

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2016110875

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on May 15, 2017.

Ronald R. House, Attorney at Law, and Neil Kramer represented the San Diego Regional Center (SDRC).

Claimant's adoptive father appeared on behalf of claimant, who was not present at the hearing.

The matter was submitted on May 15, 2017.

ISSUE

Is claimant eligible for regional center services under the Lanterman Developmental Disabilities Services Act, specifically under the basis of intellectual disability or a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals?

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a 16-year-old male. Claimant's adoptive parents applied to SDRC to obtain services for claimant under the Lanterman Act alleging claimant had an intellectual disability or a condition closely related to an intellectual disability that required treatment similar to that required for individuals with an intellectual disability. On October 14, 2016, SDRC notified claimant of its determination that he was not eligible for regional center services because the information it reviewed did not establish that claimant 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. On November 11, 2016, claimant filed a Fair Hearing Request appealing SDRC's determination. In the request, claimant asserted that his "mental and physical condition is below level of peers" and "constitutes a substantial disability."

3. On January 31, 2016, a mediation with SDRC and claimant's adoptive parents was conducted. An interim mediation agreement was reached whereby Dr. Harry Eisner performed an informal evaluation of claimant on February 24, 2017. After his informal evaluation, Dr. Eisner wrote a letter confirming SDRC's determination that claimant was not eligible for regional center services. This matter proceeded to hearing.

TESTIMONY OF HARRY EISNER, PH.D.

4. Harry Eisner, Ph.D., is SDRC's coordinator of psychology services. After receiving his Ph.D., Dr. Eisner worked for approximately nine years in state psychiatric hospitals before joining SDRC in 1988. Dr. Eisner is responsible for evaluating individuals to determine eligibility for services from SDRC and has made about 10,000 such

determinations during his 28 years working for SDRC. Dr. Eisner was a member of the team that reviewed claimant's case, and he testified as to the reasons SDRC found claimant ineligible for regional center services.

5. Dr. Eisner did not believe claimant has a condition that qualifies him for regional center services, and he testified that claimant's native intellectual abilities are in the average to low-average range. Dr. Eisner testified that claimant has a serious mental illness that has resulted in profound impairment so that claimant needs constant supervision and cannot function independently. However, Dr. Eisner believes that claimant's impairment is the result of his serious mental illness and not an underlying intellectual disability or a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. Dr. Eisner stated claimant was born into particularly difficult circumstances, was neglected, abused, and exposed to dangerous drugs and alcohol in utero. Claimant was placed in Polinsky Children's Center at birth and into foster care at 18 months of age. He had challenging behavioral issues from birth. Claimant was returned to Polinsky Children's Center from foster care several times before his adoption by his current family. Dr. Eisner stated claimant has a history of Attention Deficit Hyperactivity Disorder (ADHD) and impulse control problems. Most importantly, he first exhibited delusions and other signs of psychotic illness at the age of 12, when on Thanksgiving Day 2012, claimant developed a serious psychotic illness and has had a decline in functioning despite treatment with medications since that day. Dr. Eisner stated the seriousness of claimant's psychotic illness is apparent and causes significant impairment of his day-to-day living skills. Dr. Eisner stated claimant's impairment is completely the result of his mental illness and not an underlying intellectual disability or a disabling condition closely related to intellectual disability requiring treatment similar to that required for intellectually disabled individuals. Dr. Eisner believes claimant's intellectual ability is in

the average range, but claimant is too affected by his mental illness and medications to access his native intellectual ability.

6. Dr. Eisner reviewed claimant's early start services records, school records, and other records provided by claimant. Dr. Eisner noted that claimant received early start services from SDRC and was evaluated for these services while living at Polinsky Children's Center. At that time claimant received early start services based upon an evaluation showing he had borderline cognitive, language, and fine motor abilities. On July 10, 2003, when claimant turned three years old¹, he was evaluated by SDRC by Gordon Caras, Ph.D. for a determination of whether he qualified for services at SDRC under the Lanterman Developmental Disabilities Services Act.

On July 10, 2003, Dr. Caras documented his results in a psychological evaluation report. Dr. Eisner reviewed Dr. Caras's report as part of his evaluation of claimant's eligibility. Dr. Eisner testified that Dr. Caras performed developmental testing on claimant utilizing the Bayley Scales of Infant Development, Second Edition, and the Vineland Adaptive Behavior Scales. Dr. Caras concluded that claimant had "cognitive capabilities falling within the borderline range" but that the results "are believed to provide a lower estimate of his true cognitive abilities" because claimant was reluctant to fully engage with the testing tasks, and claimant chose to remain non-verbal. Dr. Caras further stated that claimant "was able to perform a variety of nonverbal tasks approaching his age level which required perceptual discrimination, visual-motor and problem solving abilities."

