

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

NORTH LOS ANGELES COUNTY  
REGIONAL CENTER,

Service Agency.

OAH Case No. 2015120381

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on January 7, 2016, in Van Nuys. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was present, was represented by his mother, who in turn was assisted by a Spanish interpreter.<sup>1</sup> Rhonda Campbell, Contract Officer, represented the North Los Angeles County Regional Center (service agency).

ISSUE

Does claimant have a substantially disabling developmental disability (epilepsy, intellectual disability or the fifth category) making him eligible for regional center services under the Lanterman Developmental Disabilities Services Act?

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<sup>1</sup> The names of claimant and his family are omitted to protect their privacy.

## EVIDENCE RELIED ON

In making this Decision, the ALJ relied on exhibits 1-18 jointly submitted by the parties, as well as the testimony of Heike Ballmaier, Psy.D., Carlo De Antonio, M.D., FAAP, and claimant's mother.

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a 27-year-old unconserved male on whose behalf regional center services were first requested from the service agency in 2012. As explained in more detail below, the request for services was reiterated in 2015.

2. By a letter dated October 26, 2015, claimant and his mother were advised service agency staff concluded claimant was not eligible for regional center services.

3. On November 2, 2015, a Fair Hearing Request on claimant's behalf was submitted to the service agency, by which the decision denying his eligibility was appealed. Claimant designated his mother to serve as his authorized representative.

4. On November 6, 2015, the parties participated in an Informal Conference to discuss the service agency's denial of claimant's request for services.

### CLAIMANT'S DEVELOPMENTAL HISTORY

5. Claimant was raised by his mother, who is a single parent. He has no contact with his biological father. Claimant has a 24-year-old brother whom he sees regularly.

6. Claimant was born and raised in Guatemala. During the Informal Conference, claimant's mother stated her son suffered from a high fever when he was four years old and had a febrile seizure, his first known seizure episode. (Ex. 14.) Claimant's mother indicates her son did not do well in school and that teachers in

Guatemala told her he had a learning problem. (Ex. 14.) Claimant repeated the first grade twice for that reason. (Ex. 14.) He attended school in Guatemala through the sixth grade. (Ex. 14.) She tried to work with him on his reading skills, but claimant never read well. (Ex. 14.) No school or medical records were presented from the period when claimant lived in Guatemala.

7. Claimant and his family moved to the United States when he was 14 years old. During the Informal Conference, claimant's mother stated her son was enrolled in his local school district and placed in the eighth grade because of his age. (Ex. 14.) Since he spoke Spanish, he had to adjust to the language here. His mother also indicated claimant was still having trouble speaking well and pronouncing words. (Ex. 14.) Claimant's mother also indicated her son suffered from bullying at school. (Ex. 14.) In fact, claimant's mother told service agency staff claimant left school at age 16 due to the bullying. (Ex. 14.)

8. A. Few school records were presented, essentially his cumulative record consisting of a few pages of historical data. (Ex. 4.) Those records show claimant attended both semesters of his ninth grade year, before he left school in May 2005. He received mostly Fs in his classes, with the exception of a handful of Ds, one C and one B. He also received effort and performance marks in the "unsatisfactory" range. Claimant took the STAR test and was ranked as "far below basic" in reading and math, and lower than the bottom fifth percentile nationally in all domains; except for language skills, in which he was ranked within the bottom 16.3 percentile nationally. On the California English Language Development Test, claimant received scores at the "beginning" proficiency level in listening, speaking, reading and writing. A one-page health record did not show anything unusual for claimant. The cumulative record did not indicate claimant was identified as one who needed special education.

B. The service agency's Supervisor of Psychology / Intake Service

Departments, Heike Ballmaier, a licensed psychologist, testified any number of factors could explain claimant's poor grades and performance on the above-described normed reference tests. Examples are cultural and language differences due to claimant coming from another country, poor effort given in class and on tests, psychological or emotional disturbances (including the bullying) and perhaps a learning disorder related to reading and/or speaking. In addition, Dr. Ballmaier expressed concern over the lack of information from claimant's native country, which could explain what level of education he received before coming here. She persuasively opined the lack of notation in the records concerning special education services, coupled with the lack of psychological testing regarding claimant's cognitive level, prevent anyone from making a meaningful determination regarding claimant's cognitive functioning or ability while enrolled in school.

