or delusions. There does appear to be significant psychological overlay that should be monitored and appropriately treated.” He either did not ask, or did not report, what medications claimant was taking when she appeared for the evaluation or on a regular basis. Nonetheless, he appeared to be aware of them as he noted that “Current medication regime is not relieving her symptoms.” It was unclear what symptoms he is referring to.

Dr. Bickford provided insight into claimant and the type of working environment she needed to succeed. He observed that she required a supportive environment that would treat her with kindness and respect. He opined that she would not do well with authoritarian type individuals or in a work environment where she would be ignored or isolated. He felt that “With the help, support and guidance of her rehab counselor she will have her best opportunity at success.”

30. On May 14, 2014, DOR closed claimant’s case on the basis that “You cannot benefit from Vocational Rehabilitation services in terms of employment. [Citation.]”

#### MARCH 2014 - IRC DETERMINATION OF INELIGIBILITY

31. An Intake Assessment Flow Sheet dated March 31, 2014, documents that an IRC Screening Committee determined that claimant did not meet the criteria for eligibility for IRC services and supports. The Screening Committee, that included Paul Greenwald, Ph.D., noted that Dr. Bickford’s diagnosis of Autism was not based upon specialized testing but was based on the history provided to him by claimant and on his clinical observations. The determination of ineligibility was based upon a review of claimant’s records. IRC did not administer tests or otherwise conduct an assessment of claimant. IRC’s last psychological evaluation of claimant was performed by Dr. Chang in 1990.

32. A Notice of Proposed Action dated April 2, 2014, advised claimant that she had been found to be ineligible for IRC services and supports. In this hearing, claimant challenges IRC’s determination and seeks further intake and evaluation services.

#### *Dr. Greenwald’s Testimony*

33. Paul Greenwald, Ph.D. received a doctorate in clinical psychology from the California School of Professional Psychology in 1987. He has been licensed in California as a clinical psychologist since 2001. He has served as a staff psychologist for IRC since 2008. He has extensive experience assessing, evaluating, and developing treatment plans for persons diagnosed with, or identified as being at risk for, autism, mental retardation and psychological disorders. He has conducted approximately 700 psychological assessments for IRC. Dr. Greenwald was qualified to review and evaluate claimant's records and to form an opinion whether claimant is eligible for IRC services based upon his review. Dr. Greenwald did not conduct a psychological assessment of claimant.

Dr. Greenwald was a member of the 2014 IRC Screening Committee that considered claimant's request for services. He, along with other committee members, reviewed the various reports and evaluations discussed above. After his review of the records, Dr. Greenwald agreed with the Screening Committee's determination that claimant did not have a qualifying developmental disability on the basis of mental retardation, autism, or a condition closely related to mental retardation.

Dr. Greenwald based his opinion that claimant did not have a qualifying developmental disability on the fact that claimant's primary diagnosis was related to psychiatric disorders that would have interfered with cognitive functioning test results and that any potentially qualifying conditions were not present before the age of 18. He asserted that claimant would not have been given psychotropic medications if she did not have a psychiatric disorder. Dr. Greenwald testified that IRC was not able to provide services to an individual with a primary diagnosis of psychiatric disorders because they did not contract with mental health care providers to treat psychiatric clients.

34. As relates to the 2014 evaluation performed by Dr. Bickford, Dr. Greenwald noted the twenty point spread between the scores claimant obtained in the verbal (60) and performance tests (80). He stated that when there is such a large discrepancy, the higher score is considered a more valid indicator of the person's true cognitive ability. Dr. Greenwald observed that Dr. Bickford administered the abbreviated version of the Wechsler test. He testified that, although the abbreviated version was a little less reliable than the full test, it was "acceptably reliable."

Dr. Greenwald also noted a large discrepancy in scores obtained by claimant in 1982, when she was 17 years old. In that assessment there was 14 points between claimant's verbal score (83) and performance score (69). He stated that an individual with borderline mental retardation would not be expected to obtain scores with such a large discrepancy. He further stated that thought disorders could affect "all sorts of test results."

Dr. Greenwald discounted Dr. Bickford's diagnosis of autism because he did not administer standardized tests used to detect and diagnose autism and because no records support his statement that claimant was diagnosed with autism at an early age.