7. Dr. Eisner testified that there were no further records regarding claimant's developmental status until he developed a psychotic illness at age 12. Dr. Eisner reviewed a neuropsychological evaluation of claimant conducted by Mark McDonough,

¹ Early Start Services automatically terminate at the age of three.

Ph.D., on June 19, 2013, June 26, 2013 and July 5, 2013. Dr. McDonough performed a variety of tests on claimant at that time, including Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The results of the WISC-IV test showed that claimant had an overall full scale I.Q. score of 98, placing him in the average range of intellectual functioning. Dr. McDonough noted that while claimant has difficulty making decisions, claimant was "doing fairly well academically." Dr. McDonough diagnosed claimant with schizophreniform disorder, childhood schizophrenia, and Post Traumatic Stress Disorder (PTSD).

8. Dr. Eisner also reviewed a psychological evaluation report by Jill Weckerly, Ph.D., conducted when claimant was 14 years old. Dr. Weckerly evaluated claimant on July 14, 2014, August 5, 2014, August 7, 2014, August 12, 2014, September 9, 2014, and October 3, 2014. Dr. Weckerly made note of claimant's school records and that, according to his teachers, claimant was "at grade level in all academic areas" and he "was in average range of cognitive abilities" as measured by various tests conducted before the end of his sixth grade year in school. Dr. Weckerly's report also included information demonstrating that claimant's mental illness was progressing significantly. Specifically, the report noted that claimant's school assistant observed the dramatic change in claimant over a year's time, which demonstrated the profound effect his psychotic illness had on his day to day functioning. The school assistant noted that compared to the previous year, he now had slurred speech, shuffling gait, and somber affect.

Dr. Weckerly also conducted various tests, including the WISC-IV. Her report indicated claimant had a full scale I.Q. score of 64, placing him in the moderately impaired range. However, Dr. Eisner testified he believed Dr. Weckerly made a typographical error with the score of 64 because if the other composite scores she provided were used to calculate the overall score, claimant's full scale I.Q. should be 73

and not 64. Even with that calculation correction, the full scale I.Q. score of 73 or 64 is a dramatic drop from the WISC-IV score of 98 taken only one year prior. Dr. Weckerly noted in her report that “the discrepancies in [claimant’s] performances across intellectual domains render an overall estimate of his current intellectual functioning less meaningful.” Dr. Weckerly noted that claimant was not able to follow directions due to his severe mental illness. Therefore, according to Dr. Eisner, due to claimant’s psychotic illness, it is unlikely that his full scale I.Q. score is accurate. Dr. Weckerly concluded that claimant’s diagnosis was schizophrenia, bipolar mood disorder, and PTSD. Dr. Eisner noted that Dr. Weckerly did not include a diagnosis of intellectual disability or borderline intellectual disability in her report. Dr. Weckerly also wrote in her report that claimant’s “cognitive abilities can be expected to wax and wane with mood disturbance and the severity of his psychotic symptoms.” Dr. Eisner stated that claimant’s psychotic illness does not affect his intellectual abilities per se, but that his psychotic symptoms can impair his ability to access his native intellectual ability at times, thereby explaining the waxing and waning of intellectual functioning. However, the psychotic illness does not cause a decline in claimant’s innate intellectual abilities.

9. Dr. Eisner also reviewed an Individualized Education Plan (IEP) review conducted when claimant was 14 years of age. The IEP concluded that claimant was eligible for special education services under a qualifying disability of emotional disturbance. The IEP stated claimant was “easily distracted by external and internal stimuli,” and he “hears voices” who he refers to as “the others.” These symptoms show that claimant was actively psychotic with serious mental health problems. Another IEP reviewed by Dr. Eisner was conducted on January 6, 2015, by the North Coastal SELPA. This IEP also concluded that claimant suffered from emotional disturbance as the basis for qualification for services. Dr. Eisner stated that the observations in the January 6,

2015, IEP were consistent with the progression of claimant's serious mental illness as the primary factor in the deterioration of his academic and behavioral skills.