#### CLAIMANT IS DIAGNOSED WITH EPILEPSY BEFORE HE TURNS 18

9. A. Claimant suffered a seizure in December 2005 per his mother's report. Medical records also document that in October 2006 (just weeks before his 18th birthday) claimant suffered from seizures and was diagnosed with epilepsy (or seizure disorder). (Exs. 5-6.) However, a CT scan of claimant's brain and an EEG were within normal limits and did not display any other problems or injuries. By November 2006, claimant had been taking anti-seizure medication and his seizures were otherwise under control, with the exception of initial problems from medication side-effects.

B. The service agency's Director of Clinical Services, Dr. Carlo De Antonio, testified pertinent medical records indicate claimant's epilepsy was well controlled by the anti-seizure medications. Dr. De Antonio also clarified claimant's febrile seizure he suffered when he was four should not be considered an early sign of epilepsy and was probably a function of his having a fever at that time.

10. Claimant's developmental condition at this time was not established.

Anecdotal information indicates claimant was functioning independently. For example, medical records indicate he worked in an office. (Ex. 5, p. 4.) He lived with a friend and cooked for himself. He also had a girlfriend and they planned on getting married. Claimant's mother described her son as being independent at this time. (Ex. 14, p. 1.)

#### CLAIMANT EXPERIENCES A CATASTROPHIC ILLNESS AT AGE 22

11. In February 2012, when claimant was 22 years old, he suffered a devastating illness. Pertinent medical records document claimant had a severe infection causing swelling of his brain. (Exs. 7, 8 & 10.) Claimant's treating physicians were unsure if he had meningitis, a question they never fully resolved. By this time, claimant was no longer speaking. After being released to a recovery facility, claimant suffered from a series of strokes and seizures and his condition worsened in April 2012. His mother testified claimant was in a five-day coma at this time. A CT scan of claimant's head revealed a significant brain injury. Dr. De Antonio persuasively testified that CT scan, when compared with the unremarkable one taken in 2006, shows the 2012 illness caused the brain injury.

12. Claimant's illness in 2012 was catastrophic. He has never fully recovered. He was released to a convalescent home, where he continues to reside. He can no longer walk or talk, although he regained use of his hands and arms and can move his legs. He needs a feeding tube.

#### THE SERVICE AGENCY'S ASSESSMENT OF CLAIMANT

13. A social worker at claimant's residential facility referred claimant's mother to the service agency. By May 2012, claimant's mother contacted the service agency about her son, who was still in the midst of his medical crisis.

14. On May 4, 2012, Lucia Hebner, an intake vendor for the service agency, conducted a telephonic intake assessment with claimant's mother. Ms. Lucia did not see

claimant at this time. Much of claimant's mother's reporting was based on her son's condition before his medical crisis in 2012. Ms. Lucia completed a social assessment report based on the information provided by claimant's mother. (Ex. 9.) Claimant's mother described her son as independent, as explained above. He was able to ambulate and attend to his self-care needs. He could use the public transportation system alone. He was able to manage his money. Despite having a girlfriend and a roommate, claimant's mother complained that her son did not have other friends at home or work. He was isolated and depressed about his seizures. She also reported that claimant was able to speak in sentences, had good pronunciation and could engage in conversations. Although claimant achieved his major milestones while developing, claimant's mother stated her son's development became arrested when he began having seizures at age 17. For example, claimant's mother explained her son had issues at work, possibly related to his seizures, and lost his jobs as a result.

15. The service agency decided not to refer claimant for psychological or medical evaluations because his current level of functioning was different from before he turned 18 as a result of his catastrophic illness in 2012 and he was nonverbal and nonresponsive to external stimuli at the time. Instead, the service agency obtained as many school and medical reports as it could locate for staff review to reconstruct claimant's developmental picture before he turned 18.

16. A. Dr. De Antonio reviewed and wrote a summary of available records on June 27, 2012. (Ex. 11.) Although claimant was diagnosed with epilepsy in 2006 before he turned 18, the medical records indicate the situation was well controlled by anti-seizure medications and claimant was living independently. Dr. De Antonio saw no evidence claimant suffered any substantially handicapping problem related to his seizure disorder in 2006. Dr. De Antonio noted claimant's illness in 2012 was not related to his seizure disorder, but rather caused by an infection and swelling of the brain. He

also noted the 2012 illness caused an acute decline in claimant's condition and was neurologically devastating.