35. Dr. Greenwald reviewed the test results from the 1990 assessment Dr. Chang conducted. He noted that claimant's test scores were consistently very low with little or no discrepancy between the scores (Verbal = 64, performance = 64, full scale = 62). He stated that, by themselves, these test scores were consistent with an intellectual disability; however, because the earlier test scores were not consistent with the 1990 scores, Dr. Greenwald would expect that something occurred to interrupt claimant's intellectual functioning. He stated that cognitive functioning scores of an individual with mental retardation would not be expected to be as erratic as claimant's. In her case, claimant obtained a score of 83 in verbal and 69 in performance in 1982; but in 2014 she obtained a score of 60 in verbal and 80 in performance. He interpreted claimant's "erratic regression then restoration" of scores to be explained by her psychiatric disorders.

36. Dr. Greenwald agreed that the Vineland Adaptive Behavior Scale (Vineland Scale) is a standard tool used as an aid in diagnosing conditions including mental retardation and autism. Dr. Greenwald stated, however, that he did not know if use of the Vineland Scale was standard practice when claimant was younger than 18. Dr. Greenwald noted that the Vineland Scale was important to diagnose deficiencies in adaptive behavior, but it did not determine the cause of the deficiency.

37. Dr. Greenwald testified that when determining whether an individual qualified for regional center services under the fifth category, it was essential to examine the disabling condition and its relationship to an intellectual disability. Additionally, individuals who qualify under the fifth category should have scores close to the cut-off for mental retardation which is 70. He also looks for stability of scores over time and consistency within the subtests of the assessment tool. Further, he looks for evidence that the condition was present before the individual's 18th birthday. Dr. Greenwald testified that, even though the Lanterman Act provides that an individual can qualify for services if the individual has a disabling condition that requires treatment similar to that required for individuals with mental retardation, "there is no treatment for mental retardation" and, therefore, he could not respond to a question about such treatment.

38. Dr. Greenwald stated that "childish behavior" could be a symptom that presents in an individual with schizophrenia or with a developmental disability, but it was not a symptom of an individual with borderline intellectual ability. He believed that claimant was more appropriately referred to DOR.

#### *Jennifer Cummings Testimony*

39. Jennifer Cummings is employed by IRC as a Program Manager for Fair Hearings. For ten years, Ms. Cummings was a Consumer Services Coordinator. Ms. Cummings has experience working with individuals who have dual diagnoses of being developmentally disabled and having psychiatric disorders. She has explored programs that are available for such individuals. One program she is familiar with that assists individuals to obtain employment is operated through the County Mental Health Department.

Ms. Cummings referenced a distinction in the Lanterman Act between “treatment” and “services.” She opined that IRC was not the appropriate agency for claimant to receive services. Claimant’s “treatment” consists of medication management for psychiatric disorders and medication management is not “treatment” provided to developmentally disabled consumers at IRC.

*Evidence On Behalf of Claimant*

LINDA COLLINS

40. Linda Collins is employed as an In-Home Support Services worker for the County of Riverside. She is referred to as claimant’s “caregiver.” Ms. Collins lives across the street from claimant and assists her with everyday life activities. Ms. Collins is paid to provide services six days a week for a total of 74 hours per month, but she stated that she assists claimant for 110 hours per month.

Claimant lives alone in her rented home with a guinea pig and two dogs. She reaches out to Ms. Collins and others in the community for help when she needs it.

Ms. Collins reminds claimant to take a bath, shampoo her hair, cut her nails, and shave. She helps claimant get dressed. Claimant had been trying to learn to tie her shoe laces, but she could not learn to do it; she gave up and purchased shoes with a Velcro fastening.

Ms. Collins cooks meals for claimant. Claimant can use the microwave to heat food, although she has burned herself on occasion, but she cannot cook food on the stove. Claimant burned herself with hot oil or water when she tried to use the stove. Ms. Collins helps claimant clean the house and make her bed.

Ms. Collins testified that claimant has her own way of saying things. She will telephone Ms. Collins frequently and leave messages to the effect of “I have one thing to tell you, please pick up the phone.” If Ms. Collins answers the telephone, claimant will ask her a question and then tell Ms. Collins what was going on in her home.

