

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Agency. Service

OAH No. 2016020837

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on April 20, 2016.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Brian Allen, Educational Consultant Advocate, represented claimant, who was not present.

The matter was submitted on April 20, 2016.

ISSUE

1. Is claimant eligible for regional center services under the Lanterman Act as a result of an intellectual disability?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On January 20, 2016, IRC notified claimant that he was not eligible for regional center services because the records he provided to IRC did not establish that he had a substantial disability as a result of an intellectual disability, autism, cerebral palsy, epilepsy, or a disabling condition closely related to an intellectual disability that required similar treatment needs as an individual with an intellectual disability.

2. Claimant's mother, claimant's representative, and representatives from IRC attended an informal meeting on February 2, 2016, to discuss claimant's eligibility. Claimant's mother provided claimant's school records, and the parties discussed areas in which claimant requires assistance. Following the meeting, IRC adhered to its original determination that claimant was ineligible for IRC services. Specifically, IRC noted that although claimant's Full Scale Intelligence Quotient (IQ) score was 65, the variances between the verbal and non-verbal indexes comprising the overall IQ score were too great to attribute to a diagnosis of intellectual disability.

3. On February 11, 2016, claimant filed a Fair Hearing Request appealing IRC's determination; this hearing ensued.

DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY

4. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) contains the diagnostic criteria used to diagnose intellectual disability. Intellectual disability is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive functioning, as compared to an individual's age, gender, and socioculturally matched peers.

5. Three diagnostic criteria must be met in order to receive a diagnosis of intellectual disability. The first, deficits in intellectual functions,¹ include deficits in reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. The second, deficits in adaptive functioning, includes deficits resulting in the failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Finally, the onset of the deficits in intellectual and adaptive functioning must have occurred during the developmental period.

CLAIMANT'S BACKGROUND

6. Claimant is a 7-year-old male child who had received Early Start services from IRC until the age of three due to speech and language delays. Claimant currently receives special education services at school. Claimant's school records show that he is currently receiving special education services due to an intellectual disability, specific learning disability, and impairment in speech and language.

EVIDENCE PRESENTED BY IRC

7. Paul Greenwald, Ph.D., a licensed staff psychologist at IRC, reviewed the school records and psychological assessment reports provided to IRC on behalf of claimant. These reports included the following: A November 20, 2015, Individualized Education Plan (IEP); a February 24, 2016, addendum to the November 20, 2015, IEP; a psychological assessment report for an assessment completed at the Desert Mountain Children's Center in February and March 2015; and a psychological evaluation report completed by Edward Frey, Ph.D., following an assessment completed on January 20, 2016.

¹ Intellectual functioning is typically measured using intelligence tests. Individuals with an intellectual disability typically have intelligent quotient (IQ) scores at or below the 65-75 range.

8. Regarding claimant's IEPs, Dr. Greenwald noted that a specific learning disability would typically not be found where a person is suffering from an intellectual disability. He explained that although both conditions are theoretically possible, it would make it difficult to ascertain whether the lower IQ scores or difficulties in performing assessments were due to the intellectual disability or the learning disability. In other words, if a person has a specific learning disability or speech and language problems like claimant, those issues could alter the outcome of any assessments directed towards assessing a person for intellectual disability. For example, Dr. Greenwald pointed out that claimant's weaknesses in oral expression, reading, and other areas as detailed in the IEP could be explained by a host of other disorders listed in the DSM-5, such as reading and communication disorders, and not intellectual disability. The IEP's also did not include any documentation regarding why the school identified claimant as having an intellectual disability – it is merely listed as one of the three concerns.

9. Regarding the February 25, 2015, and March 13, 2015, psychological assessment completed by Tonya Brooks-Brewster, Ed. D., Dr. Greenwald explained that there was a wide variance in claimant's scores on the various tests were inconsistent with a diagnosis of intellectual disability.

The report noted that claimant exhibits behavioral difficulties at school that impeded his ability to succeed in a general education class. Claimant's most recent speech and language report showed claimant's receptive and expressive vocabulary was below average and his language skills were significantly delayed. The assessments utilized during the evaluation were: the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV); the Leiter International Performance Scale Third Edition (Lietter-3); the Cognitive Assessment System (CAS); and the Vineland Adaptive Behavioral Scales, Second Edition (Vineland-2).

Dr. Greenwald testified that claimant's scores among the various assessments varied

widely, from average, to borderline, to low average, which would not be expected in an individual with an intellectual disability. Instead, the scores should be consistently low across all subsets. Dr. Greenwald found it compelling that claimant scored relatively well in fluid reasoning, working memory index, and processing speed, because children with an intellectual disability typically do not perform well in these areas.