B. Dr. Ballmaier similarly reviewed and wrote a record review on August 21, 2012. (Ex. 12.) The school records reviewed did not explain claimant's poor performance at school. She saw no evidence of any psychological testing revealing claimant's cognitive functioning while he was in school or thereafter. Due to the lack of existing evidence, Dr. Ballmaier concluded claimant's developmental level or limitations before he turned 18 could not be ascertained.

17. On October 10, 2012, an interagency review team comprised of service agency staff met to review claimant's eligibility request. The team concluded claimant was not eligible for regional center services. Claimant's mother was informed of that decision at or about that time. She did not request a hearing. However, in 2015 claimant's mother requested service agency staff to reconsider her son's eligibility. An interagency review team again met on November 16, 2015. Based on the above information, the team concluded claimant was not eligible for regional center services.

18. Dr. Ballmaier testified during the hearing. She maintains claimant's school records do not explain why he did not do well in school, although there are many possible explanations other than a developmental disability. Because claimant was not administered psychological and cognitive testing, there is no way to determine claimant's intellectual functioning before he turned 18. However, claimant's score on the language portion of the STAR test (in which he ranked in the bottom 16.3 percentile) put him in the low average range and is some evidence he was not intellectually disabled. Moreover, claimant's independence and ability to care for himself from 2006 to 2012 is more evidence to her that claimant did not have significant adaptive deficits at that time.

19. Dr. De Antonio also testified during the hearing. He opined claimant's

epilepsy before turning 18 was well controlled by medication and did not disable claimant from functioning. Dr. De Antonio opined the devastating illness in 2012 is what caused claimant's present physical and intellectual problems, not his seizure disorder.

#### CLAIMANT'S EVIDENCE

20. Claimant's mother testified her son always had trouble in school, both here and in Guatemala. She believes claimant's problems were not remediated in her native country because schools there lack specialists who can do so. While in the country, she had to work too much and could not monitor her son while he was in school.

21. Claimant's mother also testified she did not contact the service agency when her son was first diagnosed with epilepsy in 2006 because she did not know it existed.

22. During the Informal Conference, claimant's mother indicated her son's epilepsy disabled him. For example, she stated her son worked in a number of jobs after dropping out of school, but he lost them because his employers would not accommodate his seizures. She also said the anti-seizure medications made him angry, agitated, depressed and withdrawn. He isolated himself and had no friends his age, just friends who were older.

23. Claimant's mother concedes her son was living independently after he turned 18. During the Informal Conference, she stated claimant found a job with an employer who accommodated his seizure disorder, lived with a friend, cooked his own meals, and planned to marry his girlfriend. But she testified claimant had a seizure in early 2012, went to the hospital, fell into a coma and "everything fell apart." She believes her son is now substantially disabled. Claimant resides at a facility with six other patients. She is working with him to move his feet and legs as he can his arms and hands. She contacted the service agency because her son needs therapy to help him talk, move and become more independent.



24. Claimant's mother also testified she has had difficulty obtaining records for her son to prove his level of disability prior to 18 because of the passage of time and the fact some of claimant's treating medical facilities went out of business.

25. The only reference in the presented records to claimant having a developmental disability are vague statements of "developmental delay" in some of the medical records from his 2012 illness. (Exs. 8, p. 4; 10, p. 3.) The records do not explain why developmental delay was listed or what was the condition in question. Interestingly, the medical records from 2006 do not contain any such notation.

26. No evidence was presented concerning claimant's current cognitive functioning. He cannot talk, so he did not testify. The ALJ did observe claimant's ability to follow the hearing. For example, claimant smiled and nodded when greeted by others. He raised his right hand when his mother was asked to do so while being sworn to testify, and he raised both arms and legs precisely when his mother testified about his ability to do so.

## LEGAL CONCLUSIONS

### JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-4.)

2. A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman

Act) requires otherwise. (Evid. Code, § 115.) “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ (Citations.) . . . [T]he sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.)

B. “[T]he Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals’ determination as to whether an individual is developmentally disabled.” (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether an applicant’s expert witness(es)’ opinions on eligibility “sufficiently refuted” those expressed by the regional center’s experts that the applicant was not eligible. (*Id.*, at p. 1137.)

C. Based on the above, claimant has the burden of proving by a preponderance of the evidence that his evidence regarding eligibility is more persuasive than the service agency’s.