Claimant tries very hard to learn new skills. She reads first and second grade books and cannot get to a higher level. With most books, claimant will look at the pictures; she and Ms. Collins will read books together. Claimant will ask for help reading words. She does not always remember what she read.

Claimant gets around the neighborhood on a motorized scooter. She goes to McDonalds and she volunteers in a nearby thrift store. Efforts were made in the past to teach claimant to use public transportation, but they were not successful. On one occasion, claimant got on a bus and wound up in Palm Springs. It was suggested that claimant use the “Dial a Ride” program; however, claimant was not comfortable with the idea of riding in a

car with someone she did not know, and she did not submit the application to join the program.

Ms. Collins tries to help claimant manage her money. She and claimant make a budget based upon claimant's expenses and income. Because claimant cannot handle a checkbook, she and Ms. Collins purchase money orders to pay claimant's bills. After the bills are paid, claimant and Ms. Collins do the grocery shopping. Claimant does fine in the grocery store unless she goes by the toy aisle. Ms. Collins stated that claimant would rather buy toys than food.

Ms. Collins opined that claimant could not live without help.

MARTHA SLUSSER

41. Martha Slusser is self-employed and has been an entrepreneur most of her life. She was introduced to claimant by Sandra Fastasia, whom she described as claimant's "surrogate mother." Ms. Slusser and other community members helped claimant apply for assistance from the Riverside Housing Authority so that she could move into a rental house.

Ms. Slusser has tried to teach claimant how to tie her shoes. She stated that claimant "gets it" but then forgets.

Ms. Slusser has tried to work with claimant to manage her money. They have discussed budgets and the importance of paying bills and other necessities before spending money on non-essentials. Ms. Slusser also helps claimant do grocery shopping. In the grocery store, claimant gravitates to the toy aisle and wants to buy toys, crayons and coloring books with her grocery money; Ms. Slusser steers her to the food aisles. Ms. Slusser stated that claimant has not learned to walk past the toy aisle.

Ms. Slusser helps claimant with her personal hygiene because sometimes she forgets. Ms. Slusser is aware that claimant's caregiver helps with her hair. Claimant chooses her clothing. Ms. Slusser stated that "[her] hygiene might need help."

Ms. Slusser's ex-husband was diagnosed with schizophrenia and bi-polar disorder. She did not observe claimant engage in conduct similar to the conduct in which her husband engaged.

CAROLYN BUMAN

42. Carolyn Buman is a retired member of the community in which claimant lives. She was introduced to claimant by Ms. Fastasia in 2005 and has extended her friendship to claimant. Ms. Buman has not observed claimant engage in bizarre behavior. When claimant does not know what to do, she telephones Ms. Buman for help. Ms. Buman sometimes helps claimant read books; claimant asks her the meaning of words she does not know. Ms.

Buman has observed that claimant will sometimes retain the meaning or will ask Ms. Buman to explain the meaning of the word again.

Ms. Buman has helped teach claimant how to tell time. Ms. Buman has observed that claimant will forget how to tell time if she is not asked to do it regularly. If a task is repeated, claimant will be able to complete it. Ms. Buman feels that claimant tries very hard to learn new things; sometimes she can, and other times she cannot.

Ms. Buman has been to claimant's home many times. She opined that claimant can care for herself and her two dogs. She understands that claimant would like to have a job. Claimant worked for a short time in a thrift store, but Ms. Buman believes that claimant must be in a sponsored program to get paid for her work. Ms. Buman agreed that claimant engages in childish behavior sometimes, but "we all do."

### *Community Letters*

43. Claimant submitted three letters from community members and friends. Two letters are from individuals who know claimant through church organizations and one is from a family friend. Each author stated that she had multiple opportunities to interact with claimant and that she observed that claimant functioned at a level similar to an elementary school child. One writer stated, "Despite attempts to advance in grade level, [claimant] is only able to work independently on first and second grade work." That writer also wrote that despite claimant's hard work and diligence in trying to remember songs and choreography in a children's choir, she was unable to retain the information.