10. Dr. Eisner also reviewed a second psychological report by Dr. Jill Weckerly based upon an evaluation of claimant conducted on November 8, 2016, November 17, 2016, December 8, 2016, December 13, 2016, and December 20, 2016. Dr. Eisner noted these evaluations were conducted after SDRC initially denied services to claimant on the basis that he was not eligible under a diagnosis of intellectual disability or a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. Dr. Eisner also noted that Dr. Weckerly's report stated that claimant continued to have significant psychotic illness that affected him substantially in every aspect of his life, including academics. Dr. Weckerly again administered the WISC-IV test and the scores demonstrated that claimant had a full I.Q. score of 70. Dr. Eisner took issue with some of the statements made by Dr. Weckerly in this report; specifically Dr. Weckerly wrote:

[Claimant's] current presentation is a condition closely approximating an intellectual disability which requires treatment and interventions similar to that of individuals with intellectual disability.

Dr. Weckerly also wrote that her diagnostic impressions of claimant were as follows:

Moderate deficits in intellectual functioning Significant deficits in memory, attention, working memory, and executive functioning.

Likely co-occurring prenatal drug and/or alcohol exposure
Features consistent with Schizophrenia, Bipolar Mood
Disorder, and PTSD

(Developmental Trauma Disorder, complex developmental
trauma)

Dr. Eisner noted that Dr. Weckerly's list of "diagnostic impressions" is unclear. If her statement of "moderate deficits in intellectual functioning" meant that claimant was not functioning well intellectually, Dr. Eisner would agree with her statement as indicating claimant was not accessing his native intellectual ability because of his mental illness. However, if she was implying that claimant is becoming intellectually disabled, Dr. Eisner does not agree and stated that there was no indication that claimant's decline in intellectual functioning was the result of anything other than his severe mental illness.

11. On February 24, 2017, Dr. Eisner met with claimant for an informal assessment. Dr. Eisner noted claimant drooled constantly and had significant difficulty articulating his words, likely as a result of the medication that he needs to manage his mental illness. Dr. Eisner observed that claimant's mental illness causes him a very significant impairment requiring a high degree of support and supervision.

12. In conclusion, Dr. Eisner noted that mental health disorders are specifically excluded from the definition of developmental disability. Dr. Eisner stated claimant's adoptive parents are terrific advocates for claimant and have done a fantastic job managing and interacting with him. However, Dr. Eisner concluded claimant is cognitively average and performed well in academics until the age of 12 when his mental illness began to interfere with his ability to function. As a direct result of his mental health issues, claimant has significant deficits in his ability to access his intellectual potential and has significant limitations in his ability to live independently.

Dr. Eisner opined that claimant is not intellectually disabled and does not have a condition that is closely related to intellectual disability or a condition requiring treatment similar to a person with intellectual disability. Specifically, Dr. Eisner explained that a person needing treatment similar to a person with intellectual disability would need a specialized learning environment and of training on basic functioning. In comparison, claimant needs treatment for mental illness, which consists of medication and does not require specialized teaching which is generally ineffective for mental illness. Dr. Eisner concluded that the evidence did not support a finding that claimant was eligible for regional center services.

TESTIMONY OF CLAIMANT'S ADOPTIVE FATHER

13. Claimant's adoptive father testified regarding claimant's history and development. Claimant's adoptive parents adopted him in 2006 after claimant started living with them in May 2005 when claimant was four and a half years old. Claimant's adoptive parents have been his primary caretakers since May 2015. Claimant's adoptive parents have a total of six children, ages 40, 38, 20, 18, 17, and 16.

14. Claimant's father stated that in 2007 they found a therapist to work with claimant and his half-sister (also one of their adopted children). However, in early 2008, the therapist informed the adoptive parents she would no longer see claimant because of his explosive behavior. In May 2008, they hired a psychiatrist named Dr. Dee Ann Wong to treat claimant for issues related to ADHD, PTSD, and reactive attachment disorder (RAD). Dr. Wong provided claimant with medications at that time to treat the ADHD symptoms. Dr. Wong treated claimant from 2008 to 2012. Dr. Wong diagnosed claimant with PTSD based on his explosive behavior, including banging his head against a wall. Claimant's father stated claimant's therapist noticed changes in claimant's behavior in May 2013, which Dr. Wong diagnosed as Bipolar disorder. Claimant's father eventually lost confidence in Dr. Wong and sought another professional to evaluate

claimant. In June 2013, Dr. Mark McDonough, Ph.D., a pediatric and neuropsychologist, evaluated claimant. Additionally, on January 27, 2012, claimant's parents hired Clarita Thoms, LMFT, LPCC, a therapist to provide counseling services to claimant.