3. One is eligible for services under the Lanterman Act if it is established that he is suffering from intellectual disability, cerebral palsy, epilepsy, autism or what is referred to as the fifth category. (Welf. & Inst. Code, § 4512, subd. (a).)<sup>2</sup> The qualifying condition must originate before one’s 18th birthday, continue indefinitely thereafter, and constitute a substantial disability for that individual. (§ 4512.)

#### DOES CLAIMANT HAVE AN INTELLECTUAL DISABILITY?

4. It is not clear claimant contends he has an intellectual disability. Out of an

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<sup>2</sup> Further unspecified references are to the Welfare and Institutions Code.

abundance of caution, this basis for eligibility is considered. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” (DSM-5, p. 33.) IQ scores of 75 or below typically demonstrate an intellectual disability. But emphasis is placed on the need for an assessment of both cognitive capacity and adaptive functioning; the severity of intellectual disability is determined by adaptive functioning rather than simply an IQ score. Thus, a person with a score above 75 may still have such severe adaptive functioning that the person’s actual functioning is comparable to a person with a lower IQ. In any event, at least one domain of adaptive functioning must be sufficiently impaired, though the impairment must be directly related to an intellectual disability. (*Id.*, pp. 34-38.)

5. In this case, it was not established by a preponderance of the evidence that claimant had an intellectual disability before he turned 18. No cognitive or intellectual testing results were presented and claimant’s IQ score is unknown. No expert has opined that claimant is intellectually disabled. While claimant had problems reading and did poorly in school and on normed reference tests, that alone does not establish he had an intellectual disability. There are several other plausible reasons explaining claimant’s poor performance at school. Moreover, claimant’s performance on the language skills portion of the STAR test is some evidence he was able to perform, at least in one academic test, in the low-average range. Finally, claimant was fairly independent by the time he turned 18, more indicia that he did not have an intellectual disability. (Factual Findings 5-26.)

#### DOES CLAIMANT HAVE A FIFTH CATEGORY CONDITION?

6. The “fifth category” is described as “disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required

for individuals with an intellectual disability.” (§ 4512, subd. (a).) A more specific definition of a “fifth category” condition is not provided in the statutes or regulations. Whereas the first four categories of eligibility are specific (e.g., epilepsy or cerebral palsy), the disabling conditions under this residual fifth category are intentionally broad so as to encompass unspecified conditions and disorders. But the Legislature requires that the condition be “closely related” (§ 4512) or “similar” (Cal. Code Regs., tit. 17, § 54000) to intellectual disability. “The fifth category condition must be very similar to mental retardation [the prior diagnostic term for intellectual disability], with many of the same, or close to the same, factors required in classifying a person as mentally retarded.” (*Mason v. Office of Administrative Hearings, supra*, 89 Cal.App.4th at p. 1129.) Based on the above, the fifth category condition must be closely related to intellectual disability.

7. In this case, claimant failed to meet his burden of establishing by a preponderance of the evidence that he has a fifth category condition. No evidence suggests claimant received special education services while in school or functioned similarly to a person with an intellectual disability. As explained above, the paucity of evidence on claimant’s development before he turned 18 does not establish he had an intellectual disability or some condition resembling the same. The problems claimant experienced at school can be explained by various reasons other than such a developmental disability. The independence claimant exhibited before he turned 18 is inconsistent with him having such a condition. (Factual Findings 5-26.)

#### DOES CLAIMANT HAVE EPILEPSY?

8. There is no dispute claimant was diagnosed with epilepsy just before he turned 18. As explained above, epilepsy is one of the five categories of eligibility for regional center services. However, to be eligible for services, claimant must also establish he was substantially disabled by epilepsy. Thus, the degree of claimant’s

disability due to epilepsy is examined below. (Factual Findings 9-10.)

### IS CLAIMANT SUBSTANTIALLY DISABLED BY EPILEPSY?

9. A condition qualifying one for services must cause a substantial disability. (§ 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) While it is clear a qualifying condition must onset before the age of 18, it is an open question whether a qualifying disability must also cause a substantial disability by that age. The statutory language is not clear, as it references the onset of the disability before the age of 18 but is not so specific as to the degree of disability at that age.