### *Claimant's Testimony*

44. Claimant testified at the hearing. She spoke in a high pitched voice with an inflection one might expect to hear in a young child. She punctuated most sentences with a slight "huffing" sound. She listened to the questions asked of her and generally responded in an appropriate, though child-like, way. She appeared to be calm and emotionally controlled through most of the hearing. During the hearing, claimant clutched a small stuffed bear; at times she moved the bear on the top of the conference table as though he were dancing. At the end of the hearing, claimant became tearful and began to sob.

45. Claimant testified that she applied to DOR because she wanted training to get a job. She related that DOR gave her an assessment but told her they could not help her. She was told that IRC would be able to help her. Claimant formerly volunteered at a thrift shop and liked working there. It was her understanding that she would have to be receiving services from IRC to get paid for working at the thrift store. She does not volunteer there any longer. Claimant is very desirous of getting a job and earning her own money. She stated that she wants to "make something of myself." She claimed that she had "no behavior problems."

Claimant enjoys working with children. She attends “children’s church” where she works with children. She showed a photograph of herself and the children. She spontaneously asserted in this discussion that she had been mislabeled many times. She stated that the children in church hug her and tell her that they love her.

Claimant participates in Special Olympics and is on a bowling team. She professes that she is “not very good.” She is not in a regular bowling league because there is “too much noise” in a regular league.

Claimant identified a photograph of her microwave which is bright pink and decorated with “Hello Kitty” stickers. She explained that her other microwave “burned up” because she put something in it she was not supposed to put in.

Claimant also identified a photograph of two rubber ducks, a rubber bear and a mermaid Barbie doll that she plays with in the bathtub. Claimant said that Ms. Collins reminds her to take a bath.

Claimant acknowledged that she gave up trying to learn to tie her shoes. She stated that her hand eye coordination was “off.” Claimant got tired of people making fun of her because she could not tie her shoes so she got shoes that have a Velcro fastener.

Claimant said she graduated from high school, but it was too hard and she did not learn there. She said that she was in special education and was “passed on through the school system.”

Claimant acknowledged that she would rather buy toys than food. She stated that her “real mom is a big mess” and did not allow her to have toys. She testified that when she was young, if someone gave her a toy, her mother would give it away so that claimant did not have any toys to play with.

#### *Dr. Greenwald’s Impressions Following Claimant’s Testimony*

46. After observing claimant’s testimony, Dr. Greenwald stated that her testimony and manner was not characteristic of a person with a developmental disability. He stated that he was “struck” by the compulsive nature of her behavior and how “relatively well organized it was in the child role.” He testified that the organization he observed was not typical of an individual who was intellectually disabled and engaged in child-like behavior, but could be seen in individuals in high and/or chronic stress situations.

## LEGAL CONCLUSIONS

### *The Burden and Standard of Proof*

1. In a proceeding to determine whether an individual is eligible for regional center

services, the burden of proof is on the claimant to establish that he or she has a qualifying diagnosis. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

#### *The Lanterman Act*

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

4. An applicant is eligible for services under the Lanterman Act if he or she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

5. California Code of Regulations, title 17, section 54000, defines “developmental disability” and the nature of the disability that must be present before an individual is found eligible for regional center services. It states:

(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.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

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

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

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

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

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

6. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. “Services and supports” for a person with a developmental disability can include diagnosis and evaluation. (Welf. & Inst. Code, § 4512, subd. (b).)

8. A regional center is required to perform initial intake and assessment services for “any person believed to have a developmental disability.” (Welf. & Inst. Code, § 4642.) “Assessment may include collection and review of available historical diagnostic data, provision or procurement of necessary tests and evaluations, and summarization of developmental levels and service needs . . .” (Welf. & Inst. Code, § 4643, subd. (a).) To determine if an individual has a qualifying developmental disability, “the regional center may consider evaluations and tests . . . that have been performed by, and are available from, other sources.” (Welf. & Inst. Code, § 4643, subd. (b).)

9. California Code of Regulations, title 5, section 3030, provides the eligibility

criteria for special education services required under the California Education Code. The criteria for special education eligibility are not the same as the eligibility criteria for regional center services found in the Lanterman Act.