15. Claimant's father testified that claimant attended Oaks Elementary School from kindergarten to the third grade. In November 2010 claimant began attending Balboa City School, a special education school with a total of 75 to 80 students and approximately 13 or 14 children in grades from kindergarten to seventh grade. Claimant's father stated that Balboa City School was chosen specifically because it had a very small class size and focused only on students with special education needs. In February 2011, claimant began exhibiting more problem behaviors at school and was very disruptive in class. Those problem behaviors continued and worsened until 2013 when claimant was formally diagnosed with schizophrenia. In August 2013, claimant's parents hired a "one-on-one" aid for claimant so he could attend classes at Balboa City School. The one-on-one aid assisted claimant all day in classes and stayed with him at home until his parents arrived. At some point, even with the one-on-one aid, claimant was no longer able to attend Balboa City School.

In September 2014 claimant began attending San Diego Center for Children, a school that allowed claimant to focus only on life skills and socialization, rather than focus on academics. Claimant remained at this school until April 28, 2017, when the school informed the adoptive parents that the school was more geared toward academics, and claimant needed to be removed from the school. As of April 28, 2017, claimant began attending the Cook Institute for Effective Education in Carlsbad (Cook). At Cook claimant focuses on basic living skills such as hygiene and toileting. Claimant's parents provided documentation of claimant's attendance at each of the schools he attended, the classes he took and instances of behavioral problems while at school.

16. From January 1, 2016, to May 1, 2016, claimant was hospitalized at UCLA Hospital under the care of psychiatrist Dr. Mark DeAntonio because of the rapid progression of his schizophrenia. According to documents provided by claimant's parents, claimant's mental illness was severe and not responsive to medications. Dr. DeAntonio recommended seeking long-term care options with respite to ensure that claimant is not a danger to himself, and to provide socialization for him.

17. Claimant's adoptive father testified he does not argue that claimant does not have a severe mental illness, but he believes the mental illness is not his only problem. Claimant's father stated claimant's IQ is only about 74 and claimant requires treatment like children with intellectual disability, such as training on basic living skills and constant supervision. He stated medications are not effective as treatment for claimant. Claimant's father also stated that claimant's problems are not limited to mental illness, but also include mild developmental delays evident since his early childhood and continuing until his schizophrenia diagnosis in 2012. Claimant's father stated they sought services from SDRC because each service provider they spoke with told them that, unless SDRC provides services for claimant, the other service providers could not help him. They are in need of respite care for claimant and other services SDRC provides for its consumers. Claimant's father believes that claimant's condition qualifies for SDRC services because claimant has a condition similar to intellectual disability that requires treatment similar to that required for intellectually disabled individuals.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for 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 can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled 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, also 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 [an intellectual disability], cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to [an intellectual disability] or to require treatment similar to that required for individuals with [an intellectual disability].
- (b) The Developmental Disability shall:
- (1) Originate before age eighteen;
 - (2) Be likely to continue indefinitely;
 - (3) Constitute a substantial disability for the individual as defined in the article.
- (c) Developmental Disability shall not include handicapping conditions that are:
- (1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
 - (2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized [intellectual disability], educational or psycho-social deprivation, psychiatric disorder, or sensory loss.
 - (3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for [intellectual disability].

6. 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 to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

7. 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

8. Claimant's adoptive parents believe claimant is eligible for regional center services because of an intellectual disability or a condition closely related to an intellectual disability that requires treatment similar to that required for individuals with an intellectual disability (Fifth Category).² The Lanterman Act and applicable regulations specify the criteria an individual must meet in order to qualify for regional center services. Dr. Eisner provided a thorough and detailed explanation of claimant's records, and explained his and SDRC's opinion as to why claimant did not qualify for regional center services. Dr. Eisner concluded that claimant's severe mental health issues were the source of his cognitive deficits and limitations. There was insufficient evidence to conclude that claimant had a qualifying developmental disability.

9. Claimant's father was sincere and his testimony heartfelt. He is clearly motivated by his desire to help his child and obtain services that he believes are necessary to allow him to function in the world; he undoubtedly has his child's best interest at heart. However, claimant has the burden of proving that he is eligible for

² There was no evidence that claimant qualifies for regional center services because of cerebral palsy, seizures, or autism.

regional center services. That is, he must prove it is more likely than not that he has a qualifying developmental disability. The weight of the evidence presented at hearing did not establish that claimant is substantially disabled because of an intellectual disability or a condition closely related to an intellectual disability that requires treatment similar to that required for individuals with an intellectual disability. Instead, the weight of the evidence established that claimant has a solely psychiatric disorder, and his impaired intellectual and/or social functioning originated as a result of the psychiatric disorder. As such, claimant failed to satisfy his burden of demonstrating eligibility for regional center services under the Lanterman Act at this time.

ORDER

Claimant's appeal from SDRC's determination that he is not eligible for regional center services and supports is denied.

DATED: May 25, 2017

DEBRA D. NYE-PERKINS
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.