Dr. Greenwald also found it telling that some of the assessments could not be properly performed because claimant's own behavior was interfering with the assessments. For example, during the CAS test designed to measure cognitive processes, claimant became irritated, impatient, and showed frustration as time progressed. But, as Dr. Greenwald noted, claimant still demonstrated a great variability among the subsets of the CAS test ranging from average to low. Again, he explained that a person with an intellectual disability should not have that great a variance among the different subsets of the same test.

10. Regarding the psychological evaluation completed by Edward Frey, Ph.D., on January 20, 2016, Dr. Greenwald pointed out again that the results were better explained by other factors such as a reading disability and a coordination disorder learning disability, rather than an overall intellectual disability.

Dr. Frey's evaluation included the following assessments: the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) and the Vineland Adaptive Behavioral Scales, Second Edition. Claimant performed very well on the WISC-V relative to the WIPSY-IV utilized by Dr. Brewster Brooks just a year before; fluid reasoning skills jumped from low last year to average in the WIPSY-IV – a jump like that would not be expected because children with intellectual disabilities should have uniformly depressed functions in areas such as fluid reasoning. Dr. Greenwald explained that if he gives an assessment to a child and that child scores in the low range, he would expect a child with an intellectual disability to perform equally as low several years later. Results such as these, as in the other

assessment, indicate that claimant's functioning is not attributable to intellectual disability.

11. Dr. Greenwald concluded, based on his review of claimant's records, that claimant did not meet the DSM-5 diagnostic criteria for intellectual disability and was therefore ineligible for regional center services.

TESTIMONY OF CLAIMANT'S MOTHER

12. Claimant's mother believes claimant has an intellectual disability because of the notations on claimant's IEP. She pointed out that the school psychologist made that determination, and lists intellectual disability as his primary diagnosis.

13. Claimant's mother reported that claimant experiences difficulties in self-care skills. For example, he has problems with toileting, wiping himself, bathing himself, brushing his teeth, and getting dressed. Claimant will generally not perform any kind of hygiene. He will attempt to brush his teeth if told to do so but does not do so correctly. Claimant's mother reported she must prompt claimant to wash himself or wipe his behind after using the bathroom, but he will get frustrated and throw tantrums.

14. Claimant's mother stated that claimant does not experience any weaknesses in self-direction.

15. Claimant's mother stated that claimant displays difficulty in speech and language; he has suffered from receptive and expressive language disorder since he was two years old.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

STATUTORY AUTHORITY

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

3. Welfare and Institutions Code section 4501 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 "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.

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

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation², 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

² 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.

mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

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

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

(a) ‘Substantial disability’ means:

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

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

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

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

the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

- (c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.
- (d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible."

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EVALUATION

7. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. The burden is on claimant to establish eligibility; claimant did not meet his burden.

Claimant is receiving special education services at school for intellectual disability, specific learning disability, and speech and language disorders. It is unknown what assessments were done or how the school reached their conclusions that claimant suffered from an intellectual disability. Further, the school records show that claimant has various strengths and weaknesses in reading and communication, something that would not be expected of a child with an intellectual disability.

Moreover, because claimant's records established that he has had speech and language problems dating back to when he was a toddler, his cognitive difficulties appear to be more attributable to the learning disorder and the speech and language disorder, rather than to an overall intellectual disability. As Dr. Greenwald explained, claimant's scores across the various subsets of each individual test on the assessments conducted by Dr. Frey and Dr. Brewster-Brooks did not show uniformly depressed functions, and are thus

inconsistent with a DSM-5 diagnosis of an intellectual disability. Further, claimant's cognitive scores varied in certain subsets from the time Dr. Brewster-Brooks conducted her assessment to the time Dr. Frey conducted his assessment, which is also inconsistent with a DSM-5 diagnosis of intellectual disability. It appears that claimant's global depressed functioning is a result of a specific learning disability and his difficulties with speech and language, rather than an overall intellectual disability. Those conditions do not qualify him for regional center services under the Lanterman Act.

Even if claimant did meet the DSM-5 diagnostic criteria for intellectual disability, insufficient evidence was presented to show that claimant experienced significant functional limitations in three or more areas of major life activities. Claimant's mother established that claimant suffers from some difficulties in the area of self-care and receptive and expressive language. However, difficulties in those areas alone are insufficient to meet the criteria set forth in the applicable regulations.

ORDER

Claimant's appeal from the Inland Regional Center's determination that he is not eligible for regional center services and supports is denied.

DATED: April 29, 2016

_____/s /_____

KIMBERLY J. BELVEDERE

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.