### *Evaluation*

10. Claimant's Fair Hearing Request sought to require IRC to provide "intake and evaluation" services to determine if she qualified to receive other services and supports from IRC. She argued that reviewing her records was not sufficient to properly assess her eligibility for IRC services. She asserted that she was eligible for services based upon autism, mental retardation, or a fifth category condition closely related to mental retardation, or that required treatment similar to that required for individuals with mental retardation.

11. This case presented many difficulties due to the claimant's age, the absence of a majority of claimant's childhood records, and the unavailability of family members or others who could shed light on claimant's functioning prior to age 18. Claimant is undoubtedly an individual who requires substantial supports and services to live a relatively independent life. The question to be answered is who must supply those supports and services.

#### ELIGIBILITY BASED UPON AUTISM

12. The information contained in claimant's records does not support a reasonable belief that claimant has a developmental disability based upon Autism, which would trigger IRC's obligation to provide or procure a further assessment of her. The earliest records produced at the hearing are school records from 1982 when claimant was 17 years old and in the 11th grade. These records substantiate that claimant was placed in special education classes prior to 1978. Claimant's school records do not suggest a suspicion or diagnosis of Autism. The first mention of Autism, or related Asperger's Syndrome, in the records submitted at the hearing was in DMH records from 2009 (Asperger's) when claimant was 44 years old, and Dr. Bickford's January 2014 evaluation. Although Dr. Bickford wrote that claimant was diagnosed with Autism, Asperger's Syndrome, mental retardation ADD and Learning Disabilities as a child, he did not identify the source of his information, and there was no corroborative evidence submitted at the hearing.

#### ELIGIBILITY BASED UPON MENTAL RETARDATION

##### *DSM-V DIAGNOSTIC CRITERIA*

13. The DSM-V contains the diagnostic criteria used for mental retardation (intellectual disability). It provides that 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, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities or daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

The DSM-V further notes that the “levels of severity (of mental retardation) are defined on the basis of adaptive functioning, and not IQ scores, because it is the adaptive functioning that determines the level of supports required.” According to a chart of expected characteristics of an individual with mild mental retardation, children and adults would have “difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations.” Additionally, communication and social judgment are immature and the individual may be easily manipulated by others. Mild mentally retarded individuals “need some support with complex daily living tasks . . . . In adulthood, supports typically involve grocery shopping, transportation, home . . . organizing, nutritious food preparation, and banking and money management.”

The DSM-V notes that, with regard to Criterion A, “individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally  $\pm 5$  points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65 – 75 ( $70 \pm 5$ ).” The DSM-V cautions that IQ tests must be interpreted in conjunction with considerations of adaptive function. It states that “a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”

With regard to Criterion B, the DSM-V provides that “Criterion B is met when at least one domain of adaptive functioning – conceptual, social, or practical – is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.”

*EVIDENCE RELATING TO THE APPLICATION OF DSM-V CRITERIA TO CLAIMANT*

14. In 1982, claimant’s obtained a full scale score of 75. The examiner stated that claimant’s overall intellectual functioning was in the borderline range. According to the

DSM-V's range of scores, claimant may have been considered mildly mentally retarded. The records provided do not address, or are not legible concerning, claimant's adaptive functioning. These are the only IQ scores available that resulted from tests administered before claimant turned 18 years old. In 1985, claimant had a full scale score of 73, which was described as borderline. In 1990, when claimant was 25 years old, she obtained a full scale score of 62, which was squarely within the mild mentally retarded range. Dr. Chang reported that claimant was unable to manage money, that she could perform only basic household tasks, and that she had never lived alone and lacked the skills to do so. In 1985 claimant was deemed ineligible for IRC services because the test results from Dr. Chang were obtained after claimant turned 18, and it was determined that there was no evidence that her condition manifested before she turned 18. In 2014, when she was 48 years old, claimant's full scale score of 71 again put her in the borderline range.

15. Although it is difficult in 2014 to fully evaluate claimant's status prior to 1983, based upon the evidence admitted at the hearing, claimant has not met her burden of proving that there is a reasonable belief that she has a developmental disability due mental retardation that would trigger IRC's obligation to provide or procure a further assessment of her because it was not proven that she was mildly mentally retarded prior to turning 18 years old.