10. A “substantial disability” is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as:

- (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.<sup>3</sup>

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<sup>3</sup> Section 4512, subdivision (l), defines “substantial disability” similar to that of

11. In this case, the determination concerning when the disabling condition becomes substantial is not necessary, because claimant's condition between the ages of 17 and 22 was static. Claimant's current situation cannot be used in the analysis, however, due to his catastrophic illness in 2012, which caused an acute decline in his functioning and independence. While claimant was suffering from seizures before and after his 2012 illness, the evidence established his current functioning is the result of an infectious process and resulting damage to his brain, not his epilepsy. So while claimant could be considered to be substantially disabled currently, it cannot be concluded his present level of disability is attributable to his epilepsy. (Factual Findings 9-12, 16-19.)

12. A. As to claimant's condition between the ages of 17 and 22 (just before his 2012 illness), applying the evidence to the above-described categories reveals claimant was not substantially disabled by virtue of his epilepsy.

B. The evidence did not demonstrate claimant's condition resulted in a major impairment of his cognitive and social functioning, as required by California Code of Regulations, title 17, section 54001, subdivision (a)(1). Claimant had academic problems at school and his mother reports he had difficulty making friends. On the other hand, the evidence did not show he had a major cognitive impairment. He had a roommate, girlfriend and was able to befriend older people. Claimant's relative independence just before his catastrophic illness also tends to show he did not have a major impairment in those areas.

C. In addition, it was not established claimant had significant functional limitations in any of the seven delineated areas of major life activity as a result of his epilepsy. (Factual Findings 5-26):

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California Code of Regulations, title 17, section 54001, subdivision (a)(2).

- (1) Receptive and expressive language. Claimant's mother described her son's problems reading and with pronunciation. His grades and test scores in these areas were well below normal. However, it was not established those problems are attributable to his epilepsy or even constituted a significant functional limitation to claimant. It is clear he was able to speak with others without difficulty. He was able to express himself and understand what others were communicating to him so as to make some friends, have a roommate and find jobs. The fact claimant's mother describes his reading problems beginning many years before he had seizures and was diagnosed with epilepsy also tends to disconnect the two.
- (2) Learning. Claimant's school records document a significant learning problem, which corroborate his mother's testimony that he had problems in school. However, it was not established whether his learning problems were the result of epilepsy or something else, such as a learning disorder, cultural and language barriers experienced when he first moved here or emotional disturbances.
- (3) Self-care. Claimant was able to care for himself and needed no assistance.
- (4) Mobility. Claimant was able to move in his community. He used public transportation to get to work and home. He was able to walk and use his arms and legs.
- (5) Self-direction. Claimant made the decision to drop out of high school and start working. He also decided to move out of his mother's home and live with a friend. Claimant thereby exhibited self-direction.
- (6) Capacity for independent living. Claimant lived with a roommate for several years. He planned on marrying his girlfriend. His mother described him as being independent during this time period.

(7) Economic self-sufficiency. Claimant had jobs and earned income. He was able to support himself for a while. He may have lost jobs because some of his employers did not accommodate his medical condition (which would have been illegal for them not to do), but his last employer did so and claimant was successful there.

#### IS CLAIMANT ELIGIBLE FOR SERVICES?

13. A. Although claimant had some problems at school when he was younger, he still met his developmental milestones. He dropped out of school and began working when he was 16. There is a lack of evidence from this time explaining the cause of claimant's school problems. He began having seizures and was diagnosed with epilepsy just before his 18th birthday. At that time, he was living independently and working. No contact was made with the service agency at that time. Claimant continued to live independently until he was 22. By that time, he found a stable job and employer willing to accommodate his medical condition. He was considering getting married. His epilepsy was under control due to prescribed medications and the frequency of seizures decreased. In early 2012, claimant suffered a catastrophic illness which caused an acute decline in all areas of his functioning. The evidence does not connect claimant's illness with epilepsy. Claimant's current level of disability is due to that illness, not his epilepsy.

B. Based on the above, claimant failed to establish by a preponderance of the evidence that his epilepsy, which onset before he turned 18, is substantially disabling. Under these circumstances, he is not eligible for regional center services and his appeal must be denied. (Factual Findings 1-26; Legal Conclusions 1-12.)



## ORDER

Claimant failed to establish that he is eligible for services under the Lanterman Developmental Disabilities Services Act. Claimant's appeal of the North Los Angeles County Regional Center's determination that he is not eligible for regional center services is therefore denied.

DATED: January 21, 2016

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ERIC SAWYER,  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

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