#### ELIGIBILITY BASED UPON THE "FIFTH CATEGORY"

16. Under the "fifth category," the Lanterman Act provides for assistance to individuals with "disabling conditions found to be closely related to mental retardation **or** to require treatment similar to that required for mentally retarded individuals" but does "not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code § 4512, subd. (a) (emphasis added).) Further, a developmental disability does not include conditions that are "**solely** psychiatric disorders." (Cal. Code. Regs., tit. 17 § 54000, subd. (c)(1) (emphasis added).) Like the other four qualifying conditions (cerebral palsy, epilepsy, autism, and mental retardation), a disability involving the fifth category must originate before an individual attains age 18 years of age, must continue or be expected to continue indefinitely, and must constitute a substantial disability.

17. The fifth category is not defined in the DSM-V. In *Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4<sup>th</sup> 1119, 1129, the California Court of Appeal 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."

#### ASSOCIATION OF REGIONAL CENTER AGENCIES GUIDELINES

18. On March 16, 2002, in response to the *Mason* case, the Association of Regional Center Agencies (ARCA) approved the *Guidelines for Determining 5th Category Eligibility for the California Regional Centers* (Guidelines). In those Guidelines, ARCA

confirmed 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 listed the following factors to be considered when determining eligibility under the fifth category:

**I. Does the individual function in a manner that is similar to that of a person with mental retardation?**

Mental retardation is defined in the DSM-IV as ‘significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning. . .’

General intellectual functioning is measured by assessment with one or more standardized tests. Significantly sub-average intellectual functioning is defined as an intelligence quotient (IQ) of 70 or below.

An individual can be considered to be functioning in a manner that is similar to a person with mental retardation if:

- A. The general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74). Factors that the eligibility team should consider include:
  - 1. Cognitive skills as defined in the California Code of regulations, Title 17. Section 54002: ‘. . . the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.’
  - 2. The higher an individual’s IQ is above 70, then the less similar to a person with mental retardation is the individual likely to appear. For example, an individual with an IQ of 79 is more similar to a person with a low average intelligence and more dissimilar to a person with mild mental retardation.
  - 3. As an individual’s intelligence quotient rises above 70, it becomes increasingly essential for the eligibility team to demonstrate that:
    - a. There are substantial adaptive deficits; and



conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience.

## **II. Does the person require treatment similar to that required by an individual who has mental retardation?**

In determining whether an individual requires ‘treatment similar to that required for mentally retarded individuals,’ the team should consider *the nature of training and intervention* that is most appropriate for the individual who has global cognitive deficits. The eligibility team should consider the following to determine whether the individual requires treatment similar to that required by an individual who has mental retardation.

- A. Individuals demonstrating *performance based deficits* often need treatment to increase motivation rather than training to develop skills.
- B. Individuals with *skill deficits* secondary to socio-cultural deprivation but not secondary to intellectual limitations need short term, remedial training, which is not similar to that required by persons with mental retardation.
- C. Persons requiring *habilitation* may be eligible, but persons requiring *rehabilitation* are not typically eligible as the term rehabilitation implies recovery of previously acquired skills; however, persons requiring rehabilitation may be eligible if the disease is acquired before age 18 and is a result of traumatic brain injury or disease.
- D. Individuals who require *long term training* with steps broken down into small discrete units taught through repetition may be eligible.
- E. The eligibility team may consider the intensity and type of *educational supports* needed to assist children with learning. Generally, children with mental retardation need more supports, with modifications across many skill areas.

## **III. Is the individual substantially handicapped based upon the statewide definition of Substantial Disability/Handicapped?**

The W&I Code (Section 4512) defines *Developmental Disability* as a disability which originates before an individual attains the age of 18, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. The CCR, Title 17 (Section 54001) defines *substantial handicap* as:

- a) Substantial handicap means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.
- b) Since an individual's cognitive and/or social functioning is many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:
  - 1) Communication skills;
  - 2) Learning;
  - 3) Self-care;
  - 4) Mobility;
  - 5) Self-direction;
  - 6) Capacity for independent living;
  - 7) Economic self-sufficiency.
- c) The assessment 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 serving the potential consumer. The group shall include as a minimum, a program coordinator, a physician, and a psychologist.
- d) The Regional Center professional group shall consult the potential consumer, parents, guardians, conservators, educators, advocates, and other consumer representatives to the extent that they are willing and available to participate in its deliberation and to the extent that the appropriate consent is obtained.

Regional Centers should use criteria of three or more limitations in the seven major life activities as used in the federal definition for Developmental Disability . . . .

**IV. Did the disability originate before age 18 and is it likely to continue indefinitely?**

The eligibility team should provide an opinion regarding the person's degree of impairment in the adaptive functioning domains, identifying skill deficits due to cognitive limitations and considering performance deficits due to factors such as physical limitations, psychiatric conditions, socio-cultural deprivation, poor motivation, substance abuse, or limited experience. Additional information, such as that obtained by a home visit, school or day program observation, or additional testing may be required to make this determination."

19. In *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, the court cited with approval to the ARCA Guidelines and recommended their application to those individuals whose "general intellectual functioning is in the low borderline range of intelligence (I.Q. scores ranging from 70-74)" for fifth category eligibility. (*Id.* at p. 1477.) Additionally, the court confirmed that individuals may qualify for regional center services under the fifth category on either of the two independent bases contained in the statute.

APPLICATION OF THE ARCA GUIDELINES

20. The first question under the ARCA Guidelines is whether claimant functions in a manner similar to that of a person with mental retardation. In this case, the evidence established that claimant's intellectual functioning is in the low borderline range. She has consistently obtained IQ scores that categorize her as borderline or mild mentally retarded, particularly after consideration that an individual's score is to be evaluated as a range that varies  $\pm 5$  points. The evidence further established that claimant has deficits in cognitive skills such as the ability to adapt to new situations, to think abstractly and to profit from experience. Claimant has substantial adaptive deficits as reported by Ms. Collins, Ms. Slusser, Ms. Buman, Dr. Chang, and claimant.

The Guidelines suggest that, when there is a significant difference between Verbal IQ and Performance IQ and the higher score is 85 or above, it may be more difficult to find that an individual's intellectual functioning is similar to that of a person with mental retardation. In this case, the highest score claimant ever received in Verbal or Performance IQ was 83. Her borderline intellectual functioning has shown stability over time.

Claimant has substantial deficits in adaptive skills. The evidence is overwhelming that claimant has deficits in communication, learning, self-care, self-direction, capacity for

independent living and economic self-sufficiency. Claimant is doing remarkably well in her living situation, but she is able to maintain her independence only with strong support provided by her caretaker and dedicated friends and community members. Without these supports, claimant could not live independently.

Claimant has established that she functions in a manner similar to that of an individual who has mental retardation.

21. The second question is whether claimant requires treatment similar to that required by an individual who has mental retardation. In this case, there was little evidence concerning what treatment claimant or individuals who have mental retardation require. Because claimant established that she functions in a manner similar to that of an individual who has mental retardation, she has satisfied the Criterion A and B of the DSM-V and the first prong of the fifth category. It, therefore, is not necessary to determine whether her treatment needs are similar to those of an individual who has mental retardation.

22. The third question is whether claimant is substantially handicapped by her condition. The factors to consider in determining whether an individual is substantially handicapped are similar to those used to determine whether an individual has deficits in adaptive functioning. Claimant has established that she has deficits in communication, learning, self-care, self-direction, capacity for independent living and economic self-sufficiency. Her condition is of sufficient impairment as to “require interdisciplinary planning and coordination of special or generic services” to assist her in “achieving maximum potential.”

23. The final question is whether claimant’s disability originated before the age of 18 and is likely to continue indefinitely. Here, claimant obtained a full scale score of 75 when she was 17 years old. Her school records confirm that her evaluation at age 17 was a “3-year” review. Other evidence is persuasive that claimant was in special education throughout her public school education. Although placement in special education is not conclusive evidence of a qualifying disability under the Lanterman Act, it has been considered that the available school records in this case are 32 years old, only five years after the Lanterman Act was enacted, and they contain testing data showing that claimant was functioning, at best, in the borderline range. They are sufficient to raise a reasonable belief that claimant has a condition similar to mental retardation, the onset of which was prior to her 18th birthday. That the condition is likely to continue indefinitely has been proven by the passage of time.

IRC suggested that the fact that claimant graduated from high school with acceptable grades proves that claimant was not functioning as a developmentally disabled individual. However, an analysis of her high school transcript shows that of 54 classes taken by claimant, 29 of them bore a designation of “LH” - learning handicapped. The remaining classes were adapted physical education, homecrafts, crafts, ceramics and other similar courses. The transcript does not support a presumption that, because claimant graduated

from high school, she was not functioning as a person who had mental retardation or a condition similar to mental retardation.

24. IRC argued that claimant could not be eligible for its services and supports because her deficits were not a result of mental retardation but were a result of psychiatric disorders. California Code of Regulations, Title 17, section 54000, subdivision (c)(1), provides that a developmental disability does not include conditions that are “[s]olely 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.” The evidence in this case does not establish that claimant suffers solely from a psychiatric condition, nor does it establish that her developmental disability originates as a result of a psychiatric disorder or the treatment of a psychiatric disorder.

The primary assessments relied on in this case, with the exception of the one in 2014, are twenty four to thirty two years old. Each evaluation is notable for the examiner’s general willingness to accept prior diagnoses or rely on a potentially gravely disabled individual’s historical recollections.

The 1982 evaluation does not diagnose claimant with a psychiatric disorder – it merely mentions that claimant has “emotional issues.” The November 1995 evaluation notes that the “presenting problem” was that claimant was a “Slow learner.” No psychiatric conditions were discussed or diagnosed. In 1986, claimant went to the County Department of Health for help because she had left her husband and moved to a board and care. She was diagnosed with schizophrenia (and borderline intellectual functioning) apparently because she told the examiner that she had emotional concerns in school and cut her wrists because she was depressed when she was 12 years old. There are no records of this incident and claimant denied any subsequent self-inflicted injuries.

In February 1990, twenty-four years ago, claimant became angry and tore up her room at her board and care. She told Dr. Kopiloff that she almost committed suicide. Claimant was admitted to a psychiatric unit of a hospital for four days. This is the last report of any inappropriate behavior or threat of self-harm by claimant. Nonetheless, the diagnosis of schizophrenia followed her in other evaluations and assessments. Interestingly, in October 1990, without knowledge of Dr. Kopiloff’s assessment, Dr. Chang did not determine that claimant had a mental disorder.

It was not until a report in 2009, that it was asserted that claimant has been diagnosed with, among other things, “Asperger’s Disorder.” There was no indication in the report that assessments designed to diagnose Asperger’s were administered to claimant to arrive at this diagnosis. After 2009, the diagnosis of Asperger’s followed claimant without any apparent basis in a comprehensive evaluation.

25. The evidence supports a finding that claimant’s handicapping conditions are not “solely psychiatric disorders.” The evidence supports a reasonable belief that claimant has a substantial disability based upon a disabling condition that is closely related to mental

retardation such as to require IRC to perform a comprehensive assessment, including an attempt to obtain sufficient records upon which to base a determination of whether claimant is eligible for IRC services and supports.

ORDER

Claimant's appeal from Inland Regional Center's determination not to provide intake services, including performing an assessment is granted in part and denied in part.

1. Claimant's appeal from Inland Regional Center's determination not to provide further intake services, including performing an assessment, based upon claimant's assertion that she has Autism is denied.

2. Claimant's appeal from Inland Regional Center's determination not to provide further intake services, including performing an assessment, based upon claimant's assertion that she has mental retardation is denied.

3. Claimant's appeal from Inland Regional Center's determination not to provide further intake services, including performing an assessment, based upon claimant's assertion that she has a disabling condition closely related to mental retardation and/or requires treatment similar to that required for individuals with mental retardation is granted. Inland Regional Center shall provide a comprehensive assessment of claimant consistent with this Decision.

DATED: August 19, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
SUSAN J. BOYLE  
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 ninety